United States District Court for the District Of Maryland

[Northern Division]

ESTATE OF WILLIAM MADDEN, et al. **Plaintiffs,** **v.** **SOUTHWEST AIRLINES, CO.** **Defendant.**	**Civil Action No.: 1:21-cv-00672-SAG**

THE ESTATE OF WILLIAM MADDEN'S AND CAROL MADDEN'S MEMORANDUM IN OPPOSITION TO SOUTHWEST AIRLINES CO.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT
[HEARING REQUESTED]

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I. INTRODUCTION

On April 14, 2021, Carol Madden, on behalf of herself and the Estate of William Madden Estate ("the Estate"), sued Southwest Airlines Co. ("Southwest") for Mr. Madden's tragic and avoidable death. Mr. Madden died from COVID-19, having been exposed to the SARS-CoV-2 virus through the negligence of Southwest during a mandatory recurrent training session in which his wife, a long-time flight attendant, participated.[1] On April 23, 2021, Southwest moved to dismiss the claims on the basis no cognizable cause (FRCP 12(b)(6)) has been pled; more particularly, that Southwest owed Mr. Madden *no duty* as a matter of law. Plaintiffs disagree.

II. FACTUAL BACKGROUND

Southwest weaves into its Motion self-serving gratuitous assertions – assertions which variously contradict Plaintiffs' factual allegations,[2] mischaracterize them,[3] issue economic

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[1] The claims are pursuant to the Maryland Survival and Wrongful Death statutes: Courts and Judicial Proceedings ("CJP") §§6-401 and 7-401 and §§3–902 and 3–904).

[2] *E.g.*, Southwest posits "the blame laid on Ms. Madden's employer for the death of her husband in the Complaint is misplaced" (irrelevant because the Motion is predicated on duty not factual causality), that they "[met] the requisite standard of care" (irrelevant since this factual question has nothing to do with a *duty of care*), that "the claims asserted in the Complaint reflect [merely] an understandably emotional response to a devastating personal loss" (read, counsel filed a vexatious claim for vindication or solace of Ms. Madden), and that they "strongly den[y] the allegations" (akin to a general denial). Southwest is correct in one respect: these assertions "have no bearing on the instant motion to dismiss."

[3] *E.g.*, Southwest posits "nowhere does the Complaint specifically allege that Ms. Madden contracted COVID-19 during the training from a fellow flight attendant or instructor" (See, p. 4 of Def.'s Mot.). And they instruct the court why she fails to do so: "because it is impossible to know precisely where or when Ms. Madden caught the virus that has caused a globalpandemic." However, ¶186 alleges "What caused Mr. Madden to contract COVID-19 was his foreseeable companionship with his wife after her exposure to COVID-19 *during the Recurrent Training session*." "But for the failure of Southwest to adhere to these common safety protocols of which it was fully aware, Mr. Madden would not have contracted COVID-19, and Southwest's failure to adhere to these standards of care was the direct and foreseeable cause of the transmission of the virus to [both] Ms. Madden and Mr. Madden." (See, ¶¶183, 185 and 186).

Further, Plaintiffs disagree they must prove causality to a standard of "precision." *Dyer v. Maryland State Bd. of Educ.*, 187 F. Supp. 3d 599, 608 (D. Md. 2016) (4th Cir. 2017).

opinion[4] and signal corporate virtues. While posturing that its "incredibly sympathetic" to the plight of those with COVID-19 worldwide, Southwest boasts a wholly unblemished role in the negligent transmission of SARS-CoV-2 to its employees (in contravention to the pleadings). *Id.* However, as this court doubtless appreciates, the extent to which Southwest can prove such boastings (or their relevance) is an issue for tomorrow. Because Southwest's Motion is predicated on FRCP 12(b)(6), what lies before the court today is a legal question. For today at least, the court must assume the facts as set forth in the Complaint when deciding if a duty of care exists.

So, what are the relevant allegations the court must accept as true at this juncture? Contrary to Southwest's disavowal, the allegations do not depict a corporation that displayed "incredibl[e] sympath[y]" for its employees; at least not in a currency that would have benefited Ms. Madden (*e.g.*, by providing a safe working environment). Rather, the allegations depict an employer which callously failed to express any concern over transmission of the virus. They depict a corporation that, in financially challenging times, took shortcuts, exhibiting a wanton disregard for its employees' safety. They describe an employer which knowingly adopted a double standard: exposing its employees to risks starkly contrastable to safeguards it touted to fare-paying patrons, as recommended by OSHA guidelines and other health advisories it stated it studied and adopted.[5]

What the Complaint does allege is that on July 13, 2020, during mandatory Recurrent Training,[6] Southwest negligently exposed Ms. Madden to SARS-CoV-2 virus.[7] The Complaint alleges that Southwest created the risk of transmission of the virus, affirmatively taking steps to

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[4] *E.g.*, Southwest pronounces "it is in the interest of economic … efficiency …" the Motion be granted, without citing a statistic or scholarly authority, or explaining the basis for its assertion *e.g.*, Hylton, Keith N., Duty in Tort Law: An Economic Approach, 75 Ford. L. Rev. 1501 (2006).'

[5]See, Complaint ¶¶ 80-86, 94 and 95, e.g., the "*Southwest Promise*" (https://www.swamedia.com/SouthwestPromise); ¶¶87-92 and ¶¶96, 176-179.

[6]Complaint ¶¶24-31.

[7]*Id.*at ¶¶115-122, 125-128, 136, 138 and 140 (¶138 alleges Southwest admits to exposure).

increase that risk, and passively failing to take steps to halt its transmission – disregarding with impunity virtually every universally understood precaution to safeguard the wellbeing of its Flight Attendant Trainees[8] from inception of the training though contact tracing.

Before training, Southwest did not inquire whether participants had symptoms of COVID-19 or past exposure.[9] Had it done so, it likely would have learned that at least one and possibly two attendees had COVID-19 or had been exposed to COVID-19;[10] such as, the COVID-19 infected employee they chose to seat within four feet (not the required six feet) of Ms. Madden during the duration of the session. Southwest chose to conduct its training in a very unventilated and congested room;[11] in fact, knowing SARS-CoV-2 was highly transmissible in close proximation, especially with lengthy exposure, Southwest effectively demanded social proximity rather than distancing.[12]. Southwest enforced no mask requirements.[13] Southwest required attendees to touch unsanitized surfaces sequentially.[14] Through such actions (and inactions), Southwest ensured decedent's spouse became an active carrier;[15] and after the session, when they were informed Ms. Madden was exposed, they failed to take the rudimentary step of contact tracing.[16] In fact, Southwest deliberately delayed alerting Ms. Madden to exposure it knew or should have known occurred.[17] The *actions* and *inactions* giving rise to negligence are as set forth in the detailed complaint -- allegations which for this Motion must assume true.[18]

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[8]*Id*. at ¶¶36-76; specifically, at ¶¶36, 39, 41, 89, 97, 99, 180, 183 and 185.
[9]*Id*. at ¶¶37, 97, 123, 124, 127, 128, 138, 141, 181, 204 and 235.
[10]*Id*. at ¶¶114-126, 131, 132, 139 and 141.
[11]*Id*. at ¶¶36, 47
[12]*Id*. at ¶¶47, 49, 60, and 73-76, 89, 127
[13]*Id*. at ¶41, 42, 81, 204 and 235.
[14]*Id*. at ¶¶52, 54, 56, 58, 59, 61, 64, 66-68, 84, 95, 97, 127, 181, 204 and 235.
[15]*Id*. at ¶¶183, 185 and 193.
[16]*Id*. at ¶136.
[17]*Id*. at ¶¶36, 120-126, 132, 140, 181, 204 and 235.
[18]The many breaches are summarized in ¶¶204 and 235, and found between ¶¶24-141 and 180-189.

III. STANDARD OF REVIEW

The pathway for a court must follow when considering a Rule 12(b)(6) motion is well-trodden. As articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007),[19] a plaintiff must state a claim "plausible on its face"; meaning "[he or she must plead] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 556). Stated otherwise, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible ….'" *Id.* at 570). Determining whether a plausible claim for relief exists is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."

