24-CV-199

In the

District of Columbia
Court of Appeals

ROBIN B. QUINN, PERSONAL REPRESENTATIVE FOR JO ANN ALLEN,

Appellant,

v.

GENERAL ELECTRIC COMPANY,

Appellee.

Appeal from the Superior Court of the District of Columbia,
Civil Division No. 2020-CA-003862-A (Hon. Alfred S. Irving, Jr., Judge)

BRIEF FOR APPELLEE

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LISTING OF PARTIES AND COUNSEL

Pursuant to Rule 28(a)(2)(A), the following is a list of all parties, intervenors, amici curiae, and their counsel in the trial court proceeding and in the appellate proceeding:

Party	**Counsel**
Appellant/Plaintiff Robin Quinn, Personal Representative of the Estate of Jo Ann Allen	Daniel A. Brown Matthew E. Kiely Brown & Kiely, LLP
General Electric Company	Donald S. Meringer Michael L. Haslup Miles & Stockbridge P.C.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Appellee General Electric Company states that it is a corporation formed under the laws of the State of New York. General Electric Company does not have a parent corporation and no publicly held company owns ten percent (10%) or more of General Electric Company's stock.

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STATEMENT OF APPEAL FROM FINAL ORDER

Appellee General Electric Company ("General Electric") acknowledges that this is an appeal from a final order granting summary judgment in its favor.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Did the trial court correctly apply governing Maryland law to hold that because Ms. Allen was neither a user, consumer, nor bystander to the General Electric products at issue, her strict liability design defect claim, like her strict liability warning defect claim, fails as a matter of law?

APPELLEE'S STATEMENT OF THE CASE

On September 2, 2020, Ms. Jo Ann Allen instituted this asbestos-related products liability action against numerous defendants. (A40.) On November 15, 2021, following Ms. Allen's death, Ms. Robin B. Quinn, the personal representative of the Estate of Jo Ann Allen was substituted as Plaintiff and she is now the Appellant. (A20.) (Appellant will be referred to as "Plaintiff".)

On January 19, 2022, following discovery, General Electric filed a Motion for Summary Judgment as to All Claims. (A55–A369.) On April 27, 2022, after briefing by the parties, the trial court granted General Electric's Motion as to each of Plaintiff's claims against it, including negligence, strict liability for both design defect and failure to warn, and breach of warranty. (A584–A594.) In the same Order, the trial court granted summary judgment in General Electric's favor on Plaintiff's punitive damages claims. (Id.)

Plaintiff appealed the trial court's April 27, 2022 ruling as to her strict liability design defect claim only. (A634.) She did not challenge the summary judgment ruling on her other claims. (*Id*.) On April 5, 2023, this Court affirmed the trial court's order granting summary judgment to General Electric on Plaintiff's negligence, breach of warranty, and strict liability failure to warn claims, but vacated the summary judgment order as to Plaintiff's strict liability design defect claim only because it concluded that General Electric's initial motion did not present an adequate challenge to that specific claim. (A634–A638.) The Court remanded the case for further proceedings consistent with its opinion. (A637.)

After remand, on July 7, 2023, General Electric filed a Motion for Summary Judgment as to Plaintiff's sole remaining claim of strict liability for design defect. (A666–A930.) On January 31, 2024, following briefing on that Motion by the parties, the trial court granted General Electric's Motion. (A1603–A1634.) Plaintiff now appeals the January 31, 2024 grant of summary judgment on her strict liability design defect claim.

APPELLEE'S STATEMENT OF FACTS

In this asbestos-related personal injury and wrongful death lawsuit, Plaintiff alleges that her decedent, Ms. Jo Ann Allen ("Plaintiff's decedent" or "Ms. Allen") developed mesothelioma and lung cancer because of exposure to asbestos from dust brought home on the work clothes of her former husband, Mr. Willard

Phillips. (A46.) Plaintiff's claims against General Electric relate to asbestos-containing thermal insulation applied to two General Electric power generation turbines during their construction at Chalk Point power plant in Aquasco, Maryland ("Chalk Point") from mid-1963 to late-1964. (A734–A735; Plaintiff's Opening Brief at 2.)

Ms. Allen was married to Mr. Willard Phillips from 1959–1988. (A696.) Mr. Phillips was a union asbestos worker for Walter E. Campbell Company ("WECCO") from 1960–1967 and worked at many jobsites. (A712–A713.)

Mr. Phillips is deceased and never testified in this case. A coworker witness, Mr. Donald Burroughs, testified about his work with Mr. Phillips at Chalk Point and stated that he and Mr. Phillips were among numerous insulators employed by WECCO to insulate the two turbines manufactured by General Electric. (A750.) In addition to the turbines, they insulated piping that was manufactured and supplied by entities other than General Electric throughout the power plant. (A752.) Mr. Burroughs testified that the process of installing insulation on the two turbines at Chalk Point took a total of eight-to-ten weeks (four-to-five weeks per turbine). (A751–A752, A757.)

The function of the General Electric power generation turbines was to generate electricity for the site owner, PEPCO, a major metropolitan utility. (A734–A735.) Bechtel was the general contractor constructing Chalk Point for

PEPCO. (A755.) Mr. Burroughs and Mr. Phillips received their instructions from their employer, WECCO. (A756.) Mr. Phillips and Mr. Burroughs were never employed by General Electric and General Electric did not direct their work. (A750–A752, A756.) Neither Mr. Phillips' employer (WECCO), nor the general contractor (Bechtel), nor the site owner (PEPCO) provided facilities for the insulators at Chalk Point to change clothes and shower. (A752–A754, A756–A757.)

As mandated by PEPCO's contract with General Electric for the turbine-generators, General Electric was required by PEPCO to furnish the thermal insulation materials for the turbines. (A785, A827.) General Electric fulfilled that contractual requirement by ordering the thermal insulation materials from WECCO, which was not only an insulation contractor (and Mr. Phillips's employer), but also an insulation supplier. (A847–A848.) WECCO procured and delivered the turbine insulation directly to the Chalk Point construction site. (Id.) Thereafter, professional union insulators in the employ of WECCO, such as Mr. Phillips, installed those insulation materials on the turbines pursuant to WECCO's separate contract with PEPCO to insulate the balance of the plant. (A850–A854.)

During Mr. Phillips's alleged work at Chalk Point, he and Ms. Allen lived in Riverdale, Maryland. (A694–A696.) Ms. Allen never visited Chalk Point.

(A884.) Accordingly, Ms. Allen never encountered the General Electric turbines or the insulation products applied to them at that site. Instead Plaintiff contends that Ms. Allen was exposed to residual dust from the insulation carried on her husband's clothing from the Chalk Point site to their home in Riverdale, Maryland.

Plaintiff did not designate an expert in turbine design and proffered no evidence of a possible, much less feasible, design in 1963–1964 that would have eliminated the alleged danger to Ms. Allen. (A674, A933.)

SUMMARY OF THE ARGUMENT

The trial court correctly granted summary judgment because, under controlling Maryland law, General Electric owed no common law tort duty to Plaintiff's decedent, a third party with no connection to the General Electric products at issue. The existence of a legal duty is a question of law for the Court and the trial court correctly determined that no such duty exists under the circumstances presented here.

Contrary to Plaintiff's arguments, the scope of a product seller's duty is neither irrelevant nor boundless in the context of a strict liability claim, including a strict liability claim for design defect. Instead, Maryland courts extend a product seller's common law tort duty, whether in the context of negligence or strict liability and regardless of the theory of defect to users, consumers, and bystanders with a direct connection to the product at issue. It is undisputed that Plaintiff's

decedent was never present at Chalk Point generating station when the General Electric turbines at issue were being constructed or when the thermal insulation was applied to those turbines. She was not a user, a consumer, or even a bystander to those products. For these reasons, in rulings that Plaintiff does not challenge and that this Court expressly affirmed in her previous appeal, the trial court already concluded, as a matter of law, that General Electric did not owe a common law tort duty to Plaintiff's decedent when it granted summary judgment in General Electric's favor on Plaintiff's negligence claim and strict liability claim based on failure to warn. Plaintiff cites no authority—and none exists—for the absurd and incongruous proposition that, in a design defect context, General Electric owed a duty to protect Plaintiff's decedent from *the very same alleged dangers regarding which it had no duty to warn her*. General Electric owed no legal duty to Plaintiff's decedent, a third-party who never encountered the products at issue, but claims an indirect injury miles away. This lack of duty is as dispositive of her strict liability design defect claim as it was of her strict liability warnings defect claim.

