UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2564

September Term, 2015

DANIEL E. HIETT, *et ux.*

v.

AC&R INSULATION CO., INC.

Eyler, Deborah S.,
Leahy,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Leahy, J.

Filed: January 27, 2017

The Court of Appeals held in *Georgia Pacific, LLC v. Farrar*, 432 Md. 532 (2013), that a manufacturer/distributor of a product containing asbestos did not owe a duty to warn the household member of a worker-bystander who was present at facilities where the asbestos-containing product was installed prior to 1972 and where protective clothing, changing rooms, and safe laundering were not available at the work sites, because there was no practical way that the manufacturer/distributor's warning to the worker-bystander could have avoided the danger to the household member. *Id.* at 541.

As in *Farrar*, Daniel Hiett is the household member of a former work-place bystander (his father) who brought asbestos-laden clothes into his home prior to 1972. After Daniel was diagnosed with malignant mesothelioma, he and his wife, Jessica Hiett, filed a multi-count complaint[1] in the Circuit Court for Baltimore City against multiple defendants, including Appellee, AC&R Insulation Co., Inc. ("AC&R")—a business that installed and distributed products containing asbestos during the relevant time period. Mr. Hiett premised his negligence and strict liability claims on a failure to warn, as did the household member in *Farrar*.

On appeal from the circuit court's grant of AC&R's motion for summary judgment,

[1] On February 3, 2015, Mr. and Mrs. Hiett filed a short-form complaint and prayer for jury trial against 49 defendants in the Circuit Court for Baltimore City. Appellants filed their short-form complaint in accordance with the differentiated case management plan for asbestos litigation that the circuit court adopted pursuant to Maryland Rule 16-306. The complaint incorporated by reference certain paragraphs in the CT-1 Trade Asbestos Cases Master Complaint, alleging causes of action for strict liability, breach of warranty, negligence, fraud, conspiracy, market share liability, and—the only claim that Jessica Hiett joined—loss of consortium. The circuit court ordered the Hietts' action consolidated into the October 8, 2015 Mesothelioma Trial Group.

Appellants Daniel and Jessica Hiett contend that their claim advanced several material facts that distinguished the circumstances in their case from those presented in *Farrar* and that should have precluded summary judgment. Those facts include that (1) AC&R had actual knowledge of the health risks caused by take-home exposures to asbestos based primarily on AC&R's subscription to a trade magazine that discussed the potential take-home dangers as early as July 1968; and (2) AC&R could implement an effective warning because, (a) changing rooms were available at the father's work sites, (b) AC&R was an installer of its product so the company was present on the work sites, and (c) a commercial laundry facility existed in the area, which the father would have used if AC&R had warned him about the danger to his household members.

For the reasons discussed below, we determine that the facts Appellants advance do not distinguish this case from *Farrar* to the extent that imposition of a duty to warn is warranted. Accordingly, we hold that Appellants failed to demonstrate that AC&R owed a duty to warn Daniel Hiett, the household member of a worker-bystander who was present at facilities where AC&R installed asbestos-containing products prior to 1972, because, even if AC&R had actual knowledge of the dangers of such exposure, there was no practical way that any warning given to the worker-bystander could have avoided the danger to the household member in this case. *Farrar*, 432 Md. at 541. The circuit court correctly granted summary judgment.

BACKGROUND

Daniel Hiett was diagnosed with mesothelioma on September 11, 2014. According

to Appellants, Daniel developed mesothelioma from two distinct sources of asbestos exposure: (1) household exposure to asbestos dust on his father's work clothes between 1962 and 1972; and (2) direct occupational exposure during his own work as a boilermaker in the 1970s.

As a child, Daniel lived in a small trailer home with his parents, Mary and Earl Hiett. Earl Hiett worked as a boilermaker at three separate powerhouses from 1962 to 1972. At these powerhouses, AC&R and other third parties installed pipecovering, block insulation, and cement that contained asbestos. The installation of these products created dust-containing asbestos fibers that would accumulate on Earl Hiett's work clothes, which he would then wear home. When Daniel was not at school, he spent much of his time in the small trailer home, including evenings spent watching TV in the living room with his father after his father returned home from work. Earl Hiett's dusty work clothes were washed at least once per week in a washing machine located only ten to fifteen feet from Daniel's bedroom. In an affidavit dated September 17, 2015, Mary Hiett stated that had her husband "been informed about the dangers posed by the asbestos-laden-dust that accumulated on this work-clothing, he would never have worn, nor brought, his work-clothing into our home, and he would have taken steps to have the clothes washed at a commercial laundry service."[2]

On March 4, 2015, AC&R answered the Hietts' complaint, asserting 31 affirmative

[2] Earl Hiett passed away in 1982 and gave no testimony, either by deposition or in court, in prior asbestos litigation.

and negative defenses, including failure to state a claim; contributory negligence; assumption of risk; and that the negligence, intentional acts or omissions of other persons or entities caused the Hietts' injuries. AC&R also filed a cross-claim against all other defendants for contribution and indemnification.

After conducting discovery, AC&R moved for summary judgment in the Hiett case on September 16, 2015, on two grounds. First, AC&R maintained that, for the same reasons stated in *Farrar*, it owed no duty to warn Daniel Hiett of the dangers of take-home asbestos. AC&R pointed out that in *Farrar*, the Court of Appeals "found that the record lacked evidence that it was foreseeable that dust from Georgia [] Pacific joint compound posed a danger to Farrar as a member of the household of a worker who was present when the product was used on a job site," and that the Court "noted that clear and widely available information about the potential danger to household members did not exist until OSHA issued asbestos regulations in June 1972." Moreover, AC&R stated that the *Farrar* Court "declined to impose on Georgia Pacific a duty to provide a warning to protect household members like Farrar because such a duty could not have been feasibly and effectively carried out."