A review of a district court's ruling on a motion to dismiss is *de novo*. *See, Novell, Inc. v. Microsoft Corp.*,505 F.3d 302, 307 (4th Cir.2007). Like the district court, the Circuit will draw all reasonable inferences Plaintiffs' favor. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir.1999), [b]ut [it] need not accept the legal conclusions drawn from the facts, [nor] accept as true unwarranted inferences, unreasonable conclusions or arguments." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir.2008) (quotations omitted). *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009).[20] Hence, because the question of "legal duty" is clearly one of policy for the court to decide (contrary to the many other issues presented in a negligence claim)[21] the panel reviews the question *de novo*.

In deciding a Motion to Dismiss, of course, courts do not typically "resolve contests

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[19] See also, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atl. Corp.* extensively at 678-79).
[20] Thus upon an appeal, the appellate court need not reach the same conclusion as to a legal duty here. See, *Nesbit v. Gov's Employees Inc. Co*., 382 MD 65, 72 (2004) and *Cash and Carry America, Inc. v. Roof Solutions, Inc*. 223 Md. App. 451, 461 (2015).
[21] *Valentine v. On Target, Inc*., 353 Md. 544, 549 (1999); Prosser and Keeton, *Law of Torts*, §45 at 320 (5th ed. 1984).

surrounding the facts, the merits of a claim, or the applicability of defenses." *Edwards* at 243; *State Farm Mut. Automobile Ins. Co. v. Slade Healthcare, Inc.*, 381 F. Supp. 3d 536, 551 (D. Md. 2019). However, some extrinsic documents that form part of the public record are fair game to consider.[22] And a recent Fourth Circuit decision, *E. Coast Repair & Fabrication, LLC v. U.S. Through Dept. of the Navy,* 492 F. Supp. 3d 625, 631 (E.D. Va. 2020), sheds light on when the court can peek beyond the pleadings. "[C]ourts may consider "official public records, documents central to the plaintiff's claim, and documents sufficiently referred to in the complaint so long as the authenticity of these documents is not disputed." ... "[Even] [i]f the documents in question do not fall into one of these exceptions, the documents must be "central to plaintiff's claim" to be considered," the court continued, and "[i]n evaluating whether documents are central to plaintiff's claim, courts will consider whether the plaintiff had notice about those documents. *Id.*

The principle has significance here.[23] The legal duty Southwest owed to its employees and to Mr. Madden, and the consequences of failing to adhere to standards during a pandemic is best informed by reference to the public record that sets those standards, such as regulations and guidance referenced in the Complaint (e.g., by OSHA or the CDC).[24]

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[22] S*ee Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir.2009) (e.g., "matters of public record."); *Walker v. Kelly*, 589 F.3d 127, 139 (4th Cir.2009); *Jeffers v. Harrison-Bailey*, 16-CV-03683-JFM, 2017 WL 1089186, at *2 (D. Md. Mar. 21, 2017)). *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007).

[23] As a *caveat*, courts must be mindful judicial notice is not "used as an expedient for courts to consider 'matters beyond the pleadings' and thereby upset the procedural rights of litigants to present evidence on disputed matters." *Goldfarb v. Mayor and City Council of Baltimore*, 791 F.3d 500, 511 (4th Cir. 2015)

[24] *E.g.* the 'Vision 100 - Century of Aviation Reauthorization Act of 2003,' as codified in 49 U.S.C. §§44728; Maryland guidelines (which at the time was found at https://covid link.maryland.gov/contents/faqs/#faq3). As MD has provided, "For older adults, social distancing is especially important because they are a high-risk group. It is recommended … those at a high risk of becoming seriously ill from COVID-19 stay home as much as possible." In ¶87-92, Plaintiffs also reference the U.S. Department of Labor, Occupational Safety and Health

III. ARGUMENT

A. Southwest Urges a Bright-Line No-Duty Test: '*Because Mr. Madden was Not a Southwest Employee, Ipso Facto, Southwest Can Owe him No Duty of Care'.*

Lying at the heart of the Southwest's legal argument is a simple syllogism:

- That in order to sustain the negligence and gross negligence claims Plaintiffs must prove Southwest owed a legal duty to Mr. Madden;
- That Southwest would only owe a legal duty to Mr. Madden if he were a Southwest employee (or had a "special relationship");
- That as the spouse of Ms. Madden, Mr. Madden was not an employee of Southwest and did not have a "Special Relationship" with Southwest;
- *Ergo*, the cause of action against Southwest fails for lack of an essential element in the cause of action.

In other words, Plaintiffs cannot establish a cognizable duty of care – the theory goes -- because Mr. Madden was only the spouse of the infected employee.

Defendant's argument that Maryland has adopted a blanket "no duty" rule suffers not for lack of repetition. "The claims require a plausible allegation that the defendant owed the injured person (Mr. Madden) a duty of care" (Def's Mot., p. 2); "that duty does not extend to family members"(*Id.*); "employer owe[s] no duty to wife of an employee" (*Id.*); "Plaintiff's Complaint does not allege Southwest owed Mr. Madden a duty … therefore the complaint must be dismissed" (*Id.*); "the Complaint does not allege that Mr. Madden was a Southwest employee … the fatal flaw in the Complaint" (*Id.* at 4); "Southwest did not owe a duty to Mr. Madden (*Id.* at 8); "Southwest

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Administration publications, such as those establishing protocols for screening workers before entry into the workplace.

In ¶85, it is alleged Southwest itself utilizes "public health guidance," "scientific research" and advice from "medical and aviation organizations" such as "Harvard's T.H. Chan School of Public Health, The International Air Transport Association, … the U.S. Department of Defense's U.S. Transportation Command, [and their] own medical professionals …."

did not owe him a duty of care" (*Id*. at 9); "a safe work environment extends only to employees and others exposed while in the workplace and not household members like Mr. Madden" (*Id.* at 8); and "[u]nder Maryland law, an employer owes no special duty to the spouse of an employee. Accordingly, the negligence claim must fail." *Id*. at 14**.** Southwest further asserts without attribution or relevance that it is "it is contrary to public policy to impose a duty on employers that is based on their employees' conduct outside of the scope of their employment duties" (*Id*. at 11).[25]

But what the argument does suffer from is a lack of substance and validity. As more fully discussed *infra*, Defendant' conclusion of law - that Southwest owed no legal duty to Mr. Madden unless he were a Southwest employee (or had a "special relationship") – is misguided. It conflates standards for *malfeasance* and *nonfeasance,* and confuses *affirmative duties* with *general duties*, in order to shoehorn the conclusion a special relationship is needed to impose a duty here. It replaces the prevailing test for determining if a legal duty exists with a constricted view of legal duty premised on arbitrary classifications between a tortfeasor (*i.e.,* "actor" in restatement parlance") and the injured party. It fails to explicate the different application of the rules when there is personal injury rather than purely economic harm. It fails to account for the evolutionary trajectory of law and the clarification of the law since the courts sought to close the floodgates of "take home" asbestos cases. In a nutshell, the headnote-thin layer of analysis Southwest offers for dismissal so misapprehends the standards for determining whether a duty of care exists, that it reduces these standards to an axiomatic conclusion that removes from the court's discretion the need to weigh the determinants of duty. Finally, in doing so it relies on cases inapposite to the one at bar.

[25] Even Defendant seems to step back from such a precipice, later stating that "Maryland Courts' [have been merely] *reluctant*[t] to extend duties to third parties without direct relationships. *Id*. at 9.

B. The Proper Legal Standard for Determining Duty Under These Circumstances

The parties certainly agree on one point: "duty" is central to proof of a negligence claim.[26] As the Maryland courts put it, "negligence is a breach of a duty owed to one, and absent that duty, there can be no negligence." *Ashburn v. Anne Arundel County,* 306 Md. 617, 627 (1986).[27] Nor would we suspect the parties to disagree with this corollary: that in a complex society, one cannot owe a duty to the world at large.[28] It is for these reasons that "analyzing a negligence claim begin[s] with whether a legally cognizable duty exists" – couched as the proverbial 'threshold question.' *Bobo v. State* 346 Md. 706, 714 (1997). But where Plaintiff parts ways with Defendant is in the assumption that a legal duty is never owed to the spouse of an individual personally injured through the active malfeasance of a tortfeasor.