Even assuming, *arguendo*, that Plaintiff's decedent was within the scope of General Electric's legal duty, Plaintiff lacks evidence to satisfy remaining required elements of a strict liability claim, including a design defect claim. First, the record contains no evidence that the General Electric turbines, or the thermal

insulation applied to them, were defective and unreasonably dangerous under Maryland law. Plaintiff does not even attempt to make this showing under the controlling risk-utility test and similarly falls short under the consumer expectation test that she contends applies. Second, the record is devoid of evidence that Plaintiff's decedent's injuries were caused by a design defect in the General Electric products at issue. The lack of showers and facilities for Chalk Point construction workers to change clothes were not aspects of the design of the General Electric turbines or of the thermal insulation applied to them. Additionally, because Plaintiff's decedent never visited Chalk Point, Plaintiff lacks the evidence required to support a finding of substantial factor causation under Maryland law. Third, and finally, the General Electric products at issue never reached Plaintiff's decedent without substantial change in their condition. Unlike a bystander, she was never present at the same place and time as the General Electric turbines or the thermal insulation installed on them at Chalk Point, but instead claims exposure to residual dust carried miles away by her husband to their home. Even ignoring, for the sake of argument, General Electric's lack of legal duty to Plaintiff's decedent, Plaintiff's inability to support the remaining required elements of a strict liability claim separately support the trial court's entry of summary judgment on her strict liability design defect claim.

STANDARD OF REVIEW

The Court of Appeals reviews the grant of a motion for summary judgment de novo, applying the same standard utilized by the trial court. *Grant v. May Department Stores Co.*, 786 A.2d 580 (D.C. 2001).

Summary judgment is appropriate where the moving party shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." D.C. Super. Ct. R. Civ. P. 56(c); *see also Weakley v. Burnham Corp.*, 871 A.2d 1167, 1173 (D.C. 2005) (citing *Clyburn v. 1411 K Street Ltd. P'ship*, 628 A.2d 1015, 1017 (D.C. 1993)). The record is viewed in the light most favorable to the non-moving party and the court does not make credibility determinations or weigh the evidence presented at the summary judgment stage. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

The moving party satisfies its burden on a summary judgment motion by demonstrating that there is a lack of evidence to support the non-moving party's claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A moving party need only demonstrate that the plaintiff failed to "make a showing sufficient to establish the existence of an element essential" for the non-moving party to prove its case. *Id.* If the moving party satisfies its burden of demonstrating the absence of supporting evidence, the non-moving party must then establish from the available evidence the existence of a genuine dispute of material fact.

ARGUMENT

I. Plaintiff's Strict Liability Design Defect Claims Fails for the Same Reason that Her Strict Liability Warning Defect Claim Failed—General Electric Had No Tort Duty to Ms. Allen as a Matter of Law.

In this appeal, Plaintiff urges the absurd position that General Electric is liable for a product design that allegedly subjected her decedent, Ms. Allen, to hazards regarding which it is established that General Electric had no legal duty to warn her. In service of that position, Plaintiff argues, utterly without support and contrary to controlling Maryland law,[1] that either the concept of legal duty has no application to the tort of strict liability for design defect or the scope such duty extends far beyond the boundaries of its legal duty in a negligence claim or even in a strict liability failure to warn claim and is, in essence, a duty to the world at large. The trial court correctly rejected these arguments and concluded that the classes of potential plaintiffs to whom General Electric's tort duty extends do not vary based on the plaintiff's theory of product defect (i.e., manufacturing, design, or warnings defect). In the context of both negligence and strict liability for alleged warning defects, the trial court already ruled that Ms. Allen falls outside the scope of General Electric's common law tort duty. Plaintiff does not challenge those

[1] There is no dispute that Plaintiff's claims against General Electric are governed by the substantive law of the State of Maryland.

rulings, which this Court affirmed in Plaintiff's prior appeal. It follows that the same lack of legal duty dooms Plaintiff's strict liability design defect claim.

A. Whether Analyzed in Express Terms of "Duty" or in Terms of the Classes of Plaintiffs Who Can Bring Such a Claim, the Legal Question of the Existence of a Duty is Essential to the Tort Claim of Strict Liability for Products, Including Design Defect Claims.

A tort is "a civil wrong for which a remedy may be obtained, usually in the form of damages; a breach of *a duty that the law imposes on everyone in the same relation to one another as those involved in a given transaction.*" *Espina v. Jackson*, 112 A.3d 442, 450 (Md. 2015) (quoting Black's Law Dictionary) (emphasis added). Without duty, there is no tort. *See Schimmel v. NORCAL Mut. Ins. Co.*, 46 Cal. Rptr. 2d 401, 402 (Cal. Ct. App. 1995) ("Without a duty, there can be no tort"); *see also Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) ("[t]he plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another" (quoting *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 100 (N.Y. 1928))).

"The existence of a legal duty is a question of law, to be decided by the court." *Gourdine v. Crews*, 955 A.2d 769, 775 (Md. 2008) (citing *Doe v. Pharmacia & Upjohn Co., Inc.*, 879 A.2d 1088, 1092 (Md. 2005)); *see also District of Columbia v. Shannon*, 696 A.2d 1359, 1365 (D.C. 1997) ("The question of whether a defendant owes a duty to a plaintiff under a particular set of circumstances is entirely a question of law that must be determined only by the

court."). Regardless of whether the plaintiff's theory of defect is based on design, manufacture, or lack of warnings, strict liability is no exception to these concepts.

The Supreme Court of Maryland first recognized strict liability for defective products by adopting § 402A of the Restatement (Second) of Torts ("Restatement § 402A") in *Phipps v. General Motors Corp.*, 363 A.2d 955 (Md. 1976). *See Halliday v. Sturm, Ruger & Co.*, 792 A.2d 1145, 1150 (Md. 2002). Under Maryland law, the elements of a strict liability claim, regardless of the theory of defect (manufacturing defect, design defect, or warnings defect) are as follows:

> (1) the product was in a defective condition at the time that it left the possession or control of the seller;
>
> (2) that it was unreasonably dangerous to the user or consumer;
>
> (3) that the defect was a cause of the injuries; and
>
> (4) that the product was expected to and did reach the consumer without substantial change in its condition.

Halliday, 792 A.2d at 1150.

The elements of strict liability under Maryland law, as adopted from Restatement § 402A, contemplate liability only to a "user or consumer" of the product. *Valk Mfg. Co. v. Rangaswamy*, 537 A.2d 622, 629–30 (Md. Ct. Spec. App. 1988), *rev'd on other grounds*, 562 A.2d 1246 (Md. 1989). In other words, the duty imposed on product sellers by Restatement § 402A as originally adopted in Maryland extended only to users and consumers of the product. *See id.*

When Maryland courts ultimately did expand strict liability beyond product users and consumers to cover certain bystanders to the use of the product, they approached the issue as addressing "the all-important concept of legal duty." *Valk*, 537 A.2d at 630*; see also Gourdine*, 955 A.2d at 786–87 (observing that the *Valk* court expanded strict liability to cover certain bystanders to the use of the product because it "was persuaded that 'the all-important concept of legal duty' should allow recovery"). It is important to note that *Valk* was a *design defect* case. It is plain, therefore, that the concept of legal duty is neither irrelevant nor boundless in the context of a strict liability design defect claim. To the contrary, the question of whether the plaintiff falls within the scope of the defendant's legal duty is "all-important," even in a design defect case.

