IN THE SUPREME COURT OF OHIO

CHRIS BOLEY, Executrix of the Estate of MARY ADAMS, and CLAYTON ADAMS,	:	Case No. 2009-0542
Appellants,	:	On appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
v.	:	
	:	Court of Appeals Case No. 08-091404
GOODYEAR TIRE AND RUBBER CO.,	:	
Appellee.	:	

AMICI CURIAE BRIEF OF THE OHIO CHAMBER OF COMMERCE, AMERICAN INSURANCE ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., NFIB SMALL BUSINESS LEGAL CENTER, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AMERICAN PETROLEUM INSTITUTE, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF APPELLEE

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The Ohio Chamber of Commerce, American Insurance Association, Coalition for Litigation Justice, Inc., NFIB Small Business Legal Center, Chamber of Commerce of the United States of America, American Tort Reform Association, National Association of Mutual Insurance Companies, American Petroleum Institute, and American Chemistry Council — collectively "*amici*" — respectfully request that this Court affirm the decision below in favor of Defendant-Appellee The Goodyear Tire and Rubber Company.

QUESTION PRESENTED

Whether R.C. § 2307.941(A)(1) bars claims against premises owners arising from off-site, secondhand exposure to asbestos.

INTEREST OF *AMICI CURIAE*

In this appeal, the Court must decide whether claims against premises owners for injuries to remote plaintiffs as a result of secondhand exposure to asbestos emitted in the workplace are barred as a matter of statutory or common-law. The action involves the estate of a woman who was allegedly exposed to asbestos at home by handling the work clothes of her husband, a former Goodyear employee.

Amici believe the Court of Appeals correctly concluded that Plaintiffs-Appellants' claims are barred by R.C. § 2307.941(A)(1), which provides: "A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property." In addition to being statutorily barred, Plaintiffs-Appellants' negligence claim fails as a matter of law because Appellee Goodyear did not owe a duty of care.

As associations representing Ohio premises owners and their insurers, *amici* have a significant interest in the subject litigation and are well-suited to provide a broad perspective to the Court. If the Court were to reverse the Court of Appeals' well-reasoned decision and impose a broad new duty rule here, Ohio employers would be subject to potentially limitless and indefinite liability, and asbestos filings in Ohio would intensify.

* * *

Founded in 1893, the Ohio Chamber of Commerce ("Ohio Chamber") is Ohio's largest and most diverse statewide business advocacy organization. The Ohio Chamber works to promote and protect the interests of its more than 5,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena. Through its member-driven standing committees and the Ohio Small

Business Council, the Ohio Chamber formulates policy positions on issues as diverse as education funding, taxation, public finance, health care, environmental regulation, workers' compensation and campaign finance. The advocacy efforts of the Ohio Chamber are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

The American Insurance Association ("AIA") is a leading national trade association representing major property and casualty insurance companies writing business in Ohio, nationwide and globally. AIA members collectively underwrote more than $124 billion in direct property and casualty premiums in 2007, including over $1.5 billion in commercial lines of business in this State. AIA members, based in Ohio and most other states, range in size from small and regional insurers to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts, including this Court.

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers to address and improve the asbestos litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1] The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

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[1] The Coalition includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company; CNA service mark companies; Fireman's Fund Insurance Company; Liberty Mutual Insurance Group; and the Great American Insurance Company.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country, including nearly 15,000 Ohio members. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,600 *amicus curiae* briefs in state and federal courts.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files *amicus* briefs in cases that will impact small businesses nationwide.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

Founded in 1895, the National Association of Mutual Insurance Companies ("NAMIC") is a full-service national trade association with more than 1,400 member companies that

underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

The American Petroleum Institute ("API") is a nationwide, non-profit, trade association headquartered in Washington, D.C., that represents over 400 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, transportation, refining and marketing.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

STATEMENT OF FACTS

Amici adopt Appellee's Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Now in its fourth decade, asbestos litigation has been sustained by the plaintiffs' bar's search for new defendants and new theories of liability. In particular, the connection between plaintiffs and asbestos-containing products has become increasingly remote, and the liability connection more attenuated. This appeal is an example.