Second, AC&R argued that Appellants failed to offer any evidence that Daniel Hiett was exposed to an asbestos product installed or distributed by AC&R. According to AC&R, Appellants had not proffered any witnesses to prove that Earl Hiett was exposed to an asbestos product supplied or installed by AC&R at any job site, and AC&R added, "three co-workers were deposed in this case, and none of them identified AC&R at any

jobsite, nor have [Appellants] proffered the [Appellees] with any documentary evidence to support their claim that AC&R was a substantial factor in causing Mr. Hiett's alleged injuries, or even that Mr. Hiett had any exposure whatsoever to a product installed or supplied by AC&R."

Appellants responded that summary judgment was improper because AC&R had a duty to warn Earl Hiett of the health risks that wearing clothes home covered in asbestos dust posed to the members of his household. Appellants challenged AC&R's interpretation of *Farrar* as barring a household member's claims related to take-home exposure prior to 1972. Instead, Appellants insisted that the Court of Appeals based its ruling on the record before it and held that "a defendant could not be held liable for injuries caused by take-home exposures to asbestos prior to 1972 unless the defendant: (1) was aware, or should have been aware, of the danger to household members at that time, and (2) could have feasibly implemented its duty to prevent the harm to the plaintiff." (Citing *Farrar*, 432 Md. at 533-535, 54). Appellants then averred that AC&R, as a longstanding member of the National Insulation Contractors Association ("NICA"), "undoubtedly possessed credible scientific information by 1968, at the latest, that clearly identified the hazards posed by take-home exposures to asbestos." Finally, Appellants argued that, unlike in *Farrar*, changing rooms were available at Earl Hiett's work sites, and that according to Mary Hiett's affidavit, had AC&R warned Earl Hiett of the risks associated with exposure to asbestos, he would have taken immediate steps to ensure that his family remained free from exposure to the dust.

In response to AC&R's second ground for summary judgment, Appellants averred that, through various depositions, they had alleged sufficient evidence to demonstrate that AC&R's products and its employees were present at the powerhouses where Earl Hiett worked. Based on this identification testimony, the Hietts urged that they would offer expert medical testimony and other expert testimony to establish that Earl Hiett sustained frequent exposure to AC&R's asbestos, which he would have then brought home and deposited in his small home, where Daniel Hiett "almost certainly sustained significant exposure to AC&R's asbestos fibers that added to his cumulative asbestos exposure and increased his risk of developing mesothelioma."

On October 7, 2015, the court heard argument on AC&R's motion, and granted summary judgment, finding that the Court of Appeals' recent decision in *Farrar* "applies sufficiently broadly to cover the facts of this case." Thereafter, on December 16, 2016, the Hietts' claims against all other non-bankrupt defendants were resolved, and they asked the court to enter a final judgment. On January 14, 2016, the circuit court entered final judgment dismissing the case "as to all unresolved Plaintiffs' claims against all non-bankrupt defendants" and dismissing "all third party claims and cross-claims filed by any Defendant," and this timely appeal followed.

Appellants present this Court with three questions:

I. "Whether the availability of change rooms and laundry facilities made it feasible to warn of the known dangers of household exposure to asbestos?"

II. "Whether the "heeding presumption" supports a finding that, had the worker been properly warned, he would have taken steps to protect his family from the grave dangers of household exposure to asbestos?"

III. "Whether the Circuit Court failed to correctly apply the holding in *Georgia Pacific, LLC v. Farrar*, 432 Md. 523 (2013)?"

DISCUSSION

We review a trial court's grant of summary judgment *de novo*. *Harford Cnty. v. Saks Fifth Ave. Distribution Co.*, 399 Md. 73, 82 (2007) (citation omitted).

> In conducting that review, we seek to determine whether any material facts are in dispute and, if they are, we resolve them in favor of the non-moving party. If there are no material facts in dispute, the aim of the review is to determine whether the summary judgment decision was correct as a matter of law.

Id. (internal citations omitted).

We may only affirm the circuit court's grant of summary judgment based on the grounds on which the circuit court relied. *Rodriguez v. Clarke*, 400 Md. 39, 70 (2007). Considering the circuit court in this case held "that the Farrar principle applies sufficiently broadly to cover the facts of this case[,]" our answer to Appellant's third question presented will dispose of this appeal. Appellant's first two questions presented are subsumed within its argument on this primary issue. Accordingly, we consolidate Appellant's arguments, and now explain why the circuit court was correct in holding that *Farrar* governs this case.

I.

A. *Georgia Pacific, LLC v. Farrar*

Just over three years ago, the Court of Appeals decided *Georgia Pacific, LLC v. Farrar*—a case it characterized as "another in a growing line of cases in which a household member contracted mesothelioma, allegedly from exposure to asbestos fibers brought into the home on the clothing of another household member who was exposed to asbestos-laden

products in the course of his employment." 432 Md. 523, 525 (2013). This appeal is from another case in the line. Because our interpretation of *Farrar* governs this appeal, we begin our discussion with a summary of the Court of Appeals' decision.