Contrary to Plaintiff's argument, the critical legal question of duty does not impose upon her an obligation to prove a "specific act of negligence." (Pl.'s Opening Brief at 21.) The question here is whether General Electric, as a product seller, owed a tort duty to Ms. Allen *at all*.

For Plaintiff to survive summary judgment on a strict liability claim, including her sole remaining claim of design defect, the Court must determine that General Electric owed a tort duty to Ms. Allen. In other words, Ms. Allen must fall within one of the classes of potential plaintiffs—users, consumers, or certain bystanders to the use of a General Electric product—permitted to bring a strict

liability claim against General Electric. In the trial court's unchallenged (and affirmed) rulings granting summary judgment against Plaintiff's negligence claim and strict liability failure to warn claim, it already determined that General Electric owed no tort duty to Ms. Allen. As set forth below, the same holds true regarding Plaintiff's strict liability design defect claim and the trial court's ruling should be affirmed.

B. Plaintiff's Strict Liability Design Defect Claim Fails Because General Electric Had No Common Law Tort Duty to Ms. Allen.

Plaintiff does not contest the trial court's legal determination that General Electric owed no tort duty, under Maryland law, to warn Ms. Allen regarding the alleged hazards of its products at Chalk Point and its resulting entry of summary judgment in General Electric's favor on her strict liability claim based on a failure to warn theory. Plaintiff cites no authority—and none exists—for the incongruous proposition that, under a design defect theory, General Electric owed a duty to protect Ms. Allen from the same alleged hazards regarding which it had no duty to warn her. Because Ms. Allen was neither a user, consumer, nor a bystander to the General Electric products at issue, Plaintiff's design defect claim, like her warning defect claim, fails as a matter of law.

It is undisputed that Ms. Allen, who never visited Chalk Point, was not a user or consumer of the General Electric power generation turbines constructed

there or the thermal insulation products applied to those turbines.[2] The inquiry does not end there, because Plaintiff contends that Ms. Allen is within a category of bystanders to which Maryland courts have expanded strict liability. As set forth below, however, Maryland courts have distinguished between bystanders to the use of a product and persons, like Ms. Allen, who never encountered the product and claim an indirect injury. They have recognized a duty to the former, but not to the latter.

1. Strict Liability of Product Sellers Under Maryland Law Extends to Bystanders, But Not to Third Parties with No Direct Connection to the Seller or to the Product.

As noted above, *Valk* was the first Maryland case to extend strict liability beyond users and consumers to cover a bystander. *Valk*, 537 A.2d at 632. In that case, the plaintiffs' decedent was struck and killed by a snowplow hitch protruding from a truck that collided with his vehicle. *Id.* at 623–24. The *Valk* plaintiffs asserted a strict liability claim against the hitch manufacturer based on design defect. *Id.* at 626. The manufacturer appealed the trial court's denial of its motion

[2] "A 'consumer' is defined as one who purchases a product or who is a member of the family of the final purchaser, his employee, a guest at his table, or a donee of the purchaser. *Valk*, 537 A.2d at 629–30. "'Users' are categorized as those who passively enjoy the benefit of the product. *Id.* Ms. Allen is neither a "consumer" nor a "user." PEPCO purchased the General Electric power generation turbines at issue. Ms. Allen was not a family member, employee, guest, or donee of PEPCO. Having never visited Chalk Point, she never "used" any General Electric product at issue.

for judgment on the basis that it owed no duty to the plaintiffs' decedent, who was not a user or consumer of the hitch, but was instead a mere bystander to another driver's use of the hitch. *Id.* at 629–632. Maryland's intermediate appellate court recognized that the question whether strict liability extends to bystanders was "an issue of first impression in Maryland." *Id.* It noted that a product seller's liability for *negligence* had long since expanded to include foreseeable bystanders to the use of the product. *Id.* It also observed that the commentary to Restatement § 402A presaged a similar potential expansion of *strict liability* to such bystanders (e.g., "employees of the retailer, or a passerby injured by an exploding bottle, or a pedestrian hit by an automobile"). *Id.* After reviewing the decisions of several jurisdictions expanding strict liability to permit recovery by bystanders to the use of the product, the *Valk* court held that strict liability under Maryland law extends to bystanders such as the decedent in that case.

Importantly, because the decedent in *Valk* was a bystander to the use of the product at issue, that court was *not* faced with the question presented here: whether strict liability of product sellers extends to individuals *who were not bystanders to the use of the product*, but who claim an indirect injury remote in time and distance from the use of the product. Subsequent Maryland jurisprudence provides the clear answer that a product seller's tort duty—including its strict liability for allegedly defective products—does not extend so far.

In *Gourdine*, 955 A.2d 769 (Md. 2008), Maryland's highest court considered whether a diabetes drug manufacturer "owed a duty" to a motorist who was injured in a motor vehicle collision by another driver who had blacked out after ingesting the manufacturer's drug. *Id.* at 772. The plaintiff in that case cited *Valk* "for the proposition that a cause of action in … strict liability may be sustained by a bystander injured as a result of a defective product." *Id.* at 775. She argued that it was foreseeable that the alleged defect in the product (the lack of an adequate warning to the motorist who took the drug) would result in injury to third persons when users operated motor vehicles. *Id.* The plaintiff conceded that the manufacturer did not owe any duty to warn her decedent, a third-party non-user of the drug, but argued that the manufacturer's duty to users of its drug, coupled with the foreseeability of harm to third parties, created a "common law" duty to decedent sufficient to support a strict liability claim. *Id.* at 772, 778 (emphasis added). The issue, therefore, was whether the manufacturer owed any common law tort duty to the plaintiff's decedent.

The *Gourdine* court observed that [d]uty requires a close or direct effect of the tortfeasor's conduct on the injured party." *Id*. at 784. It held that, because there was "no direct connection" between the manufacturer's alleged lack of warnings to its user and the decedent's injuries and, [i]n fact, there was no contact

between [the manufacturer and the decedent] whatsoever," no common law duty flowed from the manufacturer to the non-user decedent. *Id.* at 786.

Supporting its holding, the *Gourdine* court examined a long line of its jurisprudence reflecting the importance of a "close and direct connection between conduct and the injury" and Maryland courts' resistance to establishing common law duties of care to "an indeterminate class of people." *Id*. at 783–86 (internal citations omitted). In *Dehn v. Edgecombe*, 865 A.2d 603 (Md. 2005), Maryland's highest court determined that a physician owed no duty to a patient's wife for a failed vasectomy that led to her pregnancy because the marital relationship alone would not give rise to a common law duty absent "some greater relational nexus" between the physician and the patient's spouse. *Gourdine*, 955 A.2d at 784–85 (quoting *Dehn*, 865 A.2d at 615).

In *Doe v. Pharmacia & Upjohn*, 879 A.2d 1088 (Md. 2005), the court considered whether an employer that tested its employee for HIV, but did not inform him that his test results could mean he had HIV-2, owed a duty to the employee's spouse, whom he unknowingly infected with the virus. *Gourdine*, 955 A.2d at 785–86 (quoting *Pharmacia & Upjohn*, 865 A.2d at 1088–95). The court determined that the employer owed no duty because the employee's spouse "had no relationship" with the employer and to recognize a duty in the absence of such a relationship would extend the employer's duty to "an indeterminate class of

potential plaintiffs" that would include not only employees' spouses, or even employees' sexual partners, but "any person who could have contracted HIV from the employee by any means." *Gourdine*, 955 A.2d at 785–86 (quoting *Pharmacia & Upjohn*, 865 A.2d at 1095–96).

