Volume 53 | Number 3 Article 7

2019

Dust in the Wind: Revisiting Georgia's Refusal to Extend Liability to Employers In Take-Home Asbestos Litigation

Phillips Workman
University of Georgia Law School

DUST IN THE WIND: REVISITING GEORGIA'S REFUSAL TO EXTEND LIABILITY TO EMPLOYERS IN TAKE-HOME ASBESTOS LITIGATION

Phillips Workman[*]

TABLE OF CONTENTS

[*] J.D. Candidate, 2019, University of Georgia School of Law; B.A., 2015, Clemson University.

I. START ME UP: AN INTRODUCTION TO THE TAKE-HOME ASBESTOS CASE AND THE SPLIT OF AUTHORITY REGARDING EMPLOYER TAKE-HOME LIABILITY

"Have you or a loved one been diagnosed with mesothelioma?"[1] These words should be familiar to anyone who has watched late-night television commercials over the past few decades. The culprit behind this seemingly-endless stream of advertisements is asbestos, a natural mineral historically used in a wide swath of manufacturing and industrial sectors[2] that spurred the longest-running (and ongoing) mass tort litigation in legal history.[3] Asbestos is most often and most famously linked to mesothelioma, a cancer of the thin layer of tissue that covers the internal organs.[4] Since the first asbestos-related decision in 1973,[5] asbestos liability has permeated the American psyche to the point that it has even become a part of Internet meme culture.[6]

Early asbestos cases ("standard" cases) generally followed a common fact pattern: an employee who worked for most or all of his career around raw asbestos later developed mesothelioma or a similar disease years after his initial exposure.[7] In recent years, though, the creativity of the plaintiffs' bar led to the formulation of the "secondhand" or "take-home" asbestos case as opposed to the

---

[1] Mesothelioma Attorney Network - Texas, *Mesothelioma Asbestos Lawyer Chandler TX*, YOUTUBE (Mar. 20, 2017), https://www.youtube.com/watch?v=R2RR61QP504 (last visited March 3, 2019).

[2] *See* Kelly M. Murray, *Have Household Exposure Claims Washed Out in Illinois?* Nelson v. Aurora Equipment Co.*, 909 N.E.2d 931 (Ill. App. Ct. 2009)*, 35 S. ILL. U. L.J. 357, 360 (2011) (describing the characteristics and uses of asbestos).

[3] *See* Rebecca Leah Levine, *Clearing the Air: Ordinary Negligence in Take-Home Asbestos Exposure Litigation*, 86 WASH. L. REV. 359, 359 (2011) (noting the longevity of asbestos litigation).

[4] *See* Mayo Clinic, *Mesothelioma*, https://www.mayoclinic.org/diseases-conditions/mesothelioma/symptoms-causes/syc-20375022 (last visited Feb. 10, 2019) (explaining mesothelioma and noting that asbestos exposure greatly increases the risk of developing the disease).

[5] *See* Murray, *supra* note 2, at 357 (reporting the date of the first case to hold asbestos manufacturers liable).

[6] *See*, *e.g.*, *Mesothelioma Ad Copypasta*, KNOW YOUR MEME (2016), https://knowyourmeme.com/memes/mesothelioma-ad-copypasta (last visited Feb. 12, 2019) (explaining an asbestos-related internet meme).

[7] *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1081 (5th Cir. 1973) (explaining that the plaintiff developed mesothelioma after working as an industrial insulation installer for thirty-three years).

standard case.[8] The plaintiff in a take-home case is usually a member of the employee's family who alleges secondhand asbestos exposure through contact with the employee.[9] Often, the plaintiff is an employee's wife who developed mesothelioma after years of washing her husband's asbestos-dusted work clothes.[10] Other fact patterns are more unusual, and take-home claims run the gamut of possible exposure scenarios from alleged exposure as an infant to the work clothes of a visiting family member[11] to alleged exposure resulting from wrestling with an uncle after his shift at a brake shoe plant.[12]

As any first-year law student can recite, the plaintiff in a negligence suit bears the burden of proving the four elements of negligence: duty, breach, causation, and damages.[13] The rise of take-home asbestos litigation raised a difficult question regarding an employer's responsibility: to whom does an employer owe a duty of care regarding asbestos exposure?[14] In standard asbestos cases against an employer, the employee–plaintiff can easily satisfy the first element—duty—because of the well-established duty of employers to provide employees a safe place to work.[15] However, the

---

[8] *See* William L. Anderson, *The Unwarranted Basis for Today's Asbestos "Take-Home" Cases*, 39 AM. J. TRIAL ADVOC. 107, 107–08 (2015) (discussing the rise of the "take-home" asbestos case).