The courts of Maryland, as well as every other state, have wrestled with where to draw the duty line, aided by the light from a fair number of academic luminaries. None have decided to draw on the arbitrary basis urged by Defendant.[29] Prosser and Keeton explain why this is the case:

> *duty is as broad as the whole law of negligence, and … no universal test for it ever has been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself. Yet it is embedded far too firmly in our law to be discarded, and no satisfactory substitute for it, by which the defendant's responsibility may be limited, has been devised.*

Id. at 53, p. 358. So if there exists no universal test, what are courts to look to when answering the practical question of when a duty exists?

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[26] In order to prevail on a claim of negligence in Maryland, a plaintiff must prove the existence of: (a) a duty owed by the defendant to the plaintiff, (b) a breach of that duty, and (c) injury proximately resulting. E.g., *Landaverde v. Navarro*, 238 Md. App.. 224 (2018).
[27] *Id.* at 714.
[28] *Id*. at p. 358: "Who, then, in law is my neighbor? The answer seems to be persons … so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".
[29] For an academic treatise on the topic, see Benjamin C. Zipursky and John C.P. Goldberg, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 Vand. L. Rev. 657 (2001).

A starting point for understanding what is meant by "duty" is to look at how the Maryland courts have come to define the term. And in defining "duty," the Maryland courts have adopted the definition as articulated by Prosser: "duty" is "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." See, *Barclay v. Briscoe*, 427 Md. 270, 293 (2012); *Remsburg v. Montgomery*, 376 Md. 568, 582 (2003) (quoting Prosser and Keeton on the Law of Torts § 53 at 356 (5th ed. 1984).[30] As Prosser notes, "duty is not sacrosanct … but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."[31] Duty "depend[s] on the special facts and circumstances presented" (*Washington Metro. Area Transit Auth. v. Seymour*, 387 Md 217, 224 (2005)), and is at its core "a policy question of whether the specific plaintiff is entitled to protection from the acts of the defendant." *Blondell v. Littlepage*, 991 A.2d 80, 120 (Md. 2010).

In our view one of the most comprehensive discussions of the scope of "duty" can be found in *Landaverde v. Navarro*, 238 Md. App. 224 (2018). Under the facts that gave rise the dispute in *Landaverde*, homeowners and other occupants died from carbon monoxide poisoning due to improper ventilation, and the court was tasked with determining whether or not the technicians who provided repair services on the boiler owed the homeowners a duty of care. Finding they did, the court toured the evolution of cases that dealt the distinction between purely economic harm and harm from a dangerous condition that leads to personal injury.

Landaverde is an illuminant for the case at bar, not because it directly parallels the facts, but because the *Landaverde* explained the interplay between the nature of the harm and the requisite connection between the parties, why this interplay exists and in a somewhat etymological

[30] W. Page Keeton (General Editor), Dan B. Dobbs, Robert E. Keeton, and David G. Owen (5th ed.), §53, p. 356.
[31] Prosser, §53 at 358.

level, how we have gotten to where we are. Legal duty is a concept which has evolved, and *Landaverde*, as does the Restatement Torts (Third) (discussed *infra*), gives us a perspective on its trajectory.

In reaching its decision, *Landaverde* first looked to *Jacques v. First Nat'l Bank*, 307 Md. 527, 534 (1986), a case where a bank was found to owe its customer a duty of reasonable care in the proceeding and determination of a loan application. *Id* at 249-250. While the *Jacques* court dealt entirely with the issue of economic loss, there, the significance of the interplay between the parties' relationship towards one another and the harm sought to be prevented was explained (*i.e.*, in the context of whether the loss was economic or personal in nature):

> *In determining whether a tort duty should be recognized in a particular context, two major considerations are: the nature of the harm likely to result from a failure to exercise due care, and the relationship that exists between the parties. Where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability. This intimate nexus is satisfied by contractual privity or its equivalent. By contrast, where the risk created is one of personal injury, no such direct relationship need be shown, and the principal determinant of duty becomes foreseeability.*

Id. Quoting from *Jacques*, the *Landaverde* court (*Id.* at 537) offered this rationale:[32]

> *an inverse correlation exists between the nature of the risk on one hand, and the relationship of the parties on the other. As the magnitude of the risk increases, the requirement of privity is relaxed – thus justifying the imposition of a duty in favor of a large class of persons where the risk is of death or personal injury. Conversely, as the magnitude of the risk decreases, a closer relationship between the parties must be shown to support a tort duty. Therefore, if the risk created by negligent conduct is no greater than one of economic loss, generally no tort duty will be found absent a showing of privity or its equivalent.*

Moving along the continuum of time, *Landaverde* cites to *Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co.*, 308 Md. 18 (1986), where a condominium

[32] Perhaps of relevance, the *Landaverde* court also quoted from *Jacques* that another factor relevant to the determination of whether a tort duty exists is "the nature of the business of the party upon whom the burden is sought to be imposed." *Id*. at 250.

association alleged that certain contractors who constructed a building that was out of compliance with building codes endangered the occupants. *Id.* at 22. *Landaverde* cited to *Whiting Turner* for the proposition that contractual privity was not an absolute prerequisite to the existence of a tort duty in the event of personal injury. *Id.* at 32. It determined that the duty "extended to those persons foreseeably subjected to the risk of personal injury created, as here, by a latent and unreasonably dangerous condition resulting from *their* negligence" [emphasis added]. *Id*. at 27-28, *Landaverde* at 251. In discounting the issue of the closeness of the parties, the Court commented on the evolution of a general rule of liability where the result of negligence is *the creation of a dangerous condition*. *Id.* at 27-28, *Landaverde* at 251.

The same result obtained in *Cash & Carry America, Inc. v. Roof Solutions, Inc.*, 223 Md. App. 451 (2015), also cited as a point evolutionary trajectory. There, Defendants argued no duty of care is owed to a third party unless there is an "intimate nexus" between the contractor or subcontractor and the third party. *Id.* But again the court disagreed, concluding this was "a tort claim to which the economic loss doctrine has no relevance." *Id.* at 467, *Landaverde* at 254. The court ruled the contractor owed a duty of care in tort to a third party owner of personal property *who was negligent in starting a fire*. And again, this was a case of *active* malfeasance and personal injury.

The principal take back of these cases is two-fold. As expressed in *Landaverde*, when personal injury is involved, particularly when the harm results from *malfeasance* (the distinction between *malfeasance* and *nonfeasance* is discussed *infra* under IV(C)) contractual privity or its equivalent is not a prerequisite for recognizing a duty of care. This is particularly the case with personal as opposed to economic injury. Instead, the "principal determinant" of whether a duty of

care should be recognized in this instances – where there is personal injury from malfeasance -- is the worn concept of foreseeability.[33] And after this, other factors come into play including:

> *(2) the degree of certainty that the plaintiff suffered the injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant [and the] consequences to the community of imposing a duty of exercising care with resulting liability for breach, and (7) the availability, cost and prevalence of insurance for the risk involved.*

Landaverde at 254, *Jacques* at 470.[34] This is the proper standard we ask the court to apply here.

Our research shows that Maryland courts have reiterated these factors many times.[35] In fact,

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[33] It has been called the "most important of [the] factors," *Valentine* at 551.

[34] Prosser cited to several cases: "The court must balance the following factors when determining the existence of duty in each particular case: (1) foreseeability of harm to plaintiff; (2) degree of certainty that plaintiff suffered injury; (3) closeness of connection between defendant's conduct nd injury suffered; (4) moral blame attached to defendant's conduct; (5) policy of preventing future harm (6) extend ot the burden to defendant and the consequences to the community of imposing a duty to exercise case with resulting liability for breach, and (7& availability, costs and prevalence of insurance for the risk involved." Citing to *Vu. V. Singer Co*., 538 F. Supp. 26, 29 (N.D. Cal. 1981); *Tarasoff v. Regents of University of California* 17. Ca. 3d 425 (1976). See also, §11. Determination as to existence of duty, Maryland Law Encyclopedia.