Finally, in *Valentine v. On Target, Inc.*, 727 A.2d 947 (Md. 1999), the court held that a gun dealer owed no duty to the public to exercise reasonable care to prevent theft and illegal use of its handguns by others against third parties because *a duty "to the public at large without any evidence of a relationship between the parties, is simply too foreign to our well-established jurisprudence to sufficiently advocate a difference result than the one we have reached."* *Gourdine*, 955 A.2d at 986 (quoting *Valentine*, 727 A.2d at 1095–96) (emphasis added). Applying the reasoning of these cases to the claims at issue in *Gourdine*, the court concluded that, to recognize a duty owed by the drug manufacturer to the decedent, "would expand traditional tort concepts beyond manageable bounds, because such duty could apply to all individuals who could have been affected by [the user] after her ingestion of the drugs." *Gourdine*, 955 A.2d at 986.

Importantly, given Plaintiff's reliance on *Valk* in the instant case, the *Gourdine* court *rejected* the argument that the decedent was a bystander similar to the *Valk* decedent. It noted that, although *Valk* permitted a bystander to recover under a theory of strict liability, there was a direct connection in that case between

the product—a defectively designed snowplow hitch—and the decedent, whom it struck. *Id.* at 751–52. No similar direct connection existed in *Gourdine* between the defendant's drugs and the decedent. *Id.* *Gourdine* clearly establishes the distinction between product bystanders (like the *Valk* decedent) and third-parties (like the *Gourdine* decedent and Plaintiff's decedent here) with no connection to the product. It holds that product sellers have no common law tort duty to the latter.

Plaintiff's attempt to distinguish *Gourdine* as a failure to warn case is without merit for multiple reasons. First, the *Gourdine* plaintiffs did not claim that the product seller owed a duty to warn their non-user decedent. *Id.* at 775. Instead the court considered to whom a product seller's *duty under common law* flows. *Id.* at 783–89. Second, the precedents that the *Gourdine* court relied upon, which are summarized above, did not involve failure to warn claims or even product liability claims, but rather tort claims in general. *Id.* Finally, and crucially, although the defendant drug manufacturer invited the *Gourdine* court to distinguish *Valk* on the basis that *Valk* involved a design defect claim rather than a failure to warn claim, *the court did not do so*. *Id.* at 786–87. Instead, the court distinguished the *Valk* case because the decedent there was a bystander with a "direct connection" to the product whereas the decedent in *Gourdine* was not. Plaintiff cannot distinguish *Gourdine*.

Common law boundaries on a product seller's tort duty apply with no less force to asbestos-containing products than to other products. In *Georgia Pac., LLC v. Farrar*, 69 A.3d 1028, 1030 (Md. 2013), the plaintiff, Ms. Farrar, alleged that, during a six- or seven-month period in 1968 and 1969, while laundering her grandfather's work clothes, she was exposed to asbestos fibers in dust carried home from asbestos-containing drywall joint compound used on his work site. *Id.* at 1030–31. Ms. Farrar developed mesothelioma and asserted negligence and strict liability claims against the joint compound manufacturer. *Id.* Like Plaintiff's decedent here, Ms. Farrar never visited the job site and never encountered the product at issue, but was allegedly exposed to dust and residue carried home from the job site. *Id.* The issue in *Farrar* was whether the trial court erred in finding that the joint compound manufacturer owed a duty to Ms. Farrar.

Maryland's highest court held that the manufacturer's tort duty did not extend to household members, such as Ms. Farrar, of persons exposed to their product on a work site. Although the case concerned an alleged warning defect, the *Farrar* court analyzed precedent that "neither focused on nor excluded any particular tort, including product liability" and determined that the appropriate framework for its analysis was to determine "whether a *tort duty* exists, in particular a duty to warn" and, if so, "to whom does that duty extend?" *Farrar*, 69 A.3d at 1033 (emphasis added). It reviewed *Gourdine* and the line of Maryland

cases discussed therein (and summarized above) declining to extend the common law employer-employee and physician-patient duties to encompass spouses of the employees or patients.

The *Farrar* court determined that the trial court erred in concluding that the joint compound manufacturer owed a duty to warn Ms. Farrar for two reasons. First, focusing on foreseeability, it found the evidence insufficient to conclude that at the time of Ms. Farrar's alleged exposures (1968 and 1969) sellers of asbestos-containing products should have foreseen that household members of workers who used their products on a job site were at risk of developing asbestos-related lung diseases. *Id.* at 1035–39. Second, focusing on the lack of relationship between Ms. Farrar and the product at issue, the *Farrar* court concluded that *even if Georgia-Pacific should have foreseen that Ms. Farrar was in a foreseeable zone of danger*, there was no practical way for Georgia-Pacific to effectively warn persons, such as Ms. Farrar, "who had no connection with the product, the manufacturer or supplier of the product, the worker's employer, or the owner of the premises where the asbestos product was being used." *Id.* at 1039.

Here, as in *Farrar*, no relationship exists between General Electric and Plaintiff's decedent, who never visited Chalk Point at any time, much less when thermal insulation was applied to the General Electric turbines there. No authority exists for the proposition that General Electric's tort duty in a strict liability claim

under Maryland law varies depending upon the type of defect alleged. Indeed, it would be absurd to impose on General Electric a duty to protect Plaintiff's decedent, through its design of the turbines at issue, from dangers regarding which the trial court already determined it had no duty to warn her. Although Maryland courts have expanded a product seller's strict liability beyond users and consumers to bystanders, it has not expanded that liability to third-parties, like Ms. Allen, with no direct connection to the products at issue.

2. Plaintiff's Decedent was Not a Bystander to the General Electric Products at Issue.

In her opening brief, Plaintiff repeatedly insists, without explanation, that her decedent was a "bystander." This begs the question: "a bystander *to what*?" It is undisputed that Ms. Allen never visited Chalk Point and was never present when the General Electric turbines were under construction or when the thermal insulation material was applied to those turbines. She never encountered the General Electric products at issue.[3]

In previewing the potential expansion of strict liability beyond users and consumers of a product to include bystanders, the Restatement § 402A

[3] Plaintiff seems to be of two minds as to the product at issue regarding General Electric. She sometimes claims that the General Electric products at issue are the power generation turbines that General Electric sold to PEPCO and, at other times, argues that it the products at issue are the thermal insulation applied to those turbines. Regardless, Ms. Allen never encountered either the General Electric turbines or the thermal insulation material applied to them.

commentators cited examples of bystanders "who may *come in contact with the product*, as in the case of employees of the retailer, or a passerby injured by an exploding bottle, or a pedestrian hit by an automobile." *Valk*, 537 A.2d at 630 (quoting Restatement § 402A, cmt. O) (emphasis added). Plaintiff's decedent was clearly not such a bystander as she never "came in contact with the product."

The same distinction between bystanders, who are present when and where the product is used, and non-bystanders, who claim a remote injury, is evident from the Maryland jurisprudence discussed above. A motorist struck by a snowplow hitch is a bystander with respect to the hitch. *See Valk*, 537 A.2d at 632. A motorist struck by a vehicle operated by someone who ingested prescription drugs earlier that day, is not a bystander entitled to recover against the drug manufacturer. *See Gourdine*, 955 A.2d at 986. Similarly, and as dispositive of Plaintiff's strict liability design defect claim as it was for her strict liability warnings defect claim, a household member of someone who worked with an asbestos-containing product at a job site miles away is not a bystander entitled to recover against the manufacturer of that product. *See Farrar*, 69 A.3d at 1039. Plaintiff's decedent, who never came in contact with the General Electric products at issue and was never present where or when they were used, is not a bystander to whom General Electric owed a tort duty, but instead falls into the category of

individuals claiming a more remote injury to whom Maryland law recognizes no duty or liability.

3. Plaintiff's Decedent was Not in a Foreseeable Zone of Danger.

As set forth above, the lack of relationship between General Electric and Plaintiff's decedent, who was not a user, consumer, or bystander of the General Electric products at issue, alone justifies the trial court's entry of summary judgment in this case. Nonetheless, Plaintiff's failure to demonstrate that Ms. Allen was in a foreseeable zone of danger separately and sufficiently demands the same result.