Premises owner liability for off-site exposure to asbestos is of relatively recent vintage. In earlier years, asbestos litigation was focused mostly on the manufacturers of asbestos-containing products, often called "traditional defendants." Most of those companies have been

forced into bankruptcy. As a result, plaintiffs' lawyers began to target "peripheral defendants," including premises owners for alleged harms to independent contractors exposed to asbestos on the owners' premises. Plaintiffs' lawyers are now targeting property owners for alleged harms to secondarily exposed "peripheral plaintiffs." Like this action, these claims involve workers' family members who allege exposure to asbestos off-site, typically through contact with a directly exposed worker or that worker's soiled work clothes.

Ohio's General Assembly wisely appreciated this potential new path for litigation when 2004 Am. Sub. H.B. 292 ("H.B. 292") (codified at R.C. §§ 2307.91–.96) was enacted. Among other things, the General Assembly acted to block "take home" asbestos exposure claims against premises owners through R.C. § 2307.941(A)(1). Plaintiffs-Appellants invite this Court to suspend common sense and engage in a wooden reading of R.C. § 2307.941 that would render R.C. § 2307.941(A)(1) meaningless and violate the legislature's intent. This Court should reject Appellants' invitation. In addition to being barred by R.C. § 2307.941, Plaintiffs-Appellants' negligence claim fails as a matter of law because no duty of care was owed.

As it turns out, the General Assembly showed great foresight in enacting R.C. § 2307.941(A)(1). Since the statute was enacted, the issue of premises owner liability for "take home" asbestos exposure claims has come up with some frequency — and been rejected — in a growing number of states. In fact, these claims have been uniformly rejected by courts that employ an Ohio-like duty analysis, including the highest courts in Michigan, New York, Delaware, and Georgia. Other courts that have rejected take home asbestos exposure claims include state appellate courts in Illinois, Texas, Maryland, and Iowa, a federal appellate court applying Kentucky law, and a federal district court applying Pennsylvania law. In Kansas, as in Ohio, claims against premises owners for off-site asbestos exposures are statutorily barred. Only

jurisdictions that have no statute like R.C. § 2307.941(A)(1) and that apply a duty analysis that is inapplicable in Ohio have found a duty to exist in some circumstances, including the New Jersey and Tennessee Supreme Courts and a few lower courts, often in unpublished and even noncitable decisions.

Whether because of legislation or judicial decision, claims such as the instant appeal are generally failing across the board because legislatures and courts have appreciated that allowing a new cause of action against landowners by remote plaintiffs injured off-site would (1) be inconsistent with traditional duty rules, and (2) exacerbate the asbestos litigation just as it shows signs of improvement. *See* James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 3:6 Mealey's Tort Reform Update 12 (Jan. 18, 2006) ("A movement is afoot among state courts and legislatures that may prove to be the beginnings of a reversal in the disheartening trends of recent years, perhaps the turning of a corner in this hugely important and highly controversial area of tort litigation."); *see also* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears To Be Turning* (2006) 12 Conn. Ins. L.J. 477. A broad new duty requirement for premises owners would allow plaintiffs' lawyers to name scores of employers and other premises owners directly in asbestos suits. The impact would be to augment asbestos litigation and subject premises owners to limitless and indefinite liability. R.C. § 2307.941 should be interpreted to bar Plaintiffs-Appellants' action.

ARGUMENT

I. AN OVERVIEW OF THE LITIGATION ENVIRONMENT IN WHICH THE SUBJECT APPEAL MUST BE CONSIDERED

A. The Asbestos Litigation Environment

"For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.* (3d Cir. 2005) 391 F.3d 190, 200. The United

States Supreme Court has described the asbestos litigation as a "crisis." *Amchem Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 597. An estimated eighty-five employers have been pushed into bankruptcy, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, with devastating impacts on the companies' employees, retirees, shareholders, and surrounding communities. *See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms* (2003) 12 J. Bankr. L. & Prac. 51.