In *Farrar*, the plaintiff lived from infancy until her marriage in 1974 in a home with her grandfather, a mechanic in the construction industry, who "worked directly with or in the vicinity of asbestos-laden products." *Id.* "His job was insulating pipes, which did not involve the use of any Georgia Pacific product." *Id.* He did, however, work in the immediate vicinity of drywall installers, "who applied and then sanded the Georgia Pacific Ready-Mix joint compound[,]" creating "a great deal of dust" that contained asbestos and would accumulate on the workers' clothes." *Id.* at 525-26. Her grandfather wore street clothes to and from work, changing his clothes at the work site, and then keeping those work clothes in his car during the week. *Id.* He would only bring his work clothes into the home at week's end so they could be shaken out and washed. *Id.* During her teenage years, Ms. Farrar was tasked with washing her grandfather's clothes. *Id.* Doctors diagnosed Ms. Farrar with mesothelioma in 2008, and she filed suit against over thirty companies, including Georgia Pacific, alleging a failure to warn. *Id.* at 526.

After trial, the court entered a judgment against Georgia Pacific for over $5 million in damages. *Id.* Georgia Pacific appealed the trial court's denial of its motion for judgment at the close of evidence and its motion for judgment notwithstanding the verdict, both of which it premised on its lack of a duty to warn Ms. Farrar. *Id.* This Court affirmed the trial court's decision, and the Court of Appeals granted certiorari on the question of whether

Georgia Pacific was under a duty to protect Ms. Farrar from injury by reason of any exposure she may have to asbestos fibers that were embedded in its Ready-Mix compound. *Id.* at 528-29. Ultimately, the Court reversed, finding that Georgia Pacific had "no duty to warn persons such as Ms. Farrar[.]" *Id.*

After observing that actions sounding in negligence and product liability cases both require the same elements of proof, the Court limited its analysis to the first—whether the defendant was under a duty to protect the household member from injury. *Id.* at 528. Then, examining the relevant decisional law, the Court instructed that "'the determination of whether a duty should be imposed is made by weighing the various policy considerations,'" *id.* at 528-29 (quoting *Gourdine v. Crews*, 405 Md. 722, 745 (2008)), a non-exhaustive list of which includes:

> The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the more blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.

Id. (quoting *Doe v. Pharmacia & Upjohn Co., Inc.*, 388 Md. 407, 415 (2005)). The Court explained that "at least in some instances," foreseeability of harm "may be the most important of those factors," but is not itself dispositive. *Id.* at 530. The other factors on which the Court focused most heavily were the nature of the harm, *id.*, "the relationship (or lack of relationship) between the party alleged to have the duty and the party to whom the duty is alleged to run," and whether or not "there is a feasible way of carrying out that

duty and having some reason to believe the warning will be effective." *Id.* at 540. These elements, the Court continued, "especially foreseeability of danger and the ability, through a warning, to ameliorate that danger, must be based on facts what were known or should have been known to the defendant at the time the warning should have been given"—"any other rule would make the manufacturer not just *strictly*, but *absolutely* liable . . . that is not the law." *Id.* at 534-35 (emphasis in original).

The Court then focused specifically on those cases involving failure to warn claims by household members against a manufacturer or supplier of an asbestos product, considering:

> (i) when the exposures occurred—in effect, what the defendant knew or reasonably should have known about the dangers of household exposure at the time the warning should have been given, and (ii) the relative weight to be given to foreseeability, as opposed to other factors, such as the relationship between the parties and the feasibility or burden of providing warnings, under the State's negligence and product liability law.

Id. at 531-32. It explained that these cases "have turned more directly on the foreseeability of harm to the person to whom the duty is alleged to owe—whether the defendant should have recognized that household members were in a significant zone of danger because of toxic dust brought home on the worker's clothing and body." *Id.* at 533.

By point of comparison, the Court noted that in actions against the employer directly, it has focused on the lack of a relationship between the employer and injured party, "and found no duty to spouses of employees" *Id.* at 540. And that "[t]o some extent, the same tension exists in product liability actions against manufacturers and suppliers." *Id.* In both cases, "the fact that an individual or class of individuals is foreseeably within a

zone of danger, though important, is not the sole criterion in determining a duty to warn, even in a product liability case." *Id.*

Turning to Ms. Farrar's claim, the Court examined studies on the dangers of asbestos exposure that the plaintiff put into evidence, concluding that "the connection between lung disease and exposure to asbestos dust brought into the home on the clothing of workers was not generally recognized until at least [the 1960s]." *Id.* at 534. With this in mind, the Court concluded that the evidence did not support a finding "that a duty existed as far back as 1958 or 1962 to warn household members having no connection with the product or the workplace." *Id.* The Court found that, on the record before it, the duty to warn extended to household members beginning in 1972 when OSHA put in place safety regulations "dealing specifically with the problem of tracking asbestos dust on clothing into the home." *Id.* at 538. Whether the duty may have existed in the mid-1960s, or at least in 1968-69 when Ms. Farrar claimed Georgia Pacific owed its duty, the Court seemed to suggest *could* be a jury question depending on the facts of the case. *Id.* at 539-41 (explaining that this Court has "concluded, tacitly or otherwise, that it is at least a jury issue whether a manufacturer knew or should have known prior to the mid-1960s[,]" but finding that "[o]n the record before us," there was no duty on "Georgia Pacific to warn Ms. Farrar, back in 1968-69").