Throughout her brief, Plaintiff asserts that General Electric's duty as a product seller is a boundless duty to "the public" at large and therefore the question of duty and underlying issues of foreseeability have no relevance here. (Pl.'s Opening Brief at 20-21 and throughout). This assertion is rebutted above and is further belied by Plaintiff's own attempt to demonstrate foreseeability with what she describes as a "far from exhaustive list" of publications and other documents that she claims demonstrate that workers' household members were in a foreseeable zone of danger during the period from mid-1963 to late-1964 when Ms. Allen's former husband, Mr. Phillips, worked at Chalk Point. (Pl.'s Opening Brief at 7–13, 33–35). It should be noted that these are precisely the same references that Plaintiff presented in her Opposition to summary judgment on her

strict liability failure to warn claim. (A382–A391, A395–A401). In its April 27, 2022 Order granting summary judgment as to that that claim, the trial court rejected these references as insufficient evidence of foreseeability to support a legal determination that General Electric owed a duty to Plaintiff's decedent under Maryland law. (A591) Plaintiff does not challenge the trial court's entry of summary judgment on her strict liability warning defect claim and offers no explanation of how the very same evidence that was *insufficient* to establish foreseeability in the context of that strict liability claim could be *sufficient* to establish foreseeability in the context of her remaining strict liability claim. The nature of the alleged defect (warnings versus design) has no relevance to whether Ms. Allen was in a foreseeable zone of danger at the time. In any event, as discussed below, Plaintiff's references do not support a finding that Plaintiff's decedent was in a foreseeable zone of danger as required to establish a legal duty under Maryland law.

In *Farrar*, the Maryland Supreme Court observed that, although the danger of asbestos exposure in the workplace was well-recognized as early as the 1930s, "the danger from exposure in the household to asbestos dust brought home by workers, though in hindsight perhaps fairly inferable, was not made publicly clear until much later." *Farrar*, 69 A.3d at 1036. It specifically reasoned that evidence that the product seller knew or should have known (1) "generally of the hazards of

airborne asbestos" and (2) of "the danger from bringing 'toxic substances' generally into the home" does not equate to evidence that take-home asbestos exposure created a danger of asbestos-related lung disease in household members. *Id.* at 1035. Examining evidence, the *Farrar* court concluded that such a danger was not foreseeable "as far back as 1958 or 1962" and declined to hold that it was even foreseeable by the 1968–1969 timeframe at issue in the *Farrar* case. *Id.* at 1035–39. In doing so, the court examined references that are materially indistinguishable (and in at least one case, identical) to those Plaintiff presents here. *Id.* As discussed below, none of Plaintiff's references support a different conclusion in this case.

Plaintiff did not submit the publications and documents that she contends place Ms. Allen within a foreseeable zone of danger with her opposition to summary judgment below. With one exception, she does not even submit them in support of this appeal. Instead, the references are "outlined" in a declaration executed by Barry Castleman in relation to another case. (A1356–A1363.) Castleman generally describes the list as identifying "documents predating 1965 that address the need to avoid taking hazardous substances, including asbestos, home on clothing." (A1359.) He does not state that the "need" to which he alludes arose from any interest other than protecting *the worker* from further exposure to substances encountered on the job. (*Id.*) Indeed, as the trial court

noted, Castleman's descriptions of each document provides no indication that *any* of the references dated prior to 1963 reflect any concern other than the protection of *the workers themselve*s. (A1621–A1623; *see also* A1359–A1363.) Absent that, as *Farrar* court observed, such references do not support the conclusion that asbestos-containing dust carried home by workers posed a danger that *other household members* would develop asbestos-related disease.

The final two references in Castleman's declaration, from 1963 and 1964, are easily distinguished by *Farrar*. Although the *Farrar* court did not expressly mention the 1963 National Safety Council Publication entitled "Dusts, Fumes, and Mists in Industry" referenced by Castleman, it reasoned that similar references to the "the danger from bringing 'toxic substances' generally into the home" do not constitute evidence of recognition of "the connection between lung disease and exposure to asbestos brought into the home on the clothing of workers." *Farrar*, 69 A.3d at 1036. According to Castleman, the 1963 publication "describes" various diseases, including asbestosis, and also states that "contaminated work clothes should not be taken home where *a toxic dust* could contaminate the home or expose other members of the family." (A1363, emphasis added.) This fails to supply what was missing in *Farrar*—evidence that it was foreseeable that household members were specifically in danger of developing asbestos-related

disease from dust carried home from asbestos-containing products used on a job site.

Finally, the *Farrar* court *specifically* considered Castleman's last reference, the 1965 Newhouse-Thompson study and its findings, which were presented at a conference organized by Dr. Irving Selikoff, a leading asbestos-disease researcher, in October 1964. *Id.* at 1036–37. The court noted that, despite concerns regarding household asbestos exposures raised by the Newhouse-Thompson findings, Dr. Selikoff reported that the issue was still a matter of study in July 1971 at which time "fortunately, the data look[ed] reassuring." *Id.* Newhouse-Thompson is the high-water mark for Plaintiff, but the *Farrar* court was fully aware of its findings and still declined to hold that household members of workers exposed to asbestos on a job site were in a foreseeable zone of danger in 1968 and 1969, years after the period at issue here (1963–1964).

4. The 1942 Pennsylvania Department of Labor and Industry Report, which Plaintiff Mischaracterizes, Does Not Support a Finding of Foreseeability.

Plaintiff repeatedly and erroneously argues that an April 1942 Pennsylvania Department of Labor & Industry Report entitled *Exhausting Asbestos Fiber and Dust from Wire Insulation Manufacture* ("the 1942 Report") is evidence that General Electric was on "direct notice" that household members of workers applying asbestos-containing insulation to its power generation turbines in 1963–

1964 were in danger of developing lung disease from asbestos-containing dust carried home on the workers' clothing. Plaintiff did not attach the 1942 Report to her Opposition to summary judgment below, but the trial court reviewed a copy filed in support of General Electric's previous briefing on its Motion for Summary Judgment on Plaintiff's Claim for Punitive Damages.[4]

After reviewing the 1942 Report in its entirety, the trial court correctly observed that it has little to do with asbestos-related hazards to workers at a General Electric wire manufacturing plant and *does not at all relate to potential hazards to occupational users of finished asbestos-containing products, much less household members of those users.* (A1623–A1625.)

The 1942 Report consists of an editor's foreword, followed by remarks from a General Electric plant supervisor regarding the exhaust system at a General Electric wire manufacturing plant in York, Pennsylvania. (A1635–A1648.) Contrary to Plaintiff's description, the 1942 Report does not direct General Electric to take any measures, but, instead, cites the plant as "a model in its asbestos waste

[4] Plaintiff included a copy of the 1942 Report in the Appendix and, in response, General Electric included three exhibits from the same brief relating to the 1942 Report. (A1635–A1648, SA1–SA24). Those exhibits added by General Electric demonstrate that the shower and locker room facilities referenced in the 1942 Report were provided to address danger to workers from Halowax exposures, not from asbestos exposures. (*Id.*) In any event, shower and locker facilities put in place to protect *workers* are of no support to Plaintiff's argument that a danger to *household members* was foreseeable.

removal system." (A1637.) The foreword describes the "asbestos waste removal system" as a means toward preventing "long-stapled" waste and dust from asbestos fiber used in manufacturing wire from settling on and damaging plant equipment. (*Id.*) The remarks by the General Electric manager similarly frame the primary concern as preventing equipment damage and waste.[5] (A1639–A1648.) Control of potential hazards *to wire plant employees* is mentioned as a secondary concern and the 1942 Report makes no reference to any potential hazards to users of finished asbestos-containing wire, much less to their household members. (A1635–A1648.)