As a result of the large number of bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available* at 2001 WLNR 1993314. More than 8,500 defendants have been named, *see* Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin's Columns – Raising the Bar in Asbestos Litig., Aug. 2004, at 5, including at least one company in nearly every U.S. industry. Many of these defendants are familiar household names. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *abstract available at* 2000 WLNR 2042486. Other defendants include small businesses facing potentially devastating liability. *See* Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1, *abstract available at* 2003 WLNR 3099209. One well-known asbestos plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs). Nontraditional defendants such as Goodyear now account for more than half of asbestos expenditures. *See* Stephen J. Carroll et al., *Asbestos Litigation* 94 (RAND Inst. for Civil Justice 2005).

B. Ohio's Experience Reflects National Trends to a Greater Degree Than Most Other States

The asbestos litigation environment in Ohio has followed the same troubling national trends, and to a greater degree than in most other states. These impacts and large numbers of filings by the non-sick led Ohio to become the first state to enact legislation outlining asbestos claims procedures, H.B. 292. As Ohio Senator Steve Stivers acknowledged, "We are one of the states suffering the most from the asbestos crisis. Jobs have been lost. Otherwise healthy companies have gone bankrupt because of asbestos lawsuits. Because we are the poster child for abuse, we should be a poster child for reform." *Bill Curbing Asbestos Suits Signed into Law by Ohio Gov.*, Cong. Daily, June 7, 2004, *available at* 2004 WLNR 17660524.

The legislative history of H.B. 292 stated in no uncertain terms Ohio's major involvement in asbestos litigation. Findings adopted by the General Assembly describe how before 1998, Ohio, along with Mississippi, New York, West Virginia, and Texas, accounted for nine percent of asbestos cases filed nationally. Between 1998 and 2000, however, the percentage of asbestos claims filed in Ohio and these other states jumped to sixty percent of all cases filed nationally. The General Assembly further noted that in Cuyahoga County alone, the asbestos docket increased from approximately 12,800 cases in 1999 to over 39,000 cases by October 2003. The General Assembly concluded that Ohio had "become a haven for asbestos claims and, as a result, is one of the top five state court venues for asbestos claims." H.B. 292, *supra.*

Ohio businesses have borne a direct and substantial economic impact from asbestos litigation. *See* Kurtis A. Tunnell et al., Commentary, *New Ohio Asbestos Reform Law Protects Victims and State Economy*, 26:22 Andrews Asbestos Litig. Rep. 10 (Aug. 26, 2004). According to the General Assembly's findings, at least five Ohio-based companies were forced into bankruptcy by 2004 due to the "unending flood of asbestos cases." H.B. 292, *supra.* All told, at

least twenty large Ohio companies have been targets of asbestos litigation. *See* Jon Craig, *Senate OKs New Limits on Lawsuits for Asbestos*, Columbus Dispatch, May 12, 2004, at 1B, *available at* 2004 WLNR 21190291. Even for those companies able to ward off bankruptcy, the cost of the litigation has been considerable. *See, e.g.,* Homer Brickley, *Toledo, Ohio Firms Try to Manage Asbestos Liability Claims*, The Blade (Toledo), Mar. 24, 2005, *available at* 2005 WLNR 4601331.

II. R.C. § 2307.941(A)(1) BARS APPELLANTS' CLAIM

A. H.B. 292 / R.C. § 2307.941(A)(1): A Brief Background

The General Assembly enacted H.B. 292 in response to an asbestos litigation crisis. As this Court knows, one of the goals of the legislation was to address the "extraordinary volume of nonmalignant asbestos cases" that was "strain[ing] federal and state courts." *Wilson v. AC&S, Inc.* (12th Dist. 2006) 169 Ohio App. 3d 720, 729, 864 N.E.2d 682, 689, *cause dismissed* (2007) 113 Ohio St. 3d 1457, 864 N.E.2d 645. H.B. 292 began a trend of state legislatures establishing minimal impairment requirements for asbestos claims.[2] Following enactment of H.B. 292, asbestos impairment criteria laws were adopted in Texas (2005), Florida (2005), Kansas (2006), South Carolina (2006), Georgia (2007), and Oklahoma (2009). *See* Mark Behrens, *What's New in Asbestos Litigation?* (2009) 28 Rev. Litig. 501.