[35]*May v. Air & Liquid Sys. Corp.*, 129 A.3d 984, 989 (Md. 2015); *Kennedy Krieger Inst., Inc. v. Partlow*, 191 A.3d 425, 451 (Md. 2018); *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch*., 209 A.3d 158, 170 (Md. Spec. App. 2019), *cert. granted*, 216 A.3d 937 (Md. 2019), and *aff'd*, 233 A.3d 59 (Md. 2020); *Patton v. U.S. of Am. Rugby Football*, 851 A.2d 566, 571 (Md. 2004); *Warr v. JMGM Group, LLC*, 70 A.3d 347, 354 (Md. 2013); *Cash & Carry Am*., at 63; *Remsburg v. Montgomery*, 831 A.2d 18, 26 (Md. 2003); *Kiriakos v. Phillips*, 139 A.3d 1006, 1034 (Md. 2016) (notable because of its elaboration of these factors); *Sumo v. Garda World*, 1010, SEPT. TERM, 2016, 2017 WL 2962819, at *4 (Md. Spec. App. July 12, 2017) (also notable because of its elaboration of these factors); *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch*., 233 A.3d 59, 73 (Md. 2020); *Arch Ins. Co. v. Costello Constr. of Maryland, Inc*., CV DKC 19-1167, 2020 WL 1158776, at *4 (D. Md. Mar. 9, 2020); *Peamon v. A & R Dev. Corp., CIV*. WMN-06-2974, 2008 WL 4580022, at *3 (D. Md. Feb. 7, 2008); *Stratton v. Nationwide Sols*., LLC, CV JKB-17-3574, 2018 WL 4679859, at *5 (D. Md. Sept. 28, 2018); *Diaby v. Berliner Specialty Distributors, Inc*., 02024,SEPT.TERM,2017, 2019 WL 994098, at *4 (Md. Spec. App. Mar. 1, 2019); *Fletcher v. Maryland Transit Administration*, 741 Fed. Appx. 146, 149 (4th Cir. 2018)(unpublished); *Village of Cross Keys, Inc. v. U.S. Gypsum Co*., 556 A.2d 1126, 1131 (Md. 1989); *Veytsman v. New York Palace, Inc*., 906 A.2d 1028, 1033 (Md. Spec. App. 2006); *Willow Tree Learning Ctr., Inc. v. Prince George's County*, Md., 584 A.2d 157, 162 (Md. Spec. App. 1991); Hayes v. State, 963 A.2d 271, 278 (Md. Spec. App. 2009); *Valentine v. On Target, Inc.*, 686 A.2d 636, 638 (Md. Spec. App.

the standard has been described as the "7–factor test to establish a duty." *Sumo v. Garda World*, 1010, SEPT. TERM, 2016, 2017 WL 2962819, at *4 (Md. Spec. App. July 12, 2017).

From time-to-time, courts have elaborated upon what these factors mean. Two helpful cases where such elucidation occurred were *Sumo*, *Eisel v. Bd. of Educ. of Montgomery County*, 597 A.2d 447, 452 (Md. 1991) and *Warr v. JMGM Group, LLC*, 70 A.3d 347, 383 (Md. 2013). As to the first factor, "foreseeability" in the determination of the "existence of a duty [has been described as] a prospective consideration of the facts existing at the time of the negligent conduct." *Henley v. Prince George's Cnty.*, 305 Md. 320, 336 (1986). In the context of duty, the "foreseeability of harm test ... is based upon the recognition that a duty must be limited to avoid liability for unreasonably remote consequences." *Valentine*, at 551. The question to be asked in this case, therefore, is whether it was foreseeable to Southwest, and not unreasonably remote, that as a result of their utter failure to adhere to safety protocols in a pandemic that harm would befall Ms. Madden's husband.

There has been little discussion of factor two, *the degree of certainty that the plaintiff*

1996), aff'd, 727 A.2d 947 (Md. 1999); *U. of Maryland E. Shore v. Rhaney*, 858 A.2d 497, 503 (Md. Spec. App. 2004), *aff'd* on other grounds, 880 A.2d 357 (Md. 2005); *Hansberger v. Smith*, 142 A.3d 679, 688 (Md. Spec. App. 2016); *Barclay v. Ports Am. Baltimore, Inc.*, 18 A.3d 932, 940 (Md. Spec. App. 2011), *aff'd sub nom. Barclay v. Briscoe*, 47 A.3d 560 (Md. 2012); *Johnson v. PNC Bank, N.A.*, CV ELH-19-3136, 2020 WL 1491355, at *5 (D. Md. Mar. 27, 2020); *Eisel v. Bd. of Educ. of Montgomery County*, 597 A.2d 447, 452 (Md. 1991); *Doe v. Prudential Ins. Co. of Am.*, 860 F. Supp. 243, 251 (D. Md. 1993); *Ashburn*; *McNack v. State*, 920 A.2d 1097, 1107 (Md. 2007); *Bolton v. Queen*, 71, SEPT. TERM, 2020, 2021 WL 1426787, at *6 (Md. Spec. App. Apr. 15, 2021); *Corinaldi v. Columbia Courtyard, Inc.*, 873 A.2d 483, 489 (Md. Spec. App. 2005); *Jones v. State*, 38 A.3d 333, 344 (Md. 2012); *Hiett v. AC & R Insulation Co.*, Inc., 2564 SEPT.TERM 2015, 2017 WL 382908, at *4 (Md. Spec. App. Jan. 27, 2017); *Landaverde* at 866; *Doe v. Pharmacia & Upjohn Co., Inc.*, 879 A.2d 1088, 1093 (Md. 2005); *Horridge v. St. Mary's County Dept. of Soc. Services*, 854 A.2d 1232, 1239 (Md. 2004); *Williams v. Mayor & City Council of Baltimore*, 753 A.2d 41, 63 (Md. 2000); *Pendleton v. State*, 921 A.2d 196, 205 (Md. 2007; *Doe v. Salisbury U.*, 123 F. Supp. 3d 748, 763 (D. Md. 2015); *Muthukumarana v. Montgomery County*, 805 A.2d 372, 410 (Md. 2002); *Grimes v. Kennedy Krieger Inst., Inc.*, 782 A.2d 807, 842 (Md. 2001); and *Doe v. Maryland*, CV ELH-20-1227, 2021 WL 1174707, at *36 (D. Md. Mar. 29, 2021).

suffered the injury. The factor does not appear to mandate courts delve into a factual correlation between the injury and event, as it would infringe on the factual issue of causality; rather it appears to focus on the proof of injury itself, and in this case, perhaps the severity of the injury.

The courts have elaborated somewhat on what is meant by the third factor - the c*loseness of connection between conduct and the injury.* This factor has been likened to a "proximate cause element" in that "[c]onsideration is given to whether, across the universe of cases of the type presented, there would ordinarily be so little connection between breach of the duty contended for, and the allegedly resulting harm, that a court would simply foreclose liability by holding that there is no duty." *Eisel,* at 389. "Thus, this standard [has been described as] a spectrum by which courts should determine whether to impose a duty of care. The more severe the injury, the more remote the parties may be." *Warr* at 385. "[A]s the magnitude of the risk increases, the requirement of privity is relaxed—thus justifying the imposition of a duty in favor of a large class of persons where the risk is of death or personal injury." *Id.* (citation omitted). *See, Kiriakos v. Phillips*, 448 Md. 440, 488 (Md. 2016), *Jacques* at 537. Citing to *Jacques*, the Court of Appeals has stated "that an inverse correlation exists between the nature of the risk on one hand, and the relationship of the parties on the other, again that the magnitude of the risk increases, the requirement of privity is relaxed—thus justifying the imposition of a duty in favor of a large class of persons where the risk is of death or personal injury." Id. at 537; also see, *S. Maryland Elec. Co-op., Inc. v. Booth and Associates, Inc*., CIV. A. HAR 88-547, 1989 WL 85060, at *2 (D. Md. July 25, 1989). Hence, the more severe the injury, the more remote the parties may be.

The fourth factor considers the moral blameworthiness of the defendant. "Under [the moral blame] factor, our standard is not evidence of intent to cause harm ... [r]ather, we consider the reaction of persons in general to the circumstances." *Eisel,* at 390. The question is whether it is "the

sense of the community that an obligation exists under the circumstances. *Id*. at 385.

The fifth factor considers whether the imposition of a duty will help prevent future harm. In *Kiriakos* (at 490), the Court of Appeals stated that:

> *The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with the compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is … a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive. In sum, the Court of Appeals has recognized the importance of providing a strong incentive, through civil liability, of preventing future harm.*

The sixth factor examines the burden placed on the defendant from the ruling. In *Eisel,* the Court concluded that the risk of harm greatly outweighed the extent of the burden to the defendant. *Id.* at 391–92. For example, in Eisel, the court found "[T]he consequence of the risk [of teenage suicide] is so great that even a relatively remote possibility of a suicide may be enough to establish duty." *Id.* at 391. "The consequences of underage drinking are great—such that the burden … hardly warrants discussion." *Id.* We discuss the application of these factors *infra*.