[9] *See* Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made over the Past Decade and Hurdles You Can Vault in the Next*, 36 AM. J. TRIAL ADVOC. 1, 21 (2012) (describing the common fact pattern of take-home asbestos cases).

[10] *See, e.g.,* Riedel v. ICI Americas Inc., 968 A.2d 17, 19 (Del. 2009) (alleging wife's exposure through laundering of husband's work clothes); *see also* Alcoa, Inc. v. Behringer, 235 S.W.3d 456, 458 (Tex. Ct. App. 2007) (alleging the same).

[11] *See* Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 353 (Tenn. 2008) (alleging daughter's exposure began when her father visited her in the hospital while wearing his work clothes during the first three months of her life).

[12] *See* Kesner v. Superior Court, 384 P.3d 283, 288 (Cal. 2016) (alleging exposure from uncle's work clothes while nephew and uncle roughhoused).

[13] *See* 65 C.J.S. *Negligence* § 20 (listing the essential elements of a negligence action).

[14] *See* Meghan E. Flinn, *Continuing War with Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 WASH. & LEE L. REV. 707, 710 (2014) (explaining the question courts must answer in take-home cases).

[15] *See*, *e.g.*, Bailey v. Cent. Vermont Ry., 319 U.S. 350, 352 (1943) (defining the common-law duty of care employers owe employees); *see also* Dugger v. Miller Brewing Co., 406 S.E.2d 484, 486 (Ga. Ct. App. 1991) ("Under Georgia statutory and common law, an employer owes a duty to his employee to furnish a reasonably safe place to work and to exercise ordinary care and diligence to keep it safe.").

line of duty in take-home cases is not so clearly demarcated.[16] State and federal courts in over twenty states have addressed the question of whether employers owe a duty to employees' families in the context of take-home asbestos litigation.[17] Two states, Kansas and Ohio, have gone so far as to statutorily prohibit take-home asbestos claims.[18]

In Georgia, the courts, rather than the legislature, have addressed the take-home question. The Supreme Court of Georgia held that employers are not liable for the asbestos injuries of employees' families in *CSX Transportation, Inc. v. Williams*.[19] This 2005 decision, which answered a certified question from the Eleventh Circuit,[20] was one of the first in the country to consider the take-home scenario. Twelve years later, the question arose under the laws of Georgia's westerly neighbor. In 2017, the Eleventh Circuit decided the duty question in a case of first impression under Alabama law in *Bobo v. Tennessee Valley Authority*.[21] However, in *Bobo*, the Eleventh Circuit declined to follow the *Williams* decision and held that the employer owed a duty to an employee's wife who developed mesothelioma after years of exposure to her husband's work clothes.[22] While Florida courts have not yet addressed the question, a split of authority now exists within the Eleventh Circuit. After the *Bobo* decision, a hypothetical employer in Eufala, Alabama, now owes a duty to employees' families in asbestos litigation that an identical employer in Georgetown, Georgia—just two and half miles away—never has to consider. In light of this new

---

[16] *See* Flinn, *supra* note 14, at 711 (explaining that courts across the country have not reached a consensus regarding whether employers owe a duty to take-home plaintiffs).

[17] *See* Donald R. Kinsley, *Duty for Take Home Asbestos Exposures: A Jurisdictional Analysis*, MARON, MARVEL, BRADLY, ANDERSON & TARDY LLC (Jan. 7, 2019) (listing the approaches of 23 states as to whether a duty exists in take-home asbestos claims).

[18] Both KAN. STAT. ANN. § 60-4905(a) (2018) and OHIO REV. CODE ANN. § 2307.941(A)(1) (2018) limit asbestos claims to exposure on a premises owner's property.

[19] *See* 608 S.E.2d 208 (Ga. 2005) (holding that employers do not owe a duty to non-employees for asbestos exposure away from the workplace).