The *Farrar* Court then shifted its analysis to other policy considerations that weighed against imposing a duty to warn on Georgia Pacific prior to 1972. *Id.* at 540. Specifically, the Court found that it would "be poor public policy" "[t]o impose a duty that

either cannot feasibly be implemented or, even if implemented, would have no practical effect[.]" *Id.* "With respect to implementation," the Court continued,

> it is not at all clear how the hundreds or thousands of manufacturers and suppliers of products containing asbestos could have *directly* warned household members 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, not to have contact with dusty work clothes of household members who were occupationally exposed to asbestos.

Id. at 540-41 (emphasis added).

Although Ms. Farrar seemed to suggest that "the word" would have spread if Georgia Pacific had issued appropriate warnings, the Court found that the warning would have still been ineffectual:

> Assuming such warnings would, in fact, have reached the workers, much less bystanders, until the 1972 OSHA regulations were adopted, unless employers or the owners of premises where asbestos dust would be present voluntarily provided protective clothing, changing rooms, and safe laundering—which the record before us does not suggest was done by any of Mr. Hentgen's employers or existed at any facility where Mr. Hentgen worked—what were the workers to do? Mr. Hentgen did the best he could by keeping his work clothes in the car all week and bringing them home only on the weekend to be laundered, but that proved insufficient.

Id. at 541.

Thus, "*even if* Georgia Pacific should have foreseen back in 1968-69 that individuals such as Ms. Farrar were in a zone of danger," the Court concluded, "there was no practical way that any warning given by it to any of the suggested intermediaries would or could have avoided the danger." *Id.* (emphasis added). Consequently, no duty existed "on the part of Georgia Pacific to warn Ms. Farrar, back in 1968-69, of the danger of exposure to the dust on her grandfather's clothes." *Id.*

The cases on which *Farrar* relied found similarly that companies owed no duty to third parties with whom they had no relation—including their employees' family members—based on the foreseeability of harm alone. In *Pharmacia, supra*, the Court of Appeals held that a company that lab-tested HIV did not owe a duty to warn an employee's wife that it had reason to believe the employee may have contracted HIV-2. 388 Md. 411-13. The Court declared that "[n]either party has identified and we could not find any Maryland case holding that an employer has a duty to the spouse of an employee." *Id.* at 417 (citing *Dehn v. Edgecombe*, 384 Md. 606, 622-25 (2005), in which the Court denied a wife's claim that foreseeability of harm created a special relationship between herself and the doctor who performed her husband's vasectomy). In rejecting the wife's proposed imposition of a duty, the Court accepted that the wife's injury was foreseeable, but explained that "foreseeab[ility] does not end our inquiry. We have stated consistently that foreseeability *alone* is not sufficient to establish duty." *Id.* at 417 (emphasis in original).

The wife suggested that Pharmacia's duty could be limited to spouses, a determinate class of potential plaintiffs, because it was foreseeable that the company's employees would transmit the virus sexually to their spouses. *Id.* at 421. The Court disagreed, finding that the same rationale for imposing a duty to warn the wife would apply "to any person who could have contracted HIV-2 from the employee by any means." *Id.* To support its position, the Court of Appeals referenced this Court's decision in *Adams v. Owens-Illinois*, stating that our decision applied "the same policy of avoiding expansive new duties to hold that an employer owed no duty to the wife of its employee." 388 Md. at 421 (citing 119

Md. App. 395).

As in the case before us now, *Adams* involved a plaintiff who alleged an injury based on asbestos-laden dust brought home on a family member's work clothes. 119 Md. App. at 411. In *Adams*, however, the household member brought her claim against her family member's employer based on its duty to maintain a safe workplace, rather than its failure to warn. *Id.* at 410. This Court found that the employer "owed no duty to strangers based upon providing a safe workplace for employees." *Id.* at 411. The Court of Appeals in *Pharmacia* explained that the household member's position in *Adams* "would create an overly broad notion of duty. If liability were to rest on the wife's handling of her husband's clothing, the employer would owe a duty to anyone who had close contact with its employee." 388 Md. 407, 422 (citing *Adams*, 119 Md. App. at 411).

Referencing these decisions in *Farrar*, the Court of Appeals explained that in *Gourdine*, *supra*, the Court had already clarified that *Pharmacia*'s statement of law applied with equal force in the product liability context. 432 Md. at 528 (citing 405 Md. 722). In *Gourdine*, a decedent's wife brought a product liability claim against Eli Lilly, alleging that Eli Lilly's failure to warn about the side effects of an insulin medication it manufactured caused a third party, Mrs. Crews, who had ingested the drug, to suffer a debilitating diabetic episode while driving her car, which she then crashed into the plaintiff's husband. 405 Md. at 726. Relying in large part on *Pharmacia* for the proper standard to determine duty, the Court in *Gourdine* found that Eli Lilly's duty did not extend to the plaintiff's husband. *Id.* at 750. It explained that "there was no direct connection

between Lilly's warnings, or the alleged lack thereof, and Mr. Gourdine's injury. In fact, there was no contact between Lilly and Mr. Gourdine whatsoever." *Id.* The Court went on to reason that the same rationale that would extend the duty to Mr. Gourdine "could apply to all individuals who could have been affected by Mr[s]. Crews after her ingestion of the drugs. Essentially, Lilly would owe a duty to the world, an indeterminate class of people, for which we have 'resisted the establishment of duties of care.'" *Id.* (quoting *Pharmacia*, 388 Md. at 407).