C. A Special Relationship is Not Needed for a Legal Duty to Exist in This Circumstance.

Defendant's argument hinges on an assumption: since Maryland courts have explicitly embraced §315 Restatement of Torts (Second), a "special relationship" between Mr. Madden and Southwest is needed to impose the duty of care.[36] However, Southwest's reliance on this principle is also misplaced because that *affirmative* duty rule is predicated on *nonfeasance* not *malfeasance*.

Recall that the Maryland courts have adopted the often quoted passage from Prosser[37] the "duty" is "an obligation, to which the law will give recognition and effect, to conform a particular standard of conduct toward another." *Id.* Under this definition, however, "[when determining] the

[36] Def.'s Mot., pp. 2, 10, 11 and 12.
[37] Prosser, §53.

existence of a duty, there runs … a distinction between *action* and *inaction*" … '*misfeasance'* and '*nonfeasance*.' … between *active* misconduct working *positive injury* to others and *passive inaction* or a failure to take steps to protect them from harm" [emphasis added]. *Id.* The existence of a duty is said to depend, therefore, on whether the case involves active risk creation or passive failure to act (*Id*. §56, at 374):

> *Liability for 'misfeasance,' then, may extend to any person to whom harm may reasonably be anticipated as a result of the defendant's conduct, or perhaps even beyond; while for 'nonfeasance' it is necessary to find some definite relation betweenthe parties, of such a character that social policy justifies the imposition of a duty to act.*

According to Prosser and Keeton, therefore, whose interpretation is adopted by the Maryland courts, one of two separate duty rules could apply in any circumstance, depending on whether or not the "actor" acted or failed to act. This of course makes eminent sense. When a person *chooses* to act, they assume a duty to exercisereasonable care so as not to expose others to unreasonable risks of harm (*e.g., B.N.v. K.K.,* 312 Md. 135, 141 (1988)); yet, when merely are a mere passive observant, they assume no duty to affirmatively aid or rescue another to prevent them from suffering harm, absent the creation of a special relationship (*e.g., Barclay v. Briscoe,* 427 Md. 270, 294 (2012)).

This principle is embodied in the distinctions drawn in the Restatements of Law (both Second and Third). For example, §7 (Third) provides (with respect to malfeasance):

> *(a) An actor ordinarily has a duty to exercise reasonable case when the actor's conduct creates a risk of physical harm.*
> *(b) in exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability … the court may decide that the defendant has no duty or that the ordinary duty or reasonable care requires modification.*

And §37 (No Duty of Care with Respect to Risks Not Created by Actor) provides (with respect to non-feasance):

> *An actor whose conduct has not created a risk of physical or emotional harm to another had no duty of care ot the other unless a court determined that one of the affirmative duties provided in §§38-44 is applicable.*[38]

In fact, the Restatement (Third) colorizes this distinction further, stating:

> *The general duty rule contained in this section is conditioned on the actors having engaged in contact that creates a risk of physical harm. Section 37 states the adverse of this rule: in the absence of conduct creating a risk of harm to others, and after ordinarily he has no duty of care to another.*[39]

Notably, §37 is the successor to Restatement Torts (Second) §314, expressly adopted by the Maryland Courts. Section 314 provides even more pithily:

> *The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.*[40]

And §315 of the Restatement (Second) provides the exception when that special relationship exists:

> *There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless*
> *(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or*
> *(b) a special relation exists between the actor and the other which gives to the other a right to protection.*

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[38] These include: §38 (Affirmative duty Based on Statutory Provisions); §39 (Duty Based on Prior Conduct Creating a Risk); §40 (Duty Based on Special Relationship); §41 (Duty to Third Parties Based on Special Relationship with Person Posing Risks); §42 (Duty Based on Undertaking); §43 (Duty to Third Parties Based on Undertaking to Another); and §44 (Duty to Another Based on Taking Care of the Other).

[39] See, cmt. l. Also, see also, Restatement Torts (Third) Reporter's Notes, Ch. 7, §37, p. 12.

[40] The Restatement provides us with the following illustration:

> *A, a trespasser in the freight yard of the B Railroad Company, falls in the path of a slowly moving train. The conductor of the train sees A, and by signaling the engineer could readily stop the train in time to prevent its running over A, but does not do so. While a bystander would not be liable to A for refusing to give such a signal, the B Railroad is subject to liability for permitting the train to continue in motion with knowledge of A's peril.*

Id. § 314 cmt. d, illus. 3.

That §315 relates to nonfeasance is made clear by the fact it is found within the "Duties of Affirmative Action" topic of the Restatement (Second), just as is found in the "Affirmative Duties" section of the Restatement. Furthermore, in order to demonstrate the distinction between the circumstances where §§314 and 315 apply, the Restatement refers to commentary following §302, which explains the ordinary duty of care will apply when an individual engages in active risk creation, as opposed to passive failure to act:

> *In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. The duties of one who merely omits to act are more restricted, and in general are confined to situations where there is a special relation between the actor and the other which gives rise to the duty.*

Id. § 302 cmt. a. See also, Dobbs, Dan B., The Law of Torts §251, at 2-4 (2d ed. 2011).

Did Southwest's conduct fall within the passive category so as to trigger the special relationship rule upon which Southwest relies? The answer to this question is a definitive "no"; Southwest's actions clearly constituted *active malfeasance*. Again, according to the Restatement (Third) of Torts, "the proper question is not whether an actor's failure to exercise reasonable care entails the commission or omission of a specific act. Instead, it is whether the actor's entire conduct created a risk of harm." § 37 cmt. c. (2012). A defendant's conduct will be found to create a risk of harm "when [it] results in greater risk to another than the other would have faced absent the conduct." §7 cmt. o.

This is precisely what has been alleged when Southwest organized the Recurrent Training Session. When Southwest required employees to be seated within four feet of Ms. Madden, chose to conduct the training in an unventilated and congested room, required the attendees to touch unsanitized surfaces sequentially, when they deliberately delayed alerting those present in training to exposure it knew occurred it engaged in a courts of conduct creates a risk when the actor's

conduct or "course of conduct [that] result[ed] in greater risk to another than the other would have faced absent the conduct."[41]

And as the Maryland court have often explained with respect to malfeasance:

> *The notion of duty is founded on* ***the responsibility each of us bears to exercise due care to avoid unreasonable risks of harm to others.*** *When a reasonable person knows or should have known that certain types of conduct constitute an unreasonable risk of harm to another, he or she has the duty to refrain from that conduct. (emphasis added).*

B.N., at 141, See also, *Balt. Gas & Elec. Co. v. Flippo,* 348 Md. 680, 700 (1998); *Faya v. Almaraz,* 329 Md. 435, 448 (1993); *McCance v. Lindau,* 63 Md.App. 504, 514 (1985).

D. Distinguishing the Holdings Cited by the Defendant from the Case at Bar

On Facts and Rulings.-- In light of the proper standard, we next seek to address the bevy of cases cited by Southwest in defense of their position that no duty of care was owed to Mr. Madden, starting with the "take home" asbestos cases. Two of these are Maryland cases: *Ga. Pac., LLC v. Farrar,* 432 Md. 523 (2013) and *Adams v. Owens- Illinois, Inc*., 119 Md. App. 395 (1998), and two are foreign: *Miller v. Ford Motor Co. (In re Certified Question),* 740 N.W.2d 206, 219 (Mich. 2007) and *In re New York City Asbestos Litig.*, 840 N.E. 2d 115 (N.Y. 2005).

In *Farrar,* the issue before the court was stated thusly: "whether the product manufacturers owe a duty to warn the 'bystander of a bystander," with whom they had no relationship, who suffered an injury not directly caused by the product, when Plaintiff never used the product, and when the manufacturer had no ability *to identify and warn Ms. Farrar*. Southwest should place

[41]*Id. at* Restatement (Third), cmt *o; See*, Complaint at ¶¶36. 120-126, 132, 140, 181, 204 and 235.

zero reliance upon *Farrar* for its contention that a duty of care should be summarily truncated for Mr. Madden.