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[2] The General Assembly also was the first in the nation to address an increase in questionable silica-related filings through medical criteria legislation. *See* 2004 Am. Sub. H.B. 342 (codified at R.C. §§ 2307.84–902). The following year, the manager of the federal silica multi-district litigation docket, U.S. District Judge Janis Graham Jack, would issue her watershed opinion finding that virtually all of the 10,000 federal court silica cases had been misdiagnosed. *See In re Silica Prods. Liab. Litig.* (S.D. Tex. 2005) 398 F. Supp. 2d 563. Substantial numbers of these cases have been voluntarily dismissed without payment. H.B. 342 also bars take home silica exposure claims against premises owners. *See* R.C. § 2307.89(A).

The Court is familiar with those aspects of H.B. 292 because of the Court's involvement in other appeals involving the Act, *see Ackison v. Anchor Packing Co.* (2008) 120 Ohio St. 3d 228, 897 N.E.2d 1118 (holding that application of H.B. 292 to claims pending on the effective date did not offend the Retroactivity Clause of Ohio's Constitution); *Norfolk S. Ry. Co. v. Bogle* (2007) 115 Ohio St. 3d 455, 875 N.E.2d 919 (holding that H.B. 292's minimal impairment requirements for bringing asbestos claims were not preempted by the Federal Employers' Liability Act or the Locomotive Boiler Inspection Act); *see also In re Special Docket 73958* (2007) 115 Ohio St. 3d 425, 875 N.E.2d 596, and by precluding the joinder of certain asbestos-related actions. *See* Ohio R. Civ. P. 42(A)(2).

More importantly for purposes of this appeal, H.B. 292 also addressed the potential for take home asbestos exposure claims against premises owners. *See* R.C. § 2307.941(A)(1). The General Assembly intended to broadly foreclose these claims. R.C. § 2307.941(A)(1) states in no uncertain terms: "A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property."

At the time H.B. 292 was enacted, a few courts had permitted *product liability* claims involving bystander asbestos exposure. *See Fuller-Austin Insulation Co., Inc. v. Bilder* (Tex. App.—Beaumont 1998) 960 S.W.2d 914, 918; *AC&S, Inc. v. Abate* (Md. Ct. Spec. App.) 710 A.2d 944, 961, *cert. denied sub nom. Crane v. Abate* (Md. 1998) 713 A.2d 979, *cert. denied* (1999) 525 U.S. 1171; *Anchor Packing Co. v. Grimshaw* (Md. Ct. Spec. App. 1997) 692 A.2d 5, 34, *rev'd on other grounds sub nom. Porter Hayden Co. v. Bullinger* (Md. 1998) 713 A.2d 962; *but see Rohrbaugh v. Owens-Corning Fiberglas Corp.* (10th Cir. 1992) 965 F.2d 844, 847

(asbestos manufacturer was not liable under Oklahoma law for the death of an insulator's wife, who was exposed to asbestos dust carried home on the insulator's work clothes).

As this Court knows, product liability law is based on entirely different rationales than the claims at issue here. The application of strict product liability to commercial sellers and distributors "reflects the origins of liability without fault in the law of warranty, which has traditionally focused on sales transactions." Restatement Third, Torts: Products Liability § 20 cmt. *a* (1997). A justification for strict products liability has been that "the seller, by undertaking to market his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it. . . ." Restatement (Second) of Torts § 402A cmt. *c* (1965). In contrast, premises owners have no meaningful way to incorporate the costs of risks posed by others' products into the pricing of their wholly unrelated activities.