[20] *See id.* at 208 ("Whether Georgia negligence law imposes 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, such as the employee's home?").

[21] 855 F.3d 1294 (11th Cir. 2017).

[22] *See id.* at 1310 (explaining the employer's liability).

disparity and the avalanche of take-home litigation since 2005,[23] it seems an appropriate time to revisit the *Williams* decision. Should the Georgia Supreme Court overturn *Williams* and align the state with the expansive scope of duty advocated by the Eleventh Circuit in *Bobo*?

This Note examines *Williams* and *Bobo*, discusses the legal frameworks and theories on which both decisions rest, and provides an answer that best navigates the take-home policy minefield. Part II presents an in-depth look at the two decisions and the competing conclusions drawn by the Georgia Supreme Court and the Eleventh Circuit. Next, Part III argues that Georgia should hold fast to the *Williams* decision, as it best fits within the unique contours of Georgia negligence law and protects employers from the specter of unlimited asbestos liability. Finally, Part IV concludes the discussion and suggests the future direction of take-home litigation.

II. ONE WAY OR ANOTHER: *WILLIAMS*, *BOBO*, AND WHAT DUTY AN EMPLOYER OWES

Part II outlines the origins of the two competing views presented in the *Williams* and *Bobo* decisions. Part II.A details the Georgia Supreme Court's discussion that led it to decline to extend an employer's duty of care beyond that owed to an employee. Part II.B discusses the Eleventh Circuit's reasoning in eschewing the majority rule that no duty is owed and holding that an employer is liable to an employee's family member in take-home litigation.

A. MIDNIGHT TRAIN TO GEORGIA*: WILLIAMS* AND THE GEORGIA SUPREME COURT'S NARROW INTERPRETATION OF DUTY

Felton Williams came from a railroading family in a railroading town.[24] In 1990, he and two other plaintiffs filed suit against CSX, a major railroad company, after developing lung disease that they

---

[23] *See* Rebecca Leah Levine, *Clearing the Air: Ordinary Negligence in Take-Home Asbestos Exposure Litigation*, 86 WASH L. REV. 359, 373 (2011) (noting that, since 2005, courts have faced an increase in the number of take-home cases).

[24] *See* Brief of Appellant at 1, CSX Transp., Inc. v. Williams, 608 S.E.2d 208 (Ga. 2005) (No. 03-14038), 2003 WL 25655311, at *3 (referencing Williams' family history of railroad work); *see also* Waycross Tourism Bureau, *Waycross Train Watching*, WAYCROSS & THE OKEFENOKEE SWAMP, http://www.waycrosstourism.com/?project=waycross-train-watching (last visited Feb. 4, 2019) (detailing the prevalence of the railroad industry in Waycross).

alleged was partially caused by exposure to asbestos in CSX's railyard in Waycross, Georgia.[25] In addition, these plaintiffs alleged secondary exposure to asbestos from contact with their fathers'—all former CSX employees—work clothes.[26] After the federal district court denied CSX's motion for summary judgment on the issue of whether it owed a duty to its employees' family members, CSX appealed to the Eleventh Circuit, which then certified the question to the Georgia Supreme Court.[27]

The Georgia Supreme Court first noted the duty of ordinary care that CSX owed its employees.[28] However, since the plaintiffs' take-home claim rested on alleged exposure as children from their fathers' clothes—and not from their employment with CSX—the court held this duty inapplicable.[29] In determining whether CSX owed a duty beyond the duty to its employees, the court considered several factors but centered its focus on policy considerations.

The court first discussed the role that location plays in determining whether a duty is owed under Georgia law. A previous federal case from Georgia had established a duty of employers to protect third parties from exposure to hazardous substances, independent of the location of exposure.[30] The Georgia Supreme Court distinguished that federal decision by explaining that liability in the case on which the federal court relied had been ultimately predicated on worksite, not off-premises, exposure.[31] Thus, the court established that location is a factor in determining whether an employer owes a duty.[32]

Next, the court briefly considered the role that foreseeability plays in determining when a duty is owed under Georgia law. While

---

[25] *See* Brief of Appellant, *supra* note 25, at 1–2 (explaining the procedural history and the circumstances under which the plaintiffs sued CSX).

[26] *See id.* (noting that CSX employed each of the plaintiffs' fathers).