B. The Parties' Arguments

The Hietts contend, as they did before the circuit court, that the Court of Appeals limited its decision in *Farrar* to the specific factual record of that case. Contrary to AC&R's argument, the Hietts insist *Farrar* did not create a bright-line rule precluding liability prior to 1972—a distinction the United States District Court for the District of Maryland made applying *Farrar* in *Sherin v. John Crane-Houdaille, Inc.*, 47 F. Supp. 3d 280, 296 n.43 (D. Md. 2014). Accordingly, they maintain that *Farrar* left open the feasibility of a warning for courts to determine on a case-by-case factual basis.

According to the Hietts, the facts here differ in five material ways: (1) changing rooms existed on the job sites in question; (2) Earl Hiett had access to local commercial laundry facilities that specialized in the cleaning of industrial clothing; (3) Mary Hiett's affidavit demonstrates that Earl Hiett would have heeded a warning of the dangers of household exposure; (4) the record below warranted the court's invocation of the "the heeding presumption;" and (5) AC&R was an on-the-job installer/supplier, which

positioned it to give warning and implement safety measures. Under the "heeding presumption," which the Hietts contend the *Farrar* Court did not consider, Maryland courts presume that a human's natural instinct leads him or her to guard against known dangers. The Hietts aver that the circuit court should have presumed that, if warned, Earl Hiett would have made use of the changing rooms and public laundry, or found alternative work at the very least.[3]

Furthermore, the Hietts maintain that the evidence of AC&R's constructive knowledge was stronger than the evidence in *Farrar*; and that, unlike *Farrar*, they presented evidence that AC&R possessed actual knowledge as early as 1968. This actual knowledge distinguishes the case *sub judice*, so they contend, and imposed on AC&R a duty to warn that began in 1968 when it gained actual knowledge that take-home asbestos posed health risks to household members. And this actual knowledge also defeats AC&R's argument about the comparative size of its company and lack of resources, because the court need not consider constructive knowledge when evidence of actual knowledge exists. The Hietts charge that AC&R, as a supplier/installer, is strictly liable for that which it knew or should have known.

Finally, the Hietts argue that public policy favors imposing on AC&R a duty to warn under the circumstances presented. The Hietts urge that *Farrar* recognized that household

[3] The parties dispute whether or not Earl Hiett actually used the changing rooms that were available. Because we must view all facts in the light most favorable to the non-moving party, we assume for the purpose of this appeal that Earl Hiett did not change his clothes at work. *See Saks Fifth Ave., supra*, 399 Md. at 82.

members are not an indeterminate class, meaning that the imposition of a duty to warn here would not create an impermissibly-broad class of plaintiffs. The Hietts continue, arguing that AC&R's concession that a direct or personal relationship need not exist to create a duty undermines AC&R's point that Daniel Hiett's lack of a direct relationship to AC&R absolves AC&R of a duty to warn.

In riposte, AC&R offers a much narrower reading of *Farrar*, and suggests that Appellant's misconstruction of that case is simply an attempt to re-litigate the issue. According to AC&R, *Farrar* stands for the proposition that "product manufacturers and suppliers had *no duty to warn household members* who had no relationship with the manufacturer or suppliers, did not use the manufacturer's or supplier's product, and were never physically present at the job site where the product was used." AC&R contends that the facts *sub judice* are on point with those in *Farrar*: (1) both household members' claim exposure to dust brought home on a family member's clothes; (2) both claimed exposure during a period that ended before June 1972; (3) both worker-family members did not actually work with or install the products in question, but were merely bystanders; and (4) neither household member was ever on a job site at which the defendants installed or supplied products. As for the existence of a change room, AC&R argues that the evidence demonstrates that Earl Hiett was using the change rooms at two of the three facilities where he worked, so a warning would not have affected his behavior.

AC&R next asserts, without citation to the record, that the circuit court, like the Court of Appeals in *Farrar*, weighed the foreseeability of harm against the other factors

bearing on the imposition of a duty, such as the relationship between the parties and feasibility of providing a warning. AC&R contends the Court of Appeals ruled explicitly in *Farrar* that it was not foreseeable prior to 1972 that household members of bystanders to asbestos installation were at risk. And also, that in *Farrar*, the Court examined the very same scientific materials that the Hietts claim provided knowledge to AC&R here. With respect to foreseeability, AC&R suggests, again without citation to the record, that its company is and was much smaller than Georgia Pacific, the defendant in *Farrar*, so it would make little sense to impose a stricter standard on AC&R to review and analyze research studies.

Finally, AC&R argues that under *Farrar* and the precedent that the Court of Appeals relied on in that case, the relationship between the parties is a guidepost for determining duty and that there must be a "sufficiently close nexus between the defendant's conduct and the plaintiff's injury to give rise to a duty to warn." As in those cases, AC&R continues, there was "no relationship whatsoever between the parties" here, meaning that AC&R had no duty to warn the family members of bystanders who were present while end users installed the products that AC&R supplied. AC&R maintains that were the Court to permit claims for liability based on duties owed to intermediaries, the class of protected individuals would be indeterminately broad—larger than those the Court found impermissibly broad in *Pharmacia* and *Dehn* and comparable to those rejected by *Gourdine* and *Farrar*.