The key point here is that the potential for the plaintiffs' bar to try to bring "copy cat" take home asbestos exposure claims against premises owners was on the horizon when the General Assembly chose to cut off these claims in H.B. 292 / R.C. § 2307.941(A)(1). Premises owners were already being targeted in asbestos litigation. And, as more former asbestos product makers declared bankruptcy, it was almost inevitable that plaintiffs' lawyers would increasingly focus their creative energies on the remaining solvent defendants. It is against this background that the General Assembly adopted R.C. § 2307.941(A)(1). Indeed, as we will explain, since R.C. § 2307.941(A)(1) was enacted, the issue of premises owner liability for take home asbestos exposure claims has come up with some frequency — and is being rejected — in other states.

B. Appellants' Theory Would Render R.C. § 2307.941(A)(1) Meaningless

Plaintiffs-Appellants ask this Court to suspend common sense and engage in a construction of R.C. § 2307.941 that would render R.C. § 2307.941(A)(1) meaningless and violate the legislature's intent. The General Assembly intended R.C. § 2307.941(A)(1) to broadly protect premises owners from claims such as those at issue here that arise from take home or other off-site asbestos exposures. The statute is crystal clear: "A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property." R.C. § 2307.941(A)(1). The statute is dispositive of Appellants' claims.

This Court should reject Appellants' invitation to ignore R.C. § 2307.941(A)(1) and, instead, follow the well-reasoned approach of the Court of Appeals below. *See D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health* (2002) 96 Ohio St. 3d 250, 256, 773 N.E.2d 536, 543 (statutes should be read to "avoid that construction which renders a provision meaningless or inoperative.") (citation omitted). Statutes must be construed to avoid "unreasonable or absurd results," *State ex rel. Yasti v. Ohio Dept. of Youth Servs.* (2005) 107 Ohio St. 3d 262, 267, 838 N.E.2d 658, 664, of the sort advocated here by Appellants. This Court should interpret H.B. 292 "to give meaning to the statute at issue," R.C. § 2307.941(A)(1). *Ford Motor Co. v. Ohio Bur. of Employment Servs.* (1991) 59 Ohio St. 3d 188, 191, 571 N.E.2d 727, 730.

III. R.C. § 2307.941(A)(1) RESTS ON A SOLID COMMON-LAW FOUNDATION

R.C. § 2307.941(A)(1) was written broadly enough to bar all of plaintiffs' claims. The statute rests on a solid common-law foundation. Consequently, even if this Court were to somehow find that the statute does not mean what it says, then Plaintiffs-Appellants' negligence claim still fails as a matter of law because Appellee Goodyear owed no duty of care.

It is well-established that an antecedent duty of care with respect to the interest involved must be established before liability is imposed. *Mussivand v. David* (1989) 45 Ohio St. 3d 314, 318, 544 N.E.2d 265, 270. "There is no formula for ascertaining whether a duty exists," *id.*, but courts do consider (1) "the relationship between the plaintiff and the defendant," *Comm. & Indus. Ins. Co. v. City of Toledo* (1989) 45 Ohio St. 3d 96, 99, 543 N.E.2d 1188, 1192, and (2) the foreseeability of injury." *Id.*; *see also Huston v. Konieczny* (1990) 52 Ohio St. 3d 214, 217, 556 N.E.2d 505, 508 ("In tort law, whether a defendant owes a duty to a plaintiff depends upon the relationship between them. Whether a duty exists depends on the foreseeability of injury.") (internal citations omitted); *Simmers v. Bentley Const. Co.* (1992) 64 Ohio St. 3d 642, 645, 597 N.E.2d 504, 507 ("Under the law of negligence, a defendant's duty to a plaintiff depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position."). Policy considerations also may play a role. *See Wallace v. Ohio Dept. of Comm., Div. of State Fire Marshal* (2002) 96 Ohio St. 3d 266, 274, 773 N.E.2d 1018, 1026.