Plaintiff focuses on the "Health Routine" set forth in the final two pages of the 1942 Report and described by the author as a separate topic worthy of its own detailed discussion. (A1647–A1648.) In any event, this "health routine" plainly concerns the safety of *workers at the wire manufacturing plant*, not household members of users of finished wire or of any asbestos-containing product:

> In brief, this program to protect *the health and safety of employees* develops the following practices:

[5] (*See, e.g.*, A1639 (describing issue as "a dust control problem which may require attention either as a potential dust hazard, a housekeeping problem[,] or both"); A1643 (noting that uncontrolled asbestos dust will collect on all surfaces and enter machinery, thus causing "in a short time an unsightly appearance" and also "necessitating costly replacements and repairs or high maintenance costs" as a result of the "abrasive action of the asbestos on rotating members, bearings, gears, [and] cams"); and A1647 (stating that collection and reuse of waste asbestos has "added to [the plant's] saleable waste 20% of good fiber which is valued at $500.00 per year").

1. A thorough physical examination and pre-employment history a pre-requisite to initial *employment*.

2. A distribution of G.E. Co. Booklets on general safety requirements requiring *employees signatures*.

3. A distribution of booklets on rules and precautions of safety and heath *applying specifically to the York Works*.

4. Distribution and furnishing of the following materials:

   (a) Clothing – Coveralls – Underwear – caps – gloves.

   (b) Towels – Soap – Protective Cream

   (c) Lockers – 1 for street clothes – 1 for work clothes

   (d) Shower baths – 15 minutes allowed in work schedule.

   (e) Trained nurse – Routine inspection and first aid.

   (f) Lunch room facilities.

(A1647–A1648, emphasis added.)

Plaintiff quotes only Item 4 from the above-quoted list and excludes the statement that the entire routine is intended to minimize generalized health hazards (not necessarily asbestos-related hazards) to "employees" of the wire manufacturing plant. The 1942 Report contains no reference to protecting household members of plant employees, much less household members of workers using a finished asbestos-containing product on a job site. In short, the 1942 Report from which Plaintiff selectively quotes offers no support for her argument that it was foreseeable to General Electric that household members of workers

exposed, on a job site, to finished asbestos-containing products were at risk of developing asbestos-related disease.

5. Plaintiff's reliance on *Grimshaw* and *Abate* is misplaced.

In opposing General Electric's argument that its common law tort duty, including its strict liability as a product seller, does not extend to third parties, such as Plaintiff's decedent, with no connection to the General Electric products at issue, Plaintiff relies upon two opinions from Maryland's intermediate appellate court (now known as the Appellate Court of Maryland). (Plaintiff's Brief at 25, 31–32.) These cases were decided a decade before the Supreme Court of Maryland decided *Gourdine* and *Farrar* and, as the trial court found below, are inapposite to the issues presented. (A1629–A1632)

In *ACandS v. Abate*, 710 A.2d 944 (Md. App. 1998), the Appellate Court of Maryland considered an appeal from a consolidated asbestos personal injury trial. *Id*. at 950. The court merely examined whether the plaintiff had adduced sufficient evidence that carry-home asbestos exposures (or, the case of one defendant, mixed carry-home and direct exposures) "was a substantial factor in causing [Mr. Glensky's] illness." *Id.* at 988-89. The intermediate appellate court did not consider the scope of duty question at issue here and would not have had the benefit of the *Gourdine* and *Farrar* decisions from Maryland's highest court even if it had reached that question. Indeed, in *Farrar*, the Maryland Supreme Court

criticized the *Abate* court's lack of analysis of whether the product seller's tort duty extends to a non-bystander household member of a worker exposed to a product on a job site. *See Farrar*, 69 A.3d at 1035 (noting the analytical "gap" in the *Abate* court's reasoning.)

The *Farrar* court similarly criticized, and implicitly overruled, *Anchor Packing v. Grimshaw*, 692 A.2d 5 (Md. App. 1997). Like *Abate*, *Grimshaw* involved an appeal from a consolidated trial. One of the four plaintiffs in *Grimshaw* alleged that she developed mesothelioma from exposure to asbestos-containing dust on her stepfather's work clothing from 1953–1963. *Grimshaw*, 692 A.2d at 12. The defendant argued that it owed no duty to the plaintiff based *solely* on lack of foreseeability. *Id.* at 33 ("[Defendant] contends that it is not liable for [plaintiff's] household exposure to asbestos fibers because [plaintiff's] injuries were not foreseeable and, therefore, it owed her no duty to warn"). The intermediate appellate court found that there was sufficient evidence that the plaintiff's injuries were foreseeable and, therefore, rejected the defendant's argument that it owed no duty. *Id.* In *Farrar*, Maryland's highest court expressly noted a "gap" in the *Grimshaw* court's analysis of foreseeability (a lack of evidence that "the connection between lung disease and exposure to asbestos dust brought into the home on the clothing of workers" during the period in question). *Farrar*, 69 A.3d at 1035. As discussed above, Plaintiff suffers from the same lack

of evidence here. More importantly, the *Farrar* court gave more weight to the lack of direct connection between the plaintiff and the product at issue (an argument not raised by the *Grimshaw* defendant, who relied on lack of foreseeability alone) and held that, regardless of the foreseeability of harm, the product seller owed no *duty* to a household member of a worker exposed to its product on a jobsite because the lack of relationship between the seller and the household member precluded a legal duty. *See Farrar*, 69 A.3d at 1039. Respectfully, *Grimshaw* and *Abate* cannot be squared with *Farrar*.

As set forth above, Ms. Allen's lack of relationship to General Electric or its products and Plaintiff's lack of evidence that, in 1963–1964, Ms. Allen was in a foreseeable zone of danger each justify the trial court's legal conclusion that General Electric owed no duty to Ms. Allen. Accordingly, as the trial court correctly ruled, Plaintiff cannot assert a strict liability claim, including a design defect claim, against General Electric on behalf of Ms. Allen. As set forth below, Plaintiff also lacks evidence to satisfy the other essential elements of a strict liability claim and, although not relied upon by the trial court, these shortcomings similarly justify its entry of summary judgment.

II. Even if a Legal Duty Did Exist, Plaintiffs' Failure to Satisfy the Remaining Elements of a Strict Liability Claim Independently Justify the Entry of Summary Judgment.

The trial court held, as a matter of Maryland law, that Ms. Allen was not a bystander to whom General Electric owed a tort duty. (A1608.) Accordingly, although it expressed skepticism regarding whether Plaintiff could proffer sufficient evidence to satisfy the remaining elements of a strict liability claim under Maryland law, the trial court ultimately reserved judgment on those issues. (Id.) This Court need not proceed beyond the single dispositive legal duty issue that was decided by the trial court. Nevertheless, Plaintiff expends several pages in her Opening Brief arguing that the trial court's judgment should be reversed on grounds that the trial court found unnecessary to decide. If this Court is for any reason inclined to go beyond the legal duty issue on which the trial court's judgment rests, General Electric offers the following response to plaintiff's superfluous arguments on issues that the trial court declined to decide.

The elements of a strict liability claim under Maryland law, regardless of the theory of defect (manufacturing defect, design defect, or warnings defect) are as follows:

> (1) the product was in a defective condition at the time that it left the possession or control of the seller;
>
> (2) that it was unreasonably dangerous to the user or consumer;
>
> (3) that the defect was a cause of the injuries; and

> (4) that the product was expected to and did reach the consumer without substantial change in its condition.

Halliday, 792 A.2d at 1150.

As discussed above, and relevant to the second and fourth elements, Plaintiffs' decedent was not a "user or consumer" or even a bystander to whom Maryland courts have expanded a product seller's strict liability. As set forth below, it is equally clear that Plaintiff lacks evidence to satisfy the remaining essential elements of a strict liability claim under Maryland law.

