Expert Analysis

# Virginia Is Latest State To Find Employer 'Take Home' Duty

By **David Barger, Thomas McKee Jr., Michael Sklaire and Brett Castellat**

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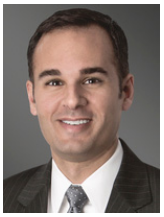
On Oct. 11, 2018, the Virginia Supreme Court extended the duty of care owed by an employer beyond just employees to any family members or third parties who may be affected by the employer's action. In a 4-3 decision, the court ruled in Quisenberry v. Huntington Ingalls Inc. that if an employer knew or should have known that an employee's clothing dusted with asbestos could be handled by others, the employer owed a duty of care to those other people.

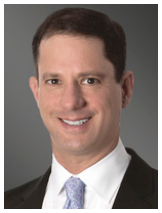
David Barger

Recognizing that the impact of this decision on tort law and business litigation in general will extend beyond the asbestos claims at issue in the case, the dissent warned that after this decision, "no one will be able to predict who else among the host of possible targets will be subjected to this novel theory of liability."



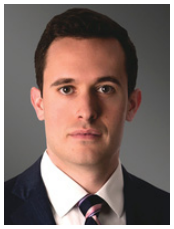
Thomas McKee Jr.

The case arose from Bennie Plessinger's employment at Huntington Ingalls, where he was regularly exposed to asbestos and, as a result, regularly brought home asbestos fibers stuck to his clothing. Plessinger's daughter, Wanda, eventually died from asbestos exposure, the result of her regularly helping her father with his laundry, shaking off his work clothing and inevitably inhaling asbestos particles.



Michael Sklaire

Wanda Plessinger's estate filed suit against Huntington Ingalls, alleging the employer was negligent in failing to exercise reasonable care by, among other things, failing to warn workers not to wear work clothes home or provide other necessary safeguards designed to prevent exposure to third parties. Huntington Ingalls denied it owed any such duty.



Brett Castellat

Upon a question of law certified by the United States District Court for the Eastern District of Virginia, the Virginia Supreme Court considered the following question: "Does an employer owe a duty of care to an employee's family member who alleges exposure to asbestos from the work clothes of an employee, where the family member alleges the employer's negligence allowed asbestos fibers to be regularly transported away from the place of employment to the employee's home?" The majority, answering in the affirmative, held that a "a general duty is owed to those within the reach of defendant's conduct."

Accordingly, Wanda Plessinger, as a person who regularly interacted with and assisted her father, as well as those persons "similarly situated," were all within Huntington Ingalls' "zone of danger." The fact that Wanda Plessinger and Huntington Ingalls were otherwise strangers was apparently of no consequence under the law.

The dissenting justices strongly criticized the majority's ruling, warning that "[t]he duty created by the majority today is limitless" and it "does not propose any framework for limiting an employer's duty to those who share living quarters with its employees." The ruling, the dissent said, will "push a wave of indeterminancy into [Virginia's] reputation for stable and predictable tort law." The dissent explained that prior to the majority's ruling, "no one could have predicted that an employer owed a legal 'take home' duty to a non-employee based solely on a tort committed by an employer against an employee, occurring at the employer's work site, and arising out of and in the course of the employer's work."

Quisenberry was decided just months after a May 11, 2018, Supreme Court of Arizona decision, Quiroz v. Alcoa Inc., that held that employers owed no "take home" duty to their employees' family members. The facts in Quiroz were similar to those in Quisenberry.

In Quiroz, the father of plaintiff Ernest Quiroz had worked at the defendant's plant, and returned home from work with asbestos fibers attached to his clothing when the plaintiff was a child. After Ernest Quiroz contracted and died from mesothelioma, his family sued the defendant for negligently causing his death. The court, reaching the opposite conclusion from the decision in Quisenberry, held the defendant employer owed no duty to the public involving secondary asbestos exposure. Interestingly, the majority in Quisenberry did not confront the decision in Quiroz, despite Chief Justice Donald Lemons citing to the case in his dissent.

The split between Arizona and Virginia is emblematic of an increasing unpredictability as to how courts will rule regarding an alleged "take home" duty by employers. Over the years, courts in at least 13 jurisdictions (Arizona, Georgia, Illinois, Iowa, Kentucky, Maryland, Michigan, New York, North Dakota, Ohio, Oklahoma, Pennsylvania and Texas) have held that such a duty does not exist, while courts in at least eight jurisdictions (Alabama, California, Delaware, Indiana, Louisiana, New Jersey, Washington and now Virginia) have held that the duty does exist.[1]

And the legislatures of some states, such as Kansas and Ohio, have, in response to these claims, enacted statutes prohibiting suits under "take home" theories of liability. At this point, there does not appear to be a clear trend in either direction, as courts around the country continue to come out on different sides of the issue. Over the past five years, for example, cases in four of the above-noted jurisdictions had held that there was no duty, while cases in four of the other jurisdictions during the same five-year period held that there was a duty.

For now, unless the Virginia General Assembly steps in to restrict the duty as legislatures in Kansas and Ohio have done, Virginia businesses must account for Quisenberry. Businesses should take steps to evaluate their workplace practices because of the ruling's potential to expand a business' liability to third parties outside of the workplace that are nevertheless in a "zone of danger." The boundaries of that zone, however, remain undefined and an open question.

For example, can an employer be sued by an employee's family members if the employer allowed a sick employee to work, and other employees who were exposed to him contracted the illness and carried it to their families or others? And will this case undermine and circumvent Virginia's well-established Workers Compensation Act by bestowing standing upon relatives of employees to seek their own redress for injuries that arose in the workplace?

Future litigation will need to further define this "zone of danger" and interpret how far the holding

extends beyond the foreseeable handling of toxic materials. In the meantime, companies should review workplace conditions that potentially expose third parties to foreseeable harm. The full impact of Quisenberry is yet to be known, but it will likely play out in courts across the Commonwealth, as plaintiffs attorneys seek to test the limits of the decision and potentially further expand the "zone of danger."

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[1] This article is intended to highlight variations in the law in this area, but does not purport to examine the state of the law in all 50 states.