

COVID-19 Alert

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If COVID-19 Is Brought Home From Work— Can Lawsuit Follow?

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Employers, landlords and any party potentially subject to a premises liability action would be well advised to consider the consequences when COVID-19 is contracted on their property and then spread from the infected party to a family member.

A new lawsuit highlights the unresolved intersection between traditional tort law duty analysis and the expansive view of foreseeability in so-called secondary exposure torts to address the scenario where COVID-19 was allegedly brought home from work, with tragic consequences.

In the action recently filed in Kane County, Illinois (a Chicago “Collar County”), the Estate of Esperanza Ugalde seeks damages for her wrongful death, which occurred after she purportedly contracted the virus from her husband, a butcher at a local meatpacking plant.

The Complaint recites various purported wrongdoing by the meatpacker, including not enacting a COVID-19 prevention plan, failing to provide its employees with personal protective equipment (PPE), and failing to take measures consistent with Centers for Disease Control (CDC) guidelines to mitigate the spread, such as disinfecting the plant or enforcing social distancing on the work floor, after it became aware that employees had contracted the virus.

The Complaint alleges that Esperanza died four days after her husband contracted the virus.

Thus, this case necessitates a traditional tort analysis involving an assessment of the defendant’s legal duties and the foreseeability of plaintiff’s injuries, in the context where the injured party was not an employee of the defendant and was not present at the allegedly unsafe workplace.

Illinois courts look at four factors to determine whether a duty ran from the defendant to the plaintiff: (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. *Stearns v. Ridge Ambulance Serv., Inc.* 2015 IL App (2d) 140908, at 10.

A line of Illinois cases, which could materially impact the success of this claim, involve secondary exposure to asbestos. There, as in this case, it was alleged that the defendant failed to prevent a dangerous workplace exposure and that it was foreseeable that the exposure would extend to family members, who were not employees.

In *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, 965 N.E.2d 1092, at issue was the plaintiff’s claim that her mother died from injuries incurred through her exposure to the asbestos on the work clothing of plaintiff’s father. After the trial court dismissed the complaint, the Illinois Appellate Court, Fifth District, reversed, holding that the potential injury to the decedent was foreseeable and that plaintiff had sufficiently alleged that defendant owed a duty to the deceased.

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In a 4-2 decision, the Illinois Supreme Court affirmed the reversal of the trial court, but it disagreed with the Appellate Court's conclusion that plaintiff had sufficiently pleaded a cause of action. It remanded the case with the instruction that plaintiff be allowed to amend her pleading to include additional facts, which could support the existence of a duty on the part of the employer, and in so doing, the Court sidestepped addressing the policy issues underlying whether such a duty should exist.

One of the two dissenting justices was the current chief justice, who took the position that, as a matter of law, there is no duty to prevent secondary exposure.

Four years later, the question was presented to the Northern District of Illinois, sitting in diversity jurisdiction, and Judge Aspen noted the absence of guidance from Illinois courts. In *Neumann v. Borg-Warner Morse Tec LLC*, 168 F.Supp. 3d 1116 (N.D. Ill 2016), at issue was the claim of a mother who laundered the work clothes of her son who was employed at a gas station and exposed to asbestos-containing products manufactured and distributed by the defendants.

The *Neumann* court addressed the policy issues, which were embedded in the question of whether the employer owed a duty to the non-employee family member, and it focused on the third and fourth factors, "the magnitude of the burden of guarding against the injury" and "the consequences of placing that burden on the defendant." *Neumann* at 1122, quoting *Simpkins*, 358 Ill. Dec. at 618.

Implying that such a burden and the consequences of it were material, stating the Supreme Court did not provide any guidance, and noting that there was a split of authority in the appellate court, citing *Holmes v. Pneumo Abex, L.L.C.*, 353 Ill. Dec. 362 (4th Dist. 2011) and *Simpkins*, 401 Ill. App. 3d 1109 (5th Dist 2010), the *Neumann* court refused to expand the scope of potential liability to the secondarily exposed plaintiff, without more direction from the Illinois courts. Judge Aspen also took note that the majority of states, which had addressed the question, had not expanded liability to secondarily exposed plaintiffs.

The asbestos cases are likely instructive on the framework courts will utilize in assessing the seemingly open question of the legal duties of business and property owners when COVID-19 is allegedly contracted at work and then spread at home. Employers and landlords may wish to consider consulting with counsel regarding this potential expansion of liability.

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