Contrary to Appellants' theory, foreseeability alone is not the test. *See Estates of Morgan v. Fairfield Family Counseling Ctr.* (1997) 77 Ohio St. 3d 284, 293, 673 N.E.2d 1311, 1319 ("foreseeability alone is not always sufficient to establish the existence of a duty."), *reconsideration denied* (1997) 78 Ohio St. 3d 1429, 676 N.E.2d 534 (superseded on other grounds by statute); *see also Abrams v. Worthington* (10th Dist. 2006) 169 Ohio App. 3d 94, 99, 861 N.E.2d 920, 923 ("foreseeability alone does not necessarily impose a duty to act."), *appeal not allowed* (Ohio 2007) 113 Ohio St. 3d 1468, 864 N.E.2d 654.

For example, in *Simpson v. Big Bear Stores Co.* (1995) 73 Ohio St. 3d 130, 652 N.W.2d 702, a supermarket customer exited the store and was assaulted in a parking lot adjacent to the store premises. This Court held that the special relationship of business owner/invitee existed

between the store and the customer while the customer was on the store premises. Once the customer left the store, however, the relationship ended. Therefore, even if the assault had been foreseeable, the supermarket had no duty to prevent the assault of the customer once she left its premises. The Court explained, "Foreseeability alone is insufficient to create liability." 73 Ohio St. 3d at 134, 652 N.W.2d at 705; *see also Howard v. Chattahoochies's Bar* (3d Dist. 2008) 175 Ohio App. 3d 578, 587, 888 N.E.2d 462, 468 (no duty to person assaulted in parking lot after bar had closed). The Court in *Simpson* added, "Any extension of the current law would only add confusion and unpredictability." 73 Ohio St. 3d at 135, 652 N.W.2d at 705. The same issues apply to the claims against premises owners for off-site exposures to asbestos.

R.C. § 2307.941(A)(1) reflects Ohio common-law. Here, there was *no* relationship between Appellee Goodyear and the decedent, negating at least one prong of Ohio's duty test. Plaintiffs-Appellants' negligence claim fails on that basis alone. Failure to present evidence on the foreseeability issue would provide an additional basis to dispose of Appellants' claim. Finally, as we will explain, important policy considerations, such as potential open-ended liability, support the interpretation that R.C. § 2307.941(A)(1) bars Plaintiffs-Appellants' claim and that no common-law duty was owed.

IV. R.C. § 2307.941(A)(1) REFLECTS THE APPROACH TAKEN BY STATES THAT UTILIZE AN OHIO-LIKE DUTY APPROACH; THESE STATES HAVE UNIFORMLY REJECTED PREMISES OWNER LIABILITY FOR TAKE HOME ASBESTOS EXPOSURE

R.C. § 2307.941(A)(1) not only reflects Ohio common-law, but is also consistent with the approach taken by other states that utilize a similar test for duty determinations. "In jurisdictions, like [Ohio], where the duty analysis focuses on the relationship between the plaintiff and the defendant, and not simply the foreseeability of injury, the courts *uniformly* hold that an employer/premises owner owes *no* duty to a member of a household injured by take home

exposure to asbestos." *In re Asbestos Litig.* (Del. Super. Dec. 21, 2007) 2007 WL 4571196, at *8 (emphasis added), *reargument denied* (Del. Super. Mar. 21, 2008) 2008 WL 1735070, *aff'd sub nom. Riedel v. ICI Americas, Inc.* (Del. 2009) 968 A.2d 17.

For example, the Michigan Supreme Court in *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller v. Ford Motor Co.)* (Mich. 2007) 740 N.W.2d 206, held that a property owner (Ford Motor) did not owe a duty to protect plaintiff from asbestos fibers carried home on the clothing of a family member who worked at a Ford plant. Michigan's duty law is comparable to Ohio: "Before a duty can be imposed there must be a relationship between the parties and the harm must have been foreseeable." 740 N.W.2d at 213.

As here, the *Miller* plaintiff "had never been on or near defendant's property and had no further relationship with defendant" outside of being a household member of someone who worked on its premises. *Id.* at 216. Therefore, the court found, "the 'relationship between the parties' prong of the duty test, which is the most important prong in this state, strongly suggests that no duty should be imposed." *Id.* Additionally, the court concluded, "no duty should be imposed because protecting every person with whom a business's employees . . . come into contact, or even with whom their clothes come into contact, would impose an extraordinary and unworkable burden." *Id.* at 217.