[27] *See Williams*, 608 S.E.2d at 208 (recounting the procedural history of the case).

[28] *See id.* at 209 ("Under Georgia statutory and common law, an employer owes a duty to his employee to furnish a reasonably safe place to work and to exercise ordinary care and diligence to keep it safe." (quoting Dugger v. Miller Brewing Co., 406 S.E.2d 484, 486 (Ga. Ct. App. 1991)))

[29] *See id.* (discussing the inapplicability of CSX's duty to provide a safe workplace).

[30] *See id.* (discussing the federal court's unpublished order in James v. CSX Transp. No. CV–590–250 (S.D. Ga. 2001)).

[31] *See id.* (explaining that the Georgia Court of Appeals made clear that the cause of action it discussed involved worksite exposure).

[32] *See id.* (holding that the Georgia Court of Appeals case does not support the federal district court's conclusion that location is not a factor).

other states place a weighty emphasis on foreseeability in deciding the existence of a duty,[33] the court explained that mere foreseeability is sometimes insufficient to trigger a duty of care in Georgia.[34]

The court then abruptly shifted its focus to the crux of its short opinion—the policy concerns behind extending an employer's duty to non-employees. First, the court noted the important role that policy plays in determining a duty.[35] The Georgia Supreme Court quoted extensively from a 1994 New York case, *Widera v. Ettco Wire and Cable Corp.*, which declined to extend an employer's duty to an infant who was exposed in utero to toxic chemicals on her father's work clothes.[36] That decision explained that expanding an employer's duty to those who come into contact with an employee would "expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs."[37] Even when an actor commits a wrong, courts have a responsibility to "tailor [a duty] so that the illegal consequences of [the wrong are] limited to a controllable degree."[38] In recognition of these considerations, the Georgia Supreme Court held that foreseeability yielded to policy and there existed no duty to non-employee third parties exposed to an employee's clothing beyond the employer's premises.[39]

However, after relying extensively on the policy concerns noted by the New York court in *Widera*, the Georgia Supreme Court admitted that more recent New York cases had not applied the *Widera* ruling to take-home asbestos cases.[40] On the contrary, the

---

[33] *See, e.g.*, Chaisson v. Avondale Indus., Inc., 947 So.2d 171, 183 (La. Ct. App. 2006) (noting that Louisiana courts rely heavily on foreseeability when finding a duty); Satterfield v. Breeding Insulation Co., 266 S.W.3d 347, 365 (Tenn. 2008) ("[T]he foreseeability factor has taken on paramount importance in Tennessee.").

[34] *See Williams*, 608 S.E.2d at 209 (surveying Georgia case law and discussing cases in which foreseeability alone did not engender a duty of care).

[35] *See id.* ("[I]n fixing the bounds of duty, not only logic and science, but policy play an important role." (quoting Widera v. Ettco Wire and Cable Corp., 204 A.D.2d 306, 307 (N.Y. App. Div. 1994))).

[36] 204 A.D.2d at 306 (N.Y. App. Div. 1994).

[37] *Williams*, 608 S.E.2d at 209 (quoting *Widera*, 204 A.D.2d at 307).

[38] *Id.* (quoting *Widera*, 204 A.D.2d at 307).

[39] *See id.* at 210 (declining to extend a duty on the basis of foreseeability).

[40] *See id.* (acknowledging that the New York Supreme Court, Appellate Division distinguished *Widera* and did not apply it to take-home liability in *In re* New York City Asbestos Litigation, 14 A.D.3d 112, 116 (N.Y. App. Div. 2004), *rev'd* 840 N.E.2d 115 (2005)).

New York Supreme Court Appellate Division explicitly refused to apply the *Widera* holding to take-home litigation and held that employers owe a duty to employees' household family members for exposure to asbestos dust on an employee's work clothes.[41] Despite New York's walk-back, the Georgia Supreme Court found the policy underlying *Widera* to be consistent with Georgia negligence law and therefore decided that an employer's duty does not extend beyond the workplace.[42]