First, what persuaded the *Farrar* court was that the household's danger from exposure to asbestos dust brought home by workers was not made publicly clear until *after* the time of plaintiff's exposure in the 1960s.

Second, even if the risk were known, imposition of a duty upon the manufacturer would have been ineffective in any event. In the court's own words:

> *Determining the existence of a duty requires the weighing of policy considerations, among which are whether, in light of 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, there is a feasible way of carrying out that duty and having some reason to believe that a warning will be effective. To impose a duty that either cannot feasibly be implemented or, even if implemented, would have no practical effect would be poor public policy indeed.*[42]

But perhaps more significantly, *Farrar* (like virtually all cited by the Defendants) was predicted upon a duty to warn, *to wit, nonfeasance*, not *malfeasance*, which explains the court's inquiry into the nature of the relationship between the parties. The negligent actions here stand in stark contrast to those cited by the Plaintiff in *Farrar*. Southwest, as we have said repeatedly, engaged in *active malfeasance*. Southwest did not commit negligence because of *omission, e.g.*, by *failing to warn* Ms. Madden she was about to be infected with Coronavirus. They committed negligence by *commission*; **e.g.,** by seating Ms. Madden within 4 feet of a COVID-19 infected flight attendant.

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[42] Here is what the court stated as to the futility of imposing a duty that would have had no bearing on the outcome: "With respect to implementation, in an era before home computers and social media, 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 …. [E]ven if Georgia Pacific should have foreseen back in 1968–69 that individuals … were in a zone of danger, there was no practical way that any warning [could be] given by it ….

Furthermore, unlike the shout into the wind considered in *Farrar* to fulfill a duty that the Plaintiff didn't know existed, to an audience it didn't know, and by a means unavailable, the tiny measures that could have been undertaken by Southwest would have saved a life. For example, had Southwest taken the miniscule precautions that it advertised it took for its customer base – screening flight attendants, ensuring they wore the right mask and properly wore those masks, enforcing social distancing, sanitizing equipment, or expediting contact tracing – the harm would have been avoided. And once again, the current lawsuit is not predicated exclusively on actions Southwest failed to take such action; but on the actions Southwest *proactively* took to transmit the virus and increased the risk of doing so.

The significance of *Adams* is equally hard to divine beyond the headnote. In *Adams*, Edwin Hale -- one of many Plaintiffs -- sued for damages from asbestos exposure; the only one who did so behalf of his wife. Mr. Hale's wife died allegedly from mesothelioma after inhaling asbestos fibers on his laundry. The record on appeal cites to so many errors in the court below, that it is not clear which struck the fatal blow to Mr. Hale's cause of action. When the court found Mr. Wild was not entitled to damages, it stated variously that the lower court had improperly instructed the jury that duty was a question of fact, that Mr. Wild was not asserting a claim for injury he sustained (which raises the issue of whether the matter was wrongful death), and then obliquely (that Bethlehem's duty to its employees was not an issue, because Mary Wild was not an employee).

It is on this latter nub of course that Southwest hangs its hat. But using *Adams* to support it general proposition here – that Southwest owed no duty to Mr. Madden for its *active malfeasance* -- represents an unwarranted extrapolation from its provinces. Once again, from the record, it is almost certain that *Adams* was based upon *non-feasance*, such as a failure of a duty to warn, not

active malfeasance (if the court had tacitly considered the distinction). Like *Farrar*, the court in *Adams* did not have before it the active malfeasance that exists in the case at bar.

Like *Farrar* and *Adams*, *Miller* was a brand of take-home asbestos case that again involved *nonfeasance*. *Id.* at 211. In the words of the court, the legal question was whether the relationship "g[ave] rise to any legal obligation on the actor's *part to act for the benefit* of the subsequently injured person [emphasis added]" (*Id*.); specifically, "whether property owners owe a duty to protect people who have never been on or near their property from exposure to asbestos carried home on a household member's cloth" (*Id*. at 213). After framing its inquiry as whether "defendant, as owner of the property on which asbestos-containing products were located, … owed to the deceased, who was never on or near that property, a legal duty to protect her from exposure to any asbestos fibers carried home on the clothing of a member of her household who was working on that property as the employee of independent contractors, where there was no further relationship between defendant and the deceased," the court found the relationship between wrong and harm too attenuated.

Miller is not Maryland precedent; however, the court should not discount its value solely on that basis. Most notably, once again, *Miller* involved non-feasance, a failure to act. As the court phrased the issue: 'Did the Defendant owe a duty "*to act for the benefit*" of the injured party.' Hence, this is a key touchstone of distinction. Although Defendant would like to characterize the present action as one involving solely failures to act, Southeast chose the unventilated and contested room, chose the protocol, chose to require Ms. Madden to sit in close proximity to a COVID-19 positive Flight Attendant --in essence created and exacerbated the risk.

What Plaintiff sees interesting in *Miller* is that even given the utter lack of relationship between the parties in a failure to act matter, the court still somehow thought it prudent to

undertake the factor analysis identified in *Landaverde* (*e.g.*, to consider "the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented.'" *Id*. at 216. What helped to persuade the Miller court its conclusion that the "burden [imposed] on the defendant" would have been "extraordinarily onerous and unworkable" *Id.* at 217. No parallel exists here. It is inconceivable how Southwest could have a scintilla of burden by adopting protocols for their employees that they adopted for their paying customers.

Furthermore, as in the case of *Farrar*, the *Miller* court determined, in a classic sense, the harm was "not foreseeable by defendant while [the employee] was working at defendant's premises from 1954 to 1965" because the "first published literature suggesting a 'specific attribution to washing of clothes' was not published until 1965. *Id*. at 218. In the current matter, Southwest admitted and published it knew what to do to keep its employees safe.

How the Michigan court ruled in Miller *when* presented with this fact pattern was fairly predictable. In fact, given its articulation of the issue, the fact the negligence was based on an omission not a commission, the remoteness in time and distance between of cause and effect, and the fact that the Defendant would not have known of the danger, Maryland courts, might have striven mightily to reach the same result – and with less strenuous dissent.[43] But none of this relates to the issue of whether in general negligence action, a legal duty was owed to Mr. Madden. As an aside, as long as foreign cases are being cited, other courts that have achieved opposite results on far more closely aligned fact patterns with less dissent. *E.g.,* In *Satterfield v. Breeding Insulation Company*, 266 S.W.3d 347 (Tenn.2008).

[43] Even if they may not the active, sweeping and quasi- legislative proclamation in *Miller that* the "ultimate inquiry in determining whether a legal duty should be imposed is whether the *social benefits of imposing a duty outweigh the social costs of imposing a duty*." Id. at 211 that treads closely to the power of the legislature.

Doe v. Pharmacia & Upjohn Co., 388 Md. 407, 879 A.2d 1088 (Md. 2005), while not a take-home asbestos case, was, if you will, a take-home HIV case. In *Pharmacia*, Ms. Doe sued Pharmacia, after her husband, a lab technician, became infected with HIV–2 from exposure to the virus from work. Mrs. Doe argued Pharmacia had the *responsibility to inform* her husband of the possibility that a "false positive" might have indicated that he was infected with HIV–2. She alleged Pharmacia was morally to blame because apparently, *they failed to warn* Mr. Doe of the meaning of the false positive. The court disagreed, finding that even though the harm was foreseeable, the employer owed no duty to the plaintiff.

The only way one might assume *Pharmacia* draws the bright line that the Defendant imagines exists to delimit duty for spouses, is if one were to refuse to read beyond the headnotes. When *Pharmacia* is examined past superficiality, it is yet another case that represents more of a touchstone of distinction than an analog. Again *Pharmacia* involved *nonfeasance*, rather than *malfeasance* (effectively, *a duty to advise or warn*). And given that the legal duty sought was to be an *affirmative* one, where the negligence was the *failure to act*, the court was persuaded in part by elevating the issue of the tenuous relationship between the parties or future parties.

Once again, in contradistinction, the duty to warn or advise was not the breach committed by Southwest. Doubtless, Southwest failed to do what could have been done to ameliorate the risk to Ms. Madden; however, Southwest's actions also fit squarely within Restatement Tort (Third) §7 in that they *created* a risk of physical harm and substantially increased that risk. *Pharmacia* would approach the same footing only if the company had been under a duty to test Mr. Doe, and then misinformed him that he did not have HIV.