In sum, the Hietts urge that the following facts distinguish this case from those that

Farrar considered, and therefore require imposition of a duty in this case: (1) AC&R's alleged actual knowledge based primarily on the company's subscription to a trade magazine that discussed the potential take-home dangers as early as July 1968; and (2) AC&R's ability to implement its warning because, (a) changing rooms were available on-site, (b) AC&R was an installer of its product so the company was present on the work site, and (c) a commercial laundry facility existed in the area, which Earl Hiett would have used if AC&R had warned him about the danger to his household members. We address each in turn.

1. Foreseeability of Harm

a. *Farrar* did not announce a bright-line rule

As a preliminary matter, the parties disagree over the scope of *Farrar*'s foreseeability holding. AC&R claims that *Farrar* created a per se rule that "in cases involving pre-1972 household asbestos exposures, a manufacturer or supplier of an asbestos product had no duty to warn a household member who never used the product or worked near it." The Hietts, on the other hand, read *Farrar* as confined to the specific factual record before the Court in that case, and directs us to a decision by the United States District Court for the District of Maryland that interpreted *Farrar* as not setting out a per se rule precluding duty to warn asbestos claims based on events prior to 1972. *See Sherin*, *supra*, 47 F. Supp. 3d at 283. On this point, the Hietts contend that the circuit court erred by applying *Farrar* as a per se rule rather than balancing the appropriate factors.

Both parties overstate their points here. First, AC&R's reading of *Farrar* is wholly

unsupported by the Court of Appeals' opinion. The Court's language indicates that its decision as to whether Georgia Pacific possessed constructive knowledge prior to 1972 was based on the record before it. *Id.* at 539 (citations omitted) (concluding that the "evidence before [it]" did "not square" with the conclusion that the duty existed from 1958-62, and citing to decisions that found foreseeability in the mid-1960s "is at least a jury issue."). Specifically, the Court ruled that the elements of duty—especially foreseeability of danger—"*must be based on facts* that were known or should have been *known to the defendant* at the time the warning should have been given[.]" 432 Md. at 534-35 (emphasis added). AC&R does not explain how all of the same facts could be known by every conceivable defendant. In short, we do not read *Farrar* as setting out a *per se* rule that take-home asbestos was not foreseeable to any defendant prior to 1972. Still, the Hietts must demonstrate that the circumstances of this case are materially different on that point than those in *Farrar*.

According to the Hietts, the circuit court failed to consider any of the relevant circumstances. We disagree. The court's summary decision explained the court's belief that "that the Farrar principle applies sufficiently broadly to cover the facts of this case." **"**While it would be beneficial on appeal to have a more developed understanding of the trial court's reasoning as to why summary judgment was granted, without evidence to the contrary, we must assume that the court carefully considered all the various grounds" that the parties asserted. *Thomas v. City of Annapolis*, 113 Md. App. 440, 450 (1997). At the hearing below, the parties presented arguments on all the factors pertinent to the *Farrar*

Court's rationale. The circuit court then issued its ruling with no indication that it applied *Farrar* as a *per se* rule. Consequently, we presume the trial court considered the Court of Appeals' entire rationale in reaching its decision to grant summary judgment.

b. The Hietts have not established actual knowledge

Turning to the specifics of this case, the Hietts refer the Court to a number of pre-1972 studies offered as evidence that discussed the dangers of take-home asbestos, and claim that these studies provided AC&R's president with actual knowledge of the risk. The Hietts posit that AC&R's membership in NICA provided it with actual knowledge, because through that membership, AC&R (1) attended a 1970 NICA convention that discussed the health hazards of asbestos, including clothing contamination; and (2) subscribed to NICA's *Outlook* magazine, four issues of which from 1968-71 included articles on the health risks of asbestos that extend beyond the worksite.

This evidence falls short of demonstrating AC&R's actual knowledge. AC&R's membership in NICA does not change this fact. In reality, most of the NICA materials recite the same studies that the *Farrar* Court discussed, *see* 432 Md. at 536-37—such as the 1965 Newhouse/Thompson study and the work of Dr. Irving Selikoff. The Hietts present four *Outlook* articles and convention seminar: one article discusses the Newhouse/Thompson study considered in *Farrar*, a second discusses Dr. Selikoff's congressional testimony considered in *Farrar*, and the convention seminar was a presentation by Dr. Selikoff on the same topic of his congressional testimony. This leaves two *Outlook* articles—one from September 1969 and one from January 1971. The former

discussed innovations in the application of sprayed asbestos products with an aim toward achieving "complete containment" eventually through new product designs, the efficacy of which still needed to be tested "by both on-site and off-site sampling." The latter explained that it was "good housekeeping" for insulation contractors to provide "[c]hange facilities on jobs," and anticipated improved technology would allow employees to wear throw-away clothing eventually. Neither article speaks of take-home asbestos specifically, or its danger to household members. Rather, both articles discuss ongoing work to innovate the industry in hopes of one day containing asbestos fibers on site. This is not enough to differentiate *Farrar* or to establish that AC&R possessed actual knowledge that the products it distributed and installed posed health risks to the household members of bystanders present on worksites.

Even if the health risks to the household members of bystanders exposed to asbestos were known to AC&R, we return to the point that the Court in *Farrar* did not base its holding solely on Georgia Pacific's knowledge or lack thereof. *Farrar*, 432 Md. at 540 ("[T]he fact that an individual or class of individuals is foreseeably within a zone of danger, though important, is not the sole criterion in determining a duty to warn[.]"); *see also Sherin*, *supra*, 47 F. Supp. 3d at 300 (finding that a defendant's internal corporate memoranda establishing actual knowledge was insufficient to establish a duty under *Farrar* because the plaintiff had not demonstrated "that better warnings by Union Carbide would have altered Mrs. Sherin's take-home exposure"). We turn now to the feasibility of whether AC&R could have implemented a warning prior to 1972 that could have avoided

any harm to the Hietts.