B. SWEET TAKE-HOME ALABAMA: THE ELEVENTH CIRCUIT'S BROAD INTERPRETATION OF EMPLOYER DUTY IN *BOBO*

James "Neal" Bobo developed asbestos-induced lung cancer after working twenty-two years around insulation residue in the TVA's Brown's Ferry Nuclear Plant in Athens, Alabama.[43] However, it was his wife Barbara's exposure that prompted the Eleventh Circuit to determine whether an employer's duty extended to employees' families in take-home litigation under Alabama law.[44] Mrs. Bobo was diagnosed with mesothelioma in 2011 after washing Mr. Bobo's asbestos-dusted work clothes approximately two thousand times over the course of his employment with TVA.[45] At times, there was so much asbestos dust hanging in the air that it covered the Bobo's laundry room in a white fog.[46] After Mrs. Bobo's mesothelioma diagnosis, she sued TVA, among others, alleging that exposure to her husband's asbestos-dusted work clothes caused her to develop the illness.[47] She died two years later.[48]

After Mrs. Bobo's estate won in the federal district court, TVA appealed and argued that the district court erred in holding that TVA had a duty to prevent Mrs. Bobo's exposure.[49] The Eleventh

---

[41] *See In re* New York City Asbestos Litigation, 14 A.D.3d at 119, *rev'd* 840 N.E.2d at 115 (defining the scope of the duty owed by the Port Authority of New York and New Jersey).

[42] *See Williams*, 608 S.E.2d at 210 (choosing to follow the policy of *Widera* regardless of the subsequent New York decision).

[43] *See* Bobo v. Tenn. Valley Auth., 855 F.3d 1294, 1297–99 (11th Cir. 2017) (discussing Mr. Bobo's exposure to asbestos).

[44] *See id.* at 1302–03 (explaining the duty issue).

[45] *See id.* at 1297–98 (discussing and estimating Mrs. Bobo's exposure).

[46] *See id.* (describing Mrs. Bobo's exposure to asbestos while doing laundry).

[47] *See id.* at 1299 (detailing Mrs. Bobo's lawsuit).

[48] *See id.* (reporting that Mrs. Bobo died from mesothelioma in 2013).

[49] *See id.* at 1299–1300 (recounting the district court's findings).

Circuit began its review of the duty issue by explaining that its objective was to rule in a way that was consistent with Alabama state courts.[50] In pursuit of this goal, the court explained that it had certified to the Alabama Supreme Court the question of whether an employer has a duty to employee's families in the take-home context, but that the Alabama Supreme Court declined to answer the question.[51]

In determining the existence of a duty of care, Alabama courts consider public policy, social considerations, and foreseeability—the chief consideration being foreseeability.[52] With no guidance from the Alabama Supreme Court, the Eleventh Circuit surveyed out-of-state take-home litigation and compared those courts' rationales to existing Alabama law. The court summarized four cases in which other states held that an employer owed a duty to employees' families based on foreseeability.[53] On the other hand, the court noted that the majority of states that had considered the issue had found no duty—citing the *Williams* decision as one such case.[54]

It seemed that the Eleventh Circuit would follow the Supreme Court of Georgia. The *Bobo* court recognized the *Williams* position as the majority view and acknowledged that the Eleventh Circuit generally presumes Alabama courts will follow the majority rule in a case of first impression.[55] However, the Eleventh Circuit discussed several factors that suggested the Alabama Supreme Court might adopt the minority approach and hold that TVA did owe a duty to Mrs. Bobo.

In keeping with the central role that foreseeability plays in finding a duty under Alabama law, the court discussed at length whether Mrs. Bobo's injury was foreseeable to TVA under the

---

[50] *See id.* at 1302 ("A federal court's goal in deciding a state law issue is to resolve it in the same way the state's highest court would." (citing Price v. Time, Inc., 416 F.3d 1327, 1334 (11th Cir. 2005))).

[51] *See id.* (discussing the Alabama Supreme Court's treatment of the Eleventh Circuit's certified questions).

[52] *Id.* at 1302–03 (citing Smitherman v. McCafferty, 622 So.2d 322, 324 (Ala. 1993) and Taylor v. Smith, 892 So.2d 887, 891 (Ala. 2004)).

[53] *See id.* at 1303 (discussing cases from California, Louisiana, New Jersey, and Tennessee).

[54] *See id.* at 1304 (citing *Williams* as one of the cases upholding the majority view).