A. Plaintiff Lacks Evidence that the General Electric Products At Issue Were Defective and Unreasonably Dangerous.

There are two tests, under Maryland law, for determining whether a product's design is defective and unreasonably dangerous: (1) the risk-utility test; and (2) the consumer expectations test. *See Halliday*, 792 A.2d at 1150 (defining the two tests). The consumer expectation test "defines 'defective condition' as a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." *Id.* (internal quotations omitted). It defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.* (internal quotations omitted).

The risk-utility test "regards a product as defective and unreasonably dangerous, for strict liability purposes, if the danger presented by the product

outweighs its utility." *Id.* Where the risk-utility test is applied "the issue usually becomes whether a safer alternative design was feasible." *Id.*

1. The Risk-Utility Test Governs Plaintiff's Design Defect Claim.

Despite decades of asbestos-related personal injury litigation, including dozens of reported appellate opinions, no Maryland appellate court has confronted a design defect claim in this context.[6] Maryland's highest court has explained that the risk-utility test applies where "something goes wrong" with the product, meaning that it "malfunctions in some way." *Halliday*, 792 A.2d at 1153; *see also Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1149 (Md. 1985) (holding that the risk-utility test does not apply to a handgun that injured a person in whose direction it was fired because that test applies "only when something goes wrong with a product"). In contrast, where a product performs precisely as intended, the consumer expectation test applies. *See Halliday*, 792 A.2d at 1158–59 (applying the consumer expectation test to a claim that a handgun that operated as designed

[6] The dearth of Maryland case law regarding design defect claims as to asbestos-containing products is not surprising. Like the instant case, most asbestos-related personal injury cases involve alleged exposures decades in the past to asbestos-containing products that served important, sometimes highly technical functions. As discussed, *infra*, Maryland courts would likely apply the risk-utility test to such a design defect claim and require evidence that a suitable asbestos-free material was available at the time in question. Understandably, the plaintiffs in reported Maryland asbestos-related personal injury cases have sidestepped the need for such proof by universally pursuing failure-to-warn theories rather than design defect theories.

thereby killed a person was defectively designed because it lacked a safety device). The risk-utility test applies here.

Plaintiff undoubtedly alleges that "something went wrong" with the insulation applied to the General Electric turbines at Chalk Point. She alleges that, during construction of the turbines, the insulation released asbestos fibers that were carried home on Mr. Phillips's clothing and ultimately caused Ms. Allen to develop multiple diseases, including her fatal cancer. It is undisputed that the function of the General Electric turbines was to produce electricity and the function of the insulation applied to those turbines was to retain heat. Unlike a handgun, causing harm was not an intended function of the General Electric turbines or the thermal insulation applied to them.

Where a product allegedly caused a harm that was not its intended function, it "malfunctions" within the meaning of *Kelley* and *Halliday* and Maryland courts apply the risk-utility test to determine if the product was defective and unreasonably dangerous. In *C & K Lord, Inc. v. Carter*, 536 A.2d 699 (Md. Ct. Spec. App. 1988), the plaintiff alleged that a feather conveyor at a chicken processing plant had a defective design that caused his hand to be drawn into the mechanism and injured. *Id.* at 700-01. In examining whether the trial court was correct to apply the risk-utility test, the *Carter* court noted the holding in *Kelley* (later reaffirmed in *Halliday*) that the risk-utility test applies where a product

"malfunctions." *Carter*, 536 A.2d at 706-09. It observed that the *Kelley* court "cited *Duke v. Gulf & Western Mfg. Co.*, 660 S.W.2d 404 (Mo. App. 1983) as one example of a malfunctioning product." *Carter*, 536 A.2d at 707. In that case, "'a power press caught plaintiff's hands.'" *Id.* (quoting *Kelley*, 497 A.2d at 1149). The purpose of the power press was to manipulate metal. *Duke*, 660 S.W.2d at 407. The purpose of the feather conveyor at issue in *Carter* was to "transport feathers" and it did not "work precisely as intended" when it caught and injured the plaintiff's hand. *Carter*, 536 A.2d at 707. The *Carter* court reasoned that if the *Duke* press "malfunctioned" within the meaning of *Kelley* when the plaintiff's hand was drawn into it, then the feather conveyor similarly "malfunctioned" when the *Carter* plaintiff's hand was caught in it. *Id.* at 707-08. It affirmed the application of the risk-utility test to the design defect claim.[7]

Like the *Duke* press and the *Carter* conveyor, the function of the General Electric turbines and associated thermal insulation did not entail the infliction of harm. If, as Plaintiff alleges, the insulation shed fibers that caused Ms. Allen to develop a disease, that would constitute a "malfunction" under *Kelley* and

[7] The *Halliday* court criticized *Carter* for interpreting the *Kelley* holding, that the risk-utility test applies only where a product malfunctions, as inapplicable to cases in which the alleged defect is the lack of a safety device. *Halliday*, 792 A.2d at 1153. The instant case does not involve a safety device. In any event, the *Halliday* court expressed no disagreement with the *Carter* court's holding that a feather conveyor that conveys feathers nonetheless "malfunctions" under *Kelley* when a person's hand becomes caught in it.

Halliday. Accordingly, plaintiff's design defect claim is governed by the risk-utility test under Maryland law.

The consumer expectation test is unworkable in the instant case. Neither the General Electric turbines, nor the thermal insulation applied to them, are consumer products. It is unlikely that an ordinary consumer held any expectations as to the safety of such products. *See Trejo v. Johnson & Johnson*, 220 Cal. Rptr. 3d 127, 165 (Cal. Ct. App. 2017) ("the consumer expectations test is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*") (emphasis in original). Given the technical nature of designing a power generation turbine, which is beyond the ken of a jury, the consumer expectation test is inapplicable here. *See Lloyd v. Gen. Motors Corp.*, 275 F.R.D. 224, 230 (D. Md. 2011) (rejecting the consumer expectation test in favor of the risk-utility test where"[i]t would be pointless to ask whether a reasonable consumer would or would not expect a seatback to deform backwards in a moderate speed rear-impact collision[, because a]ny reasonable consumer would want to know the safety tradeoffs involved in making the seatbacks more rigid). For all of these reasons, Plaintiff's design defect claim is governed by the risk-utility test.

2. Plaintiff Lacks Evidence to Create a Genuine Issue of Fact as to Product Defect Under The Risk-Utility Test Because She Offers No Evidence of an Alternative Design

Under the risk-utility test, assessing if a product is defective and unreasonably dangerous turns on whether "the danger presented by the product outweighs its utility." *Halliday*, 792 A.2d at 1150. Courts consider the following factors:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Parker v. Allentown, Inc., 891 F. Supp. 2d 773, 791 (D. Md. 2012) (quoting *Klein v. Sears, Roebuck & Co.*, 608 A.2d 1276, 1280–81 (Md. Ct. Spec. App. 1992)).

As to the first factor, the "usefulness and desirability" of the product in question, two power generation turbines at a major metropolitan utility, cannot be overstated. Electricity powers nearly every aspect of modern life. These turbines were of immense usefulness to every home and business that received the power they generated.

Most critically, as to the third and fourth factors, Plaintiff has neither designated an expert in turbine design nor proffered any evidence that a substitute product or feasible alternative design existed during the period at issue whereby asbestos could be eliminated from the design of these turbines "without impairing its usefulness or making it too expensive to maintain its utility."

Plaintiff has similarly failed to produce evidence supporting her claim as to the remaining factors. She proffers evidence to support the conclusions that asbestos exposure can cause disease and caused Ms. Allen's diseases, but no evidence of the "likelihood" that Ms. Allen's household asbestos exposures would cause injury (Factor 2). Moreover, the evidence shows that any risk to household members such as Ms. Allen could have been mitigated or prevented if the site owner (PEPCO) or Mr. Phillips's employer (WECCO) provided shower and laundry facilities, but it is undisputed that neither did so (Factor 5). As discussed at length above, there is no evidence that, in 1963 and 1964, General Electric foresaw, or should have foreseen, any danger to household members such as

Ms. Allen so that it could spread that risk through pricing and insurance (Factor 7). While plaintiff has produced evidence that the potential risk to household members was not foreseen by Ms. Allen or by certain insulators who have testified in other cases (Factor 6), there is also no evidence (as set forth above) that General Electric foresaw or should have foreseen those potential risks in 1963 and 1964.