2. Feasibility of Implementation

In *Farrar*, the Court of Appeals explained that it "would be poor public policy" if the courts were "[t]o impose a duty that either cannot feasibly be implemented or, even if implemented would have no practical effect[.]" 432 Md. at 540. For the following reasons, the Hietts failed to present facts, in distinction to *Farrar*, that demonstrate that AC&R could have feasibly implemented a warning prior to 1972, to the household members such as Daniel Hiett, or worker-bystanders, such as Earl Hiett.

a. The Availability of On-Site Changing Rooms

As discussed *supra*, the Court of Appeals' decision in *Farrar* rested on the impracticality of implementing the warnings that the household member claimed the manufacturer owed. The Hietts urge this Court to weigh heavily the fact that changing rooms were available at the job sites where Earl Hiett worked. This point is important, they argue, because the Court in *Farrar* listed a lack of on-site changing rooms among its reasons why Georgia Pacific could not have implemented its warning. *See* 432 Md. at 541. Although this distinction may seem probative at face-value, it falls apart under scrutiny. For one, the record in *Farrar* revealed that, for at least part of the time at issue, Ms. Farrar's grandfather would change out of his work clothes before going home, and would leave those clothes in his car during the week. *Id.* at 525. Here, even if Earl Hiett changed his clothes at work, the same way that Ms. Farrar's grandfather did, he still would have gone home, unshowered, with his asbestos-covered work clothes to be washed at home.

Accordingly, we find that the existence of changing rooms alone does not distinguish pertinently the case *sub judice* from the Court of Appeals' decision in *Farrar*.

b. AC&R's Presence On Site

Next, the Hietts attempt to distinguish *Farrar* by contrasting Georgia Pacific's role as manufacturer to AC&R's role as an installer, present on the work sites where Earl Hiett accumulated asbestos-laden dust on his clothes.[4] The Hietts contend that AC&R's presence at the sites rendered the company "well-positioned to implement safety measures and warnings aimed at preventing household exposure." In doing so, the Hietts seem to comprehend the feasibility inquiry as focused on the defendant's literal ability to relay the message to those individuals to whom it owes a duty. But the explicit language of *Farrar* belies this over-simplified reading.

In finding that Georgia Pacific could not implement its warning feasibly, the Court of Appeals "[a]ssume[ed] such warnings would, in fact, have reached the workers, much less the bystanders[.]" 432 Md. at 541. Despite this assumption, the Court continued, "[t]he simple fact is that, even if" Georgia Pacific could have foreseen the danger its product posed to the household members of bystanders, "there was no practical way that any warnings given by it to any of the suggested intermediaries would or could have avoided that danger." *Id.* Put differently, the Court's holding in *Farrar* suggests that there is more to implementing a warning than stating aloud that a danger exists. Had the

[4] The parties dispute whether or not AC&R was actually present as an installer at the work sites in question, but at the summary judgment stage, we must resolve the issue in favor of Mr. Hiett, the non-moving party. *See Saks Fifth Ave.*, *supra*, 399 Md. at 82.

bystanders on the sites where AC&R was present received the warning, the same question from *Farrar* remains: "what were the workers to do?" *Id.*

There is no allegation that AC&R owned or controlled the work sites at which Earl Hiett was employed. As a result, it is difficult to understand how AC&R, as an installer present on a work site, could have controlled the asbestos dust past the point the dust dispersed into the air. *See Kesner v. Superior Court*, 384 P.3d 283 (Cal. 2016) (distinguishing *Farrar* from cases involving an employer or premises owner because, "[p]roduct liability defendants, by contrast, have no control over the movement of asbestos fibers once the products containing those fibers are sold"). The Hietts respond that Earl Hiett "could [] have found alternate work," but so too could have Ms. Farrar's grandfather, the husband in *Pharmacia*, or the worker-intermediary in any failure to warn case. Once again, the Hietts' proffered distinction is not legally sufficient.

c. Earl Hiett's Willingness to Use a Commercial Laundry

Finally, the Hietts contend that AC&R could have implemented a warning because there was a publicly-available commercial laundry in Baltimore City. As a corollary to this point, the Hietts offered the affidavit of Mary Hiett, Daniel's mother and Earl Hiett's wife, claiming that Earl Hiett would have heeded AC&R's warning and "taken steps to have the clothes washed at a commercial laundry services." This argument fails both as a general matter and under the facts specific to this case.