[55] *See id.* at 1304 ("To find a duty in this case would align Alabama with what TVA says is the 'minority' view, and we generally presume that Alabama courts would adopt the majority view on a legal issue in the absence of indications to the contrary.").

circumstances; the court concluded that it was.[56] Especially damning to TVA was the court's finding that TVA knew about Occupational Safety and Health Administration (OSHA) regulations that explicitly reported the risk that employees' family members faced from take-home asbestos exposure.[57] Although TVA, in recognition of this danger, adopted policies requiring employees to keep street clothes in a separate locker from work clothes, it did not enforce this policy.[58] Thus, the court found that TVA could foresee that employees' families would be exposed to its employees' toxic work clothes; this foreseeability cut strongly in favor of finding a duty.[59]

Further, the court discussed the policy considerations at play in deciding the duty issue. In sharp contrast to the *Williams* court, which had largely relied on policy-based reasoning in declining to extend take-home liability to employers, the Eleventh Circuit reasoned that public policy instead *supported* finding a duty.[60] The court found that TVA was in the best position to prevent the harm, as it knew about the OSHA regulations and that its own policies would prevent take-home exposure if properly followed.[61] The court then dispatched TVA's argument that expanding a duty to employers would create limitless liability; it did so by limiting the scope of the duty to only those whose harm is foreseeable, such as household family members.[62] Moreover, in direct contrast with the *Williams* court, the Eleventh Circuit reasoned that the augmented duty would have an overall positive impact since it would deter employers from acting negligently.[63]

---

[56] *See id.* at 1305 ("TVA not only could foresee injuries from take-home asbestos exposure, it also created the risk of injuries to its employees' family members . . . .").

[57] *See id.* ("Evidence has shown that family members of asbestos workers face a substantially increased risk of cancer and other asbestos-related diseases from exposure to asbestos carried home on work clothes." (quoting Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite, 51 Fed. Reg. 22.612, 22.697 (June 20, 1986))).

[58] *See id.* (discussing TVA's failure to enforce workplace regulations).

[59] *Id.*

[60] *See id.* ("Public policy concerns also weigh in favor of imposing a duty on TVA in these circumstances.").

[61] *See id.* (explaining that TVA was in the best position to prevent harm).

[62] *See id.* at 1306 (limiting the duty to foreseeable injuries).

[63] *See id.* (refuting the idea that greater liability is necessarily negative).

III. SHOULD I STAY OR SHOULD I GO: EVALUATING WHETHER GEORGIA COURTS SHOULD OVERTURN *WILLIAMS*

In light of the *Bobo* decision and with the benefit of almost fourteen years of extensive take-home litigation around the country, should the Supreme Court of Georgia revisit and reverse *Williams* and expand a duty of care to employers? The answer hinges upon two factors emphasized by the *Williams* and *Bobo* courts in their respective decisions—foreseeability and policy. Part III.A examines foreseeability, then Part III.B analyzes policy. In the end, both of these factors support the conclusion that the *Williams* decision should stand in Georgia.

A. CAN'T YOU (FORE)SEE: THE INAPPLICABILITY OF *BOBO*'S FORESEEABILITY ANALYSIS

If the risk of Mrs. Bobo's developing mesothelioma was foreseeable to TVA, how could Mr. Williams and his co-plaintiffs' injuries not be foreseeable to CSX? After all, CSX would have been aware of the same OSHA regulations (published in 1986) on which the Eleventh Circuit heavily relied in holding that TVA owed a duty to Mrs. Bobo. Shouldn't CSX have taken steps to prevent take-home exposure to its employees' families?

An observer might answer both questions in the affirmative and argue that *Bobo*'s duty analysis should be adopted in Georgia. Mesothelioma is a brutal, debilitating disease, and the standard treatment—chemotherapy—has a host of painful side effects. For example, Mrs. Bobo called her chemotherapy treatment the "Red Devil" because it caused her to spit up raw flesh.[64] One can empathize with Mrs. Bobo, Mr. Williams, and those like them who developed a terminal disease at least in part because of second-hand asbestos exposure. An understandable reaction is that *someone* should be held responsible, especially since the facts strongly suggest that the employers involved were aware of the risk posed to the plaintiffs.

---

[64] *See id*. at 1297–98 (discussing Mrs. Bobo's treatment, which also included thoracentesis, in which a long needle was used to remove two liters of fluid from the space between the lining of the outside of her lungs and the wall of her chest, and a pleurectomy, which removed one of her ribs and the pleural lining of one of her lungs).