The record here simply does not contain evidence to permit a jury to weigh the risk associated with the General Electric turbines and associated thermal insulation against their highly significant utility. Indeed, Plaintiff presents no evidence that it was even possible, much less feasible, to design these products without asbestos-containing materials in 1963 and 1964. Accordingly, Plaintiff's design defect claim fails under Maryland's risk-utility test and the entry of summary judgment was appropriate below.

3. Even if the Consumer Expectation Test is Applied, Plaintiff's Design Defect Claim Fails as a Matter of Law.

Plaintiff incorrectly asserts that her design defect claim is governed by the consumer expectation test. Nonetheless, it is clear that Plaintiff's design defect claim would fail even under a consumer expectation analysis. Under the consumer expectation test, a product is defectively designed if it is in "a condition not contemplated by the ultimate consumer," which will be "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who

purchases it, with the ordinary knowledge common to the community as to its characteristics." *Halliday,* 792 A.2d at 1150

Plaintiff cannot cite a single Maryland case finding an asbestos-containing product to be defectively designed under the consumer expectation test. She contends, in circular fashion, that: (1) Ms. Allen did not expect residue from the turbine thermal insulation on Mr. Phillips's work clothes to cause her to develop disease; (2) it did cause her to develop disease; and (3) therefore, it is defective under the consumer expectations test. By that logic, the required element of a defective and unreasonably dangerous product is completely subsumed by the separate element of causation—in the absence of misuse, any injury caused by a product would render it defective and unreasonably dangerous, simply because the injured person did not expect to be injured. This is not how the consumer expectation test operates. *See Trejo*, 220 Cal. Rptr. 3d 127, 167 (Cal. Ct. App. 2017) (if causation of an injury "were the end of the inquiry, the consumer expectation test always would apply and every product would be found to have a design defect.")

The consumer expectation test requires that the product be more dangerous than "would be contemplated by the *ordinary consumer who purchases it*, with the *ordinary knowledge common to the community* as to its characteristics." *Halliday*, 792 A.2d at 1150 (emphasis added). The test is objective rather than subjective in

that it considers the "minimum safety expectations" of the "ordinary" purchaser of the product, not the expectations of the injured plaintiff. *Trejo*, 220 Cal. Rptr. 3d at 165-66. There is no evidence that the ordinary consumer of turbine thermal insulation in 1963 or 1964 had *any* expectations regarding the safety of dust from thermal insulation applied to a power generation turbine, much less of what those expectations were. Even if those safety expectations were established, there is no evidence that the risk allegedly created by the exposures claimed here violated those expectations. Plaintiff claims that Ms. Allen was exposed to asbestos fibers in residual dust from thermal insulation applied to two General Electric turbines over a period of eight-to-ten weeks. The record contains no evidence regarding how likely (or unlikely) that alleged exposure was to cause disease. Without evidence of actual risk, it cannot be compared to expected risk.

For the reasons stated in the previous sections, the risk-utility test governs Plaintiff's design defect claim and she has failed to produce evidence to satisfy that test. Even if the consumer expectation test were to control, however, Plaintiff has similarly failed to produce evidence to satisfy that test. The entry of summary judgment on Plaintiff's strict liability design defect claim was appropriate because she lacks evidence that the products at issue were defective and unreasonably dangerous.

B. The Record Contains No Evidence that Ms. Allen's Alleged Injuries Were Caused by a Design Defect in General Electric's Products.

Although Plaintiff has retained experts on medical causation, she has failed to produce evidence sufficient to establish that a design defect in the General Electric products at issue was a proximate cause of Ms. Allen's injuries. Plaintiff's complaint is that, when thermal insulation products were applied to the turbines at Chalk Point, no facilities were provided for Mr. Phillips to change clothes and/or shower. It is undisputed that General Electric was neither the site owner (PEPCO) nor Mr. Phillips's employer (WECCO). *The lack of facilities to shower and/or change clothes was not an aspect of the design of the General Electric turbines or the thermal insulation products applied to the turbines.*

Plaintiff contends that Ms. Allen is a bystander. As set forth Section I, *supra*, she is not. Even assuming, *arguendo*, that Ms. Allen was a bystander, Plaintiff lacks evidence to support the required element of causation in a bystander asbestos personal injury case.

To survive summary judgment on causation in an asbestos-related personal injury case brought by a bystander, Maryland law requires evidence that the products at issue were a substantial factor in causing the injuries alleged. *See Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445, 460 (Md. 1992) ("The causation question here is whether the evidence and inferences most favorable to

the plaintiffs support a finding that exposure to Eagle's products was a substantial factor in the death of each decedent."). "The factors to be evaluated include the nature of the product, the frequency of its use, *the proximity, in distance and in time, of a plaintiff to the use of a product,* and the regularity of the exposure of that plaintiff *to the use* of that product." *Id.* (emphasis added); *see also Scapa Dryer Fabrics, Inc. v. Saville*, 16 A.3d 159, 163–168 (Md. 2011) (applying the *Balbos* test to strict liability claims alleging asbestos-related personal injuries). It is undisputed that Ms. Allen was *never* in proximity, in time and distance, to the use of the General Electric products at issue. Accordingly, Plaintiff cannot satisfy the element of causation.

C. The General Electric Products At Issue Did Not Reach Ms. Allen Without Substantial Change in Their Condition.

A strict liability claim under Maryland law, whether premised upon design defect, warnings defect, or manufacturing defect, requires proof that the product "was expected to and did reach the consumer without substantial change in its condition." *Halliday*, 792 A.2d at 1150. As discussed above, Ms. Allen was not a "consumer" of the General Electric turbines or associated insulation materials at Chalk Point. It is beyond dispute that those products never reached Ms. Allen. Instead, Plaintiff alleges that residual dust from the construction activities at Chalk Point, including from the insulation material installed on the General Electric turbines, was carried miles away from Chalk Point on Mr. Phillips' clothing to the

home he shared with Ms. Allen in Riverdale, Maryland. On these facts, there is no basis for a jury to conclude that a General Electric product at issue reached Ms. Allen "without substantial change in its condition." Again relevant here are the precedents cited in Section I, *supra*, in support of General Electric's argument that a product seller's tort duty (and potential liability) to product users, consumers, and bystanders does not extend to household members of such individuals absent a connection between those household members and the product.

Plaintiff's argument that the thermal insulation products applied to the General Electric turbines "reached the user—i.e. Mr. Phillips—without substantial change" is without merit. (Pl.'s Opening Brief at 39–40.) This is Ms. Allen's claim, not Mr. Phillips's claim. The elements of strict liability require evidence that the product at issue was unreasonably dangerous *to Ms. Allen*, was a cause of *Ms. Allen's* injuries, and was expected to and did reach *Ms. Allen* without substantial change in its condition. *Halliday*, 792 A.2d at 1150 (setting for the elements of a strict liability claim). The thermal insulation products reached users, like Mr. Phillips, and bystanders in physical and temporal proximity to that work, without substantial change in their condition. Ms. Allen was neither a user nor a bystander, however, and never encountered the products at issue. Accordingly, the essential element of a strict liability claim that the product at issue was "expected

to and did reach" Ms. Allen "without substantial change in its condition" is not satisfied and Plaintiff's claim fails as a matter of law.

CONCLUSION

For all of the reasons set forth above, General Electric Company requests that this Court affirm the decision of the trial court granting summary judgment in its favor as to Plaintiff's sole remaining claim of strict liability for design defect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 10, 2024, a copy of the foregoing was served on the following via the Court's E-Filing System:

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