Defendant next cites to medical cases, to argue that if a duty is not owed beyond a patient and doctor, Southwest can owe no duty to Mr. Madden. But these cases also suffer from fatal

infirmities. *Lemon v. Stewart*, 111 Md. App. 511, 682 A.2d 1177 (1996), for example, was a case where members of a patient's extended family sued a hospital and others for their alleged *failures to notify* the plaintiffs of Mr. Lemon's HIV positive status. The theory was that, had Mr. Lemon been informed of his condition, he would have taken special precautions to avoid transmission of the virus. *Id.* at 1184.

Joining the cavalcade of other misplaced precedent,, *Lemon* is a *nonfeasance* duty to warn case which (See, Restatement Torts (Third) and (Second) §§314 and 315) that does implicate the need for a special relationship. Moreover, under the facts of *Lemon*, far afield from those here, the court had little trouble pronouncing such a relationship does not exist. In the medical field, the distinction between the duty a doctor owes to his or her patient and relative to third parties has been consistently highlighted. It has occupied a special niche in medical negligence duty cases given the professional relationship between doctor and patient. In properly resolving the matter in favor of the doctor, the *Lemon* court stated, "the common law duty of care owed by a health care provider to diagnose, evaluate, and treat its patient ordinarily flows only to the patient, not to third parties. Thus, it has often been said that a malpractice action lies only where a health care provider-patient relationship exists." *Id*. at 1181.

Astonishingly, in *dicta* the *Lemon* panel entertained a different outcome under separate facts: notwithstanding the lack of a relationship and no active malfeasance the court still mused had "any of the appellants been a sexual or needle-sharing partner of Mr. Lemon … an arguable claim could be made that they were foreseeably potential victims of any breach of the duty to Mr. Lemon and ought to have a cause of action for that breach, to the extent they could prove injury." *Id.*

Last, we address *Dehn v. Edgecombe*, 384 Md. 606 (2005), Southwest's famed vasectomy case. There, Ms. Dehn sued for wrongful birth of his child. Ms. Dehn was not the patient, the

doctor she sued was not her physician, and did not even perform the surgery on her husband. The doctor's only transgression?: His failure to provide a referral for a sperm count after the performance of a vasectomy by another surgeon. Like *Lemon*, *Edge* is far from analogous to the present matter, concerning as it did, a duty of care to a non-patient. Like *Lemon*, *Dehn* stands for the unremarkable finding that recovery for malpractice is allowed where there is a relationship between doctor and patient. *See, e.g., Eid v. Duke,* 373 Md. 2, 16 (2003).

The Floodgate Argument.— All of the "take home" asbestos cases including the "take home HIV" case of *Pharmacia*, share a commonality: a tacit fear that the floodgates of litigation would be opened by the ruling. Defendant urges this court to see the same concern, and use its power to engage in a form of judicial activism to protect the judiciary (apparently, the efficient administration of justice), or the nation in large (or defendants the case may be) from the ruthless horde of lawyers that will descend upon them.

A commonality between *Dehn* and *Adams* is that, in each, the concern that there was an indeterminate class, found (especially in the case of *Dehn,* if you will), fertile ground.[44] As the *Dehn* court stated: "… imposing a duty of care to Mrs. Dehn would create an expansive new duty, expanding traditional tort concepts beyond manageable bounds …, apply to all potential sexual partners and expand the universe of potential plaintiffs ... not just to the patient who underwent the operation but every sexual partner the patient encounters … *Id.* at 627, 865 A.2d at 615.[45]

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[44] Foreseeability of harm was not an issue (Mr. Dehn had a vasectomy after all).

[45] As an aside, other courts have disagreed. *e.g., DiMarco v. Lynch Homes–Chester County, Inc.*, 525 Pa. 558, 583 A.2d 422, 424 (1990) (citing the public policy concern of avoiding the spread of communicable diseases in a case concerning a physician who allegedly misadvised a patient exposed to hepatitis as to the proper time period to abstain from sexual activity); *Skillings v. Allen*, 143 Minn. 323, 173 N.W. 663, 664 (1919) (citing public policy and holding that a physician had a duty to the parents who contracted scarlet fever from their daughter after the physician advised them that the disease was not communicable).

Gratuitously, it seems, the *Adams* court mused about the proverbial floodgate argument, expressing concern Bethlehem would owe a duty to others who came in close contact with Wild, including automobile passengers, and coworkers.

In *Pharmacia*, a significant factor likewise was its concern that by imposing an affirmative duty would "create an expansive new duty to an indeterminate class of people," "beyond manageable bounds"; "would [be] unmanageable," be "broad", apply to "an indeterminate class of people, known and unknown", "for an indeterminate time to an indeterminate class." Most notably, the could found that Pharmacia "cannot foresee liability to a boundless category of people." *Id*. at 1095–96. The court reasoned, that "[t]he potential class to whom Pharmacia would owe a duty under Doe's theory is even greater than all sexual partners of its employees. It includes any person who could have contracted HIV–2 from the employee by any means." *Id*.

In re New York City Asbestos Litigation cited by the Defendant is perhaps the classic case where the court's decision was almost unabashedly reached over policy concerns about the extent of litigation down the pike.[46] The New York court there was preoccupied with the repercussions of their ruling for "limitless liability" stating that "experience counsels that the number of new plaintiffs' claims would not necessarily reflect reality [that secondhand asbestos-related disease exposure is low]." The court was unpersuaded by the argument that new duty may be confined to members of the household of the employer's employee, or to members of the household of those who come onto the landlord's premises because maybe "the babysitter (or maybe an employee of a neighborhood laundry) launders the family members' clothes." This is reminiscent of the decision

[46] This was yet another "take home asbestos case" cited by Defendant. There, the court was asked to decide whether the Port Authority of New York and New Jersey (Port Authority) owes a duty of care to the plaintiff's wife when she was injured from exposure asbestos dust that her husband, , introduced into the family home on soiled work clothes.

reached by the Michigan Court in *Miller*, which also expressed concern that it would authorize a "potentially limitless pool of plaintiffs", "beyond manageable bounds and create an almost infinite universe of potential plaintiffs." *Id* at 220 and 222.[47]

This fear may not have been Henny Penny during the "asbestos-litigation crisis", but it is clearly unjustified in the present case. What Ms. Madden did by returning home to her husband, with whom she lived alone, was exactly what the CDC guidelines recommended she do for safety. It was a foreseeable action embraced by public policy. By the same token, what Southwest did was exactly what public policy did not recommend. While asbestos was omnipresent and unmovable for premise owners, the presence of COVID-19 transmission was very much in the hands and control of Southwest, and out of the hands and control of Ms. Madden, who did her own due diligence. A finding *not to impose* a duty would send a perverse policy signal here -- that the burden of preventing future harm is better borne by unwitting employees, than responsible employers who choose to cut corners. Unlike the Defendants in *Farrar* and *Miller*, Southwest boasted it knew what it needed to do to reduce the risk of transmission, but somehow chose to do the opposite.

There already exist adequate floodgates. The primary brakes put on this type of litigation is one of causality. COVID-19 is a pandemic. And unlike asbestos exposure identifiable as to its source, COVID-19 is ubiquitous. The case at bar is highly unique. Seldom are such facts so clearly indicative of the cause of the transmission than in the present case, where Ms. Madden was seated next to a COVID-19 employee that was not screened, practiced safe precautions otherwise, and

[47] This was the prevailing mindset. As the United States Supreme Court recognized during this period, this country is experiencing an "asbestos-litigation crisis" as a result of the " 'elephantine mass of asbestos cases' lodged in state and federal courts ...." *Norfolk & W. R. Co. v. Ayers,* 538 U.S. 135, 166 (2003) (citation omitted).

contracted the virus at precisely the time she should have. In fact, Southwest itself has admitted to the exposure. This scenario is so unusual, that concern over its propagation is regulated by the rarity of the event.