However, as tragic as the circumstances are for take-home plaintiffs, focusing on the foreseeability of Mr. Williams's (and similarly situated plaintiffs') injury misunderstands the inquiry under Georgia law. His illness very well may have been foreseeable to CSX, but that alone does not mean CSX should be held liable. Foreseeability is the chief consideration in determining a duty in Alabama (among other states), but it plays a less critical role in Georgia.[65] Other courts have noted the differences among states regarding the centrality of foreseeability in declining to find a duty.[66] While there might be compelling arguments that Georgia courts should give foreseeability more weight in duty analysis, this Note does not endeavor to evaluate such arguments.

As the law currently stands, Georgia courts can decline to find a duty even when an injury is foreseeable. In *City of Douglasville v. Queen*, a father sued the city for negligence after one of his children was killed and the other was injured by a train as they walked on railroad tracks to watch a city parade.[67] The Georgia Supreme Court held that the city was not liable for negligence even though it was foreseeable that parade viewers would walk on railroad tracks adjacent to the parade route and encounter such hazards.[68]

Similarly, the Georgia Supreme Court declined to extend a duty of care based on foreseeability in *Badische Corp. v. Caylor*.[69] In *Caylor*, creditors sued accountants for professional malpractice after the creditors relied on the accountants' flawed audit of a debtor.[70] The Eleventh Circuit certified a question to the court, asking if "third parties [can] recover against an accountant under Georgia law for the accountant's negligence in preparing audited financial statements *where it was foreseeable that the third parties would rely upon the financial statements*?"[71] The Georgia Supreme Court answered in the negative and held that foreseeability alone

---

[65] *See supra* notes 34–35 and accompanying text.

[66] *See, e.g.*, New York City Asbestos Litigation, 840 N.E.2d 115 (N.Y. 2005) (distinguishing a New Jersey take-home case on the basis that New Jersey emphasizes foreseeability in duty analysis).

[67] 514 S.E.2d 195, 197 (Ga. 1999).

[68] *See id.* at 198 ("We decline to hold that the foreseeability of such situations places an affirmative duty upon a municipality . . . .").

[69] 356 S.E.2d 198 (Ga. 1987).

[70] *See id.* at 199 (detailing the claim).

[71] *Id.* (emphasis added).

was insufficient to create a duty.[72] Moreover, the court suggested in a footnote that it disfavors duties based on foreseeability alone without some other extenuating factor, reasoning that the "unlimited foreseeability rule advocated by the plaintiffs" went too far.[73]

Thus, while the fact that take-home injuries may be foreseeable to Georgia employers certainly cuts in favor of finding a duty, foreseeability alone is not enough. Without more, Georgia courts should continue to uphold the *Williams* decision because it best comports with current Georgia negligence law.

B. OOH BABY, BABY, IT'S A WIDE WORLD (OF PLAINTIFFS): THE *WILLIAMS* DECISION PROTECTS EMPLOYERS FROM LIMITLESS LIABILITY

While foreseeability analysis, in a vacuum, supports replacing the *Williams* decision and extending an employer's duty of care to employees' families in take-home litigation, the ultimate deciding factor is public policy. Which position is the better fit in Georgia—broad or limited take-home liability?

It is fair to evaluate the Georgia Supreme Court's policy reasoning in *Williams* as feeble considering that the fulcrum of the court's policy argument, the *Widera* decision, had been overruled in New York and was no longer good law when the court issued *Williams*.[74] New York, however, subsequently vindicated the Georgia Supreme Court's reliance on *Widera*. In *New York City Asbestos Litigation*,[75] the Court of Appeals of New York (the state's highest court) held that the Port Authority of New York and New Jersey did not owe a duty to an employee's wife in a take-home asbestos case. The court explained the policy considerations at play in the case as follows:

> In sum, plaintiffs are, in effect, asking us to upset our long-settled common-law notions of an employer's and

---

[72] *See id.* at 200 (rejecting plaintiff's argument that professional liability for negligence should be extended to an unlimited class of persons whose presence is merely foreseeable).

[73] *See id.* at n.2 (explaining that the court would take a middle ground rather than premise liability on unlimited foreseeability).