First, the general matter. Although the Hietts are correct that the Court in *Farrar* limited its conclusion to "the record before [it]," the dispositive facts in *Farrar* all pertained

to the defendant's ability to implement its warnings on the job site in question. 432 Md. at 541 (looking to whether or not the record suggested the specific employer or facilities in question "provided protective clothing, changing rooms, and safe laundering"). Absent facts establishing an actual relationship between the household member and defendant, we do not believe that the *Farrar* Court intended to invite the level of plaintiff-focused micro-analysis that the Hietts suggest. Whether or not a distributor/installer owes a duty to a class of individuals with whom the company has no relation, must depend necessarily on the facts that pertain to *all* the class members. *Farrar* would be a bagatelle if household members could circumvent its holding by submitting merely an affidavit stating that the intermediary-bystander would have responded to a warning by independently taking the steps necessary to protect his or her household members.[5]

[5] The Court of Appeals explained in *Eagle-Picher Industries v. Balbos* that courts created the heeding presumption in response to the fact that failure-to-warn "'plaintiff[s] typically can offer little more than self-serving testimony and anecdotal evidence'" "'to prove not only that [they] would have read, understood, and remembered the warning, but also that [they] would have altered [their] conduct to avoid the injury.'" 326 Md. 179, 227 (1992) (citations omitted). Therefore, "courts 'presume' absent evidence to the contrary" that plaintiffs would have read and heeded a legally adequate warning. *Id*. 227-28. In Maryland, courts recognize "what has been labeled, perhaps unfortunately, as a presumption that persons exercise ordinary care for their own safety." *Id*. 228. The Court in *Balbos* explained:

> Applying this Maryland concept to the instant asbestos products litigation means that direct evidence that plaintiffs' decedents would have heeded adequate warnings was not an essential element of the plaintiffs' case. The Maryland "presumption" at a minimum means that jurors are entitled to bring to their deliberations their knowledge of the "natural instinct" and "disposition" of persons to guard themselves against danger.

In a recent decision that cited to *Farrar*'s rationale approvingly, the Supreme Court of Georgia found "problematic" a duty to warn "specifically crafted on the unique facts present [t]here, without consideration for its broader application." *Certainteed Corp. v. Fletcher*, ___ S.E.2d ___, 2016 WL 6996282, at *2–3 (Ga. Nov. 30, 2016).[6] The Georgia Court explained:

> We are disinclined to conclude that [a manufacturer of asbestos-laden pipes] owed a duty to warn third parties based on the fact that, in *this* case, such a warning *may* have been effective. Indeed, under the theory developed below, the warning aimed at protecting third parties would not have been systematically distributed or available to the individuals to which it was targeted; instead, the onus would have been on the *worker* to keep those third parties safe. It is not difficult to envision that, while some workers might have taken steps to protect or warn family members or other individuals with whom they came in contact, other workers might not have taken such steps.

Id. at *3. We find this rationale persuasive. The Hietts cannot demonstrate AC&R's ability to implement a warning based solely on a presumption that a single intermediary would have taken speculative steps to prevent harm.

Second, Earl Hiett's personal willingness to use a commercial laundry facility does not distinguish sufficiently his circumstances from those in *Farrar*, and thus does not make feasible AC&R's ability to implement a warning to the family members of bystanders on

Id. at 229. Thus, our decisional law does not support the Hietts' argument that this case is somehow different from *Farrar* because the Hietts invoked the heeding presumption and Ms. Farrar apparently did not.

[6] The Georgia Court's opinion also relied heavily on *CSX Transportation, Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005), a decision that the *Farrar* Court referenced for the proposition that an employer's duty to provide a safe workplace does not extend to "the individuals in the employees' household whose exposure did not occur in the workplace." *Farrar*, 432 Md. at 532.

job sites where AC&R installed its products. In *Farrar*, the Court pointed to the lack of "safe laundering" "on the premises" at the facilities where Ms. Farrar's grandfather worked. *Id.* at 541. We do not read this as suggesting that Georgia Pacific's duty to warn Ms. Farrar rested on the fact that there were no third-party-owned laundromats that her grandfather could have used on his way home. Evidence of a Yellow Pages advertisement for a local commercial laundromat (presumably also available to Ms. Farrar's grandfather during the same relevant time period) does not distinguish his case from *Farrar*.

This leads us to the final flaw in the Hietts' feasibility argument. Similar to the wife in *Pharmacia*, who claimed that the court could create a determinate class of employees' spouses, 388 Md. at 421, the Hietts claim that household members are a determinate class of plaintiffs. The Court in *Pharmacia* found that the same rationale that would permit spouses to recover would also apply to any other individual to whom the employee could foreseeably spread HIV. *Id.* at 420-21. And the Hietts' proposed determinate class suffers the same problem. For example, if AC&R could have implemented its warning by encouraging all bystanders to bring their asbestos-covered clothes to public laundromats, the company could have expanded the "zone of danger," putting at risk other members of the public who used those laundromats, and even workers at the laundromats who, even if trained to deal with contaminated clothing, may not have been trained to deal with asbestos. The same rationale that would impose a duty on AC&R to those household members would apply equally to all other individuals with whom those bystanders could come into contact after they left the work site with asbestos-covered clothes—such as the people present at

the laundromat or on public transportation. As the Court of Appeals explained in *Pharmacia* and *Gourdine*, this would result in AC&R "ow[ing] a duty to the world, an indeterminate class of people[.]" *Gourdine*, 405 Md. at 750 (citing *Pharmacia*, 388 Md. at 407). And "[t]he law does not countenance the imposition of such a broad and indeterminate duty of care." *Pharmacia*, 388 Md. at 421.

Accordingly, we determine that Appellants failed to demonstrate that AC&R owed a duty to warn Daniel Hiett, the household member of a worker-bystander who was present at facilities where AC&R installed asbestos-containing products prior to 1972, because, even if AC&R had actual knowledge of the dangers of such exposure, there was no practical way that any warning given to the worker-bystander could have avoided the danger to the household member in this case. *See Farrar*, 432 Md. at 541.

JUDGMENT OF THE CIRCUIT COURT AFFIRMED. COSTS TO BE PAID BY APPELLANTS.