And we raise one final point. If the court takes the activist position that a legal duty limits a cause of action here, the ruling will usurp the proper power of the legislature which has at least once sought to regulate the space. In the 116th Congress (2019-2020), Senator John Cornyn of Texas introduced S.4317, in order to lessen the burdens on interstate commerce by discouraging lawsuits relating to COVID-19. The bill was called, "Safeguarding America's Frontline Employees To Offer Work Opportunities Required to Kickstart the Economy Act" or the "SAFE TO WORK Act". If enacted, it would have made business liable for injuries resulting from coronavirus exposure only if the plaintiff were able to proves by clear and convincing evidence that the defendant did not make reasonable efforts to comply with government standards and guidance, or constituted gross negligence or willful misconduct. The bill would have limited the ability to pursue such lawsuit, or even to make a demand for remuneration in certain circumstances. The bill foundered after its referral to the Committee on the Judiciary; however the bill was an expression of Congress that it sought to regulate within this domain, and how it sought to regulate. Would a decision to limit the duty of care supplant the judgment of the court for that of the Congress when the Congress has chosen to acquiesce?

E. When the Proper Standard is Applied, Was A Owed to Mr. Madden?

Let us now we examine whether a duty exists by applying the factors enunciated in *Landaverde,* beginning with the factor Maryland courts say is most important -- foreseeability. When we ask the question of whether or not Southwest knew or should have known that it actions during the training session would have endangered Mr. and Ms. Madden, we need to look no

further than their own representations. By way of example, in its marketing of the "Southwest Promise," designed to assuage passenger concerns over the safety of flight during the pandemic, Southwest maintains that Southwest "from check-in to deplaning" has the passengers "well-being in mind …, employ[ing] stringent cleaning and physical-distancing practices such as using electrostatic and anti-microbial spray treatments in the cabin, implement[ing] physical-distancing measures, modified boarding procedures, and [requiring] masks for Employees."[48] And Southwest states that its already sound precautions are constantly being reevaluated "based on public health guidance, scientific research, and advice from medical and aviation organizations, such as … Harvard's T.H. Chan School of Public Health, … [and their] own medical professionals and … experts that we've retained to advise us during the pandemic." In fact, in their "Southwest Promise," Southwest tellingly claims to "know what needs to be done and how it needs to be done to keep people safe."

Was it foreseeable that Southwest actions would increase the risk of harm to Ms. Madden? Yes. Was it also foreseeable that Ms. Madden would be in close proximity to her husband after the training. The answer to this too is an unqualified "yes." The CDC guidelines and advice at the time was that home was the safest place to be, among family and those with whom you had a close connection. Would Mr Madden and Ms. Madden embrace? Could they expect to be within a few inches of each other?

[48] ." It boasts "[b]oth an electrostatic disinfectant and an anti-microbial spray are applied on every surface of the aircraft, killing viruses on contact and forming an anti-microbial coating or shield for 30 days," that "each plane from nose to tail [is cleaned for] nearly 6-7 hours every night," and that "every aircraft is equipped with a sophisticated air distribution system that introduces fresh, outdoor air and HEPA filtered air into the cabin every second while inflight, resulting in exchange of cabin air every two to three minutes Southwest further posits that it "wipes down seats and seatbelts after each seat used by a passenger after each use," "sanitizes all 'call buttons,' lights and … valves above each passenger seat at the end of a flight," and aggressively sanitize[s] the cabin and all equipment and surfaces in a plane after each flight.

The second factor -- the degree of certainty that the plaintiff suffered the injury – is similarly unquestionable. Without getting into the issue of causation, there is the fact that the airline itself advised Ms. Madden that she had been exposed during the training session (*albeit* 14 days after exposure and well after they knew); that she and her husband has both tested positive for COVID-19; and that COVID-19 was identified as Mr. Madden's cause of death.

We turn next to the third factor -- the connection between the defendant's conduct and the injury suffered. As noted previously this standard falls along a spectrum. The more severe the injury, the more remote the parties may be. *See Kiriakos*, at 488 and *Jacques* at 537. In the case at hand, the magnitude of the risk was undeniably severe, as was the harm stemming from that risk. As to the risk, it was widely known (and was at the time), that COVID-19 is spread in three main ways: "breathing in air when close to an infected person who is exhaling small droplets and particles that contain the virus, having these small droplets and particles that contain virus land on the eyes, nose, or mouth, especially through splashes and sprays like a cough or sneeze and touching eyes, nose, or mouth with hands that have the virus on them."[49] And it was also widely known that duration of exposure to the virus, poor ventilation and close proximity to individuals who have traveled for a living would increase the risks [50]

Accordingly, the very actions that Southwest choose to take (again, requiring sequential handling of unsantized equipment, seating in close proximity to other training attendees in a poorly ventilated room) as well as those they chose not to take (e.g., to screen employees), created an unacceptable risk. In fact, given the nature of the occupation, the fact that flight attendants were

[49] www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html
[50] www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/Improving-Ventilation-Home.html

exposed to passengers who also traveled widely, increased the risk[51] The already high risk was ratcheted up further here by the age of Ms. Madden and her husband. Risks of death from COVID-19 was well known to be greater for older members of the population. Ms. Madden was one of the oldest flight attendants at Southwest, and her husband was older. Given the gravity of the harm and the risk, the parties need not be intimately connected as employer and employee.

As to the fourth factor - the moral blame - it cannot be seriously debated that there existed in a community a sense no obligation should exist under the circumstances here? *Eisel,* at 390. During the height of the pandemic, all businesses, from doctors' offices to the local Starbucks, enforced requirements of hygiene and distancing. The courthouse did so, and still does so. And so did Southwest, at least for its passengers, as explained in the "Southwest Promise," deigned to assuage passenger concern over flying. What happened to Mr. Madden was, as we said in the beginning of this Memorandum, as tragic as it was avoidable. If only Southwest had only applied the same standard for its employees that it advertised for the fare-paying customer, it would have averted the harm to Mr. Madden.[52]

Fifth, what effect would a ruling of "no duty" have on the policy of preventing future harm? By the myriad take-home asbestos cases to which they cited, the Defendant would have the court to assume that the real harm here would result from a flood of litigation. Why this is not true is discussed *supra,* but what we would urge the court to consider is an altogether different and more appropriate repercussion: the perverse effect such a ruling would have in emboldening the

[51] For example, Maryland advised determining if individuals "who ha[d] traveled recently … to a state with a COVID-19 test positivity rate above ten percent or a case rate over 20 per 100,000" were tested recently (https://covidlink.maryland.gov/content/faqs/#faq3).

[52] A quote attributed to founder Herb Kelleher seems appropriate: to reference here: "Our people know that if they are sick, we will take care of them. If there are occasions of grief or joy, we will be there with them. They know that we value them as people, not just cogs in a machine."

Defendant and others to skirt health safeguards when the customer is not looking. In *Kiriakos*, the Court of Appeals reiterated the 'prophylactic' factor of preventing future harm so critical the field of torts, referring to the role of the court as admonisher of the wrongdoer. When the decisions of this court to hold Defendant accountable becomes known, Southwest as other similarly situated Defendants would be incentivized to prevent a similar outcome. This would result in a general benefit to society. Conversely, a decision of "no duty" would send the opposite signal, allowing Southwest to treat their flight attendants with far less care than they express for the fare-paying, eventually harming the public. Further to this point, flight attendants play an integral role on a plane. In fact the FAA regulations set standards for the minimum number of flight attendants that must be on board and available to serve passengers and execute safety procedures. *See* 14 C.F.R. § 121.391 (2001). Hence it might be assumed that just like other safety equipment, the airlines would have known that these were potential transmitters of the virus. This factor favors civil liability.

We turn next to factor six. What would be the extent of the burden to the of imposing a duty of exercising care with resulting liability for breach? One would be hard-pressed to imagine any additional burden would be imposed on Southwest for implementing safety, as opposed to hazards, during training. What burden would really have been imposed on Southwest to place the chairs at least six feet apart instead of requiring social proximity? To sanitize placards and other devices, before requiring the trainees to sequentially touch them? To choose a training location that was better ventilated or larger? To screen the attendees? To perform contact training? The answer is that no greater burden would have been imposed that Southwest had not already agreed to assume for their fare-paying customers. Moreover, when the risk of death from COVID-19 transmission is balanced against the burden sought to be imposed on Southwest, the scales tip overwhelmingly in favor of duty.

As to the final factor, the availability, cost and prevalence of insurance for the risk involved, it is our understanding that Southwest does have insurance with the U.S. Aircraft Insurance Group that would cover this loss, but has chosen not to pursue a claim.

V. CONCLUSION

For the foregoing reasons, the Motion of the Defendant should be denied.

Respectfully Submitted,

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