[74] *See supra* notes 41–43 and accompanying text.

[75] 840 N.E.2d 115 (N.Y. 2005).

> landowner's duties. Plaintiffs assure us that this will not lead to "limitless liability" . . . . This line is not so easy to draw, however. For example, an employer would certainly owe the new duty to an employee's spouse (assuming the spouse lives with the employee), but probably would not owe the duty to a babysitter who takes care of children in the employee's home five days a week. But the spouse may not have more exposure than the babysitter to whatever hazardous substances the employee may have introduced into the home from the workplace. Perhaps, for example, the babysitter . . . launders the family members' clothes . . . . While logic might suggest (and plaintiffs maintain) that the incidence of asbestos-related disease allegedly caused by the kind of secondhand exposure at issue in this case is rather low, experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality.[76]

Other states have echoed this cautious reasoning in the years since the *Williams* decision. In *Gillen v. Boeing Co.*,[77] the U.S. District Court for the Eastern District of Pennsylvania explained that, if it imposed a duty on defendants, "liability for take-home exposure would essentially be infinite."[78] The court reasoned that Boeing would not only owe a duty to its employee's wife, but also to "children, babysitters, neighbors, dry cleaners, or any other person who potentially came in contact with [the employee's] clothes."[79] Similarly, the Supreme Court of Iowa explained that extending a duty might open "a large universe of other potential plaintiffs who never visited the employers' premises but came into contact with a contractor's employee's asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a laundromat."[80] The Supreme Court of Michigan also noted that "protecting every person with whom a business's employees . . . come

---

[76] *Id.* at 122.
[77] 40 F.Supp.3d 534 (E.D. Pa. 2014).
[78] *Id.* at 540.
[79] *Id.*
[80] Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689, 699 (Iowa 2009).

into contact, or even with whom their clothes come into contact, would impose an extraordinarily onerous and unworkable burden."[81]

In light of these doom-and-gloom predictions from other courts, one might ask, "Why not just limit the scope of the duty owed like the Eleventh Circuit did in *Bobo*?" However, a closer look reveals that *Bobo* did not limit liability as much as it might appear. The court limited the scope of the duty to "only to people whose harm is foreseeable, *such as* an employee's family members or others in the employee's household."[82] While the court used the arguably-reasonable category of household family members as an example, the category of those who might be harmed is vastly more expansive.

As the courts that have declined to find a duty have noted,[83] it is foreseeable that an employee might interact with anyone while wearing clothes tainted with asbestos fibers. For example, it is foreseeable that an employee might stop at a gas station on the way home from work, but it borders on the absurd to say that an employer owes a duty to anyone behind the employee in line to buy a honey bun or a scratch-off lottery ticket at the corner store. The possible permutations on this theme, like the liability that would follow, are limitless. In recognition of this potential landslide of litigation, Georgia should continue to abide by the *Williams* decision and maintain reasonably limited employer liability in asbestos litigation.

IV. THE ROAD GOES ON FOREVER: CONCLUSION

The runaway freight train that is asbestos litigation does not seem to be running out of steam any time soon.[84] As the generation of potential plaintiffs who were directly exposed to asbestos at the workplace passes away, the focus is likely to shift to take-home claims. While roughly half of the states have yet to address the take-home question, those that have considered it have split on whether

---

[81] *In re* Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller v. Ford Motor Co.), 740 N.W.2d 206, 217 (Mich. 2007).

[82] Bobo v. Tenn. Valley Auth., 855 F.3d 1294, 1306 (11th Cir. 2017) (emphasis added).

[83] *See supra* notes 78–83 and accompanying text.

[84] *See* Anderson, *supra* note 8, at 120 ("[T]he pool of potential plaintiffs is likely to remain consistent for the next several decades or longer.").

employers owe a duty to employees' families. Georgia should remain a state that declines to extend such a duty. Though injuries to take-home plaintiffs may be foreseeable in some cases, foreseeability is not controlling under Georgia law and cannot unilaterally support a duty. Further, Georgia should maintain its policy position as announced in *Williams*: that take-home liability unreasonably expands the class of potential plaintiffs and leaves employers with near-unlimited liability. During the next term and thereafter, the justices of our state supreme court should not welcome the devil of take-home asbestos litigation down to Georgia.