New York's highest court, with one justice abstaining, unanimously reached the same conclusion in *In re New York City Asbestos Litig.* (*Holdampf v. A.C. & S., Inc.*) (N.Y. 2005) 840 N.E.2d 115.; *see also In re Eighth Jud. Dist. Asbestos Litig.* (*Rindfleisch v. AlliedSignal, Inc.*) (N.Y Sup. Ct. 2006) 12 Misc. 3d 936, 815 N.Y.S.2d 815. *Holdampf* involved an action by the spouse of a former Port Authority employee whose wife developed mesothelioma from washing her husband's asbestos-soiled work clothes. The court rejected plaintiff's foreseeability

approach, explaining that "foreseeability bears on the scope of a duty, not whether a duty exists in the first place." 840 N.E.2d at 150. Under New York law, a duty may arise only "when there is a relationship either between the defendant and a third-person tortfeasor." *Id.* (quoting *Hamilton v. Beretta U.S.A. Corp.* (N.Y. 2001) 750 N.E.2d 1055, 1061).

The *Holdampf* court found that there was "no relationship" between the Port Authority and the plaintiff that would give rise to a duty owed, "much less that of master and servant (employer and employee), parent and child or common carrier and passenger" – examples where liability has been imposed in other cases. 840 N.E.2d at 150.

The court further stated that the duty rule sought by plaintiffs would be unworkable in practice and unsound as a matter of policy. The court expressed skepticism that a new duty rule could be crafted to avoid potentially open-ended liability for premises owners. The appellate court had tried to avoid this problem by limiting its holding to members of the employee's household, but the state's highest court said this "line is not so easy to draw." *Id.* at 153. The new duty rule could potentially cover anyone who might come into contact with a dusty employee or that person's dirty clothes, such as a baby-sitter or an employee of a local laundry.

In *CSX Transportation, Inc. v. Williams* (Ga. 2005) 608 S.E.2d 208, the Georgia Supreme Court unanimously held, "Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace." *Id.* at 210. The court noted that in Georgia, as in New York, foreseeability of harm had been rejected as the sole basis for extending a duty of care. *Id.* at 209. The court also said that its decision was guided by important public policy considerations: "The recognition of a common-law cause of action under the circumstances of this case would . . . expand traditional tort concepts beyond manageable bounds and create an

almost infinite universe of potential plaintiffs." *Id.* (quoting *Widera v. Ettco Wire and Cable Corp.* (N.Y. App. Div. 1994) 204 A.D.2d 306, 307-08, 611 N.Y.S.2d 569,571, *leave denied*, (N.Y. 1995) 650 N.E.2d 414).

Most recently, the Delaware Supreme Court in *Riedel v. ICI Americas Inc.* (Del. 2009) 968 A.2d 17, affirmed summary judgment in favor of defendant on a nonfeasance theory of negligence because of the lack of a relationship between plaintiff and her husband's employer.

Other courts that have recently rejected take home asbestos exposure claims include state appellate courts in Illinois, Texas, and Iowa, *see Nelson v. Aurora Equip. Co.* (Ill. App. 2009) 909 N.E.2d 931; *Alcoa, Inc. v. Behringer* (Tex. App.—Dallas 2007) 235 S.W.3d 456; *Van Fossen v. MidAmerican Energy Co.*, (Iowa Ct. App. Jan. 16, 2008) 746 N.W.2d 278, 2008 WL 141194 (unpublished table decision), *review granted*, No. 06-1691 (Iowa Apr. 3, 2008); a federal appellate court applying Kentucky law, *see Martin v. Cincinnati Gas & Elec. Co.* (6th Cir. 2009) 561 F.3d 439; and a federal district court applying Pennsylvania law, *see Jesensky v. A-Best Prods. Co.* (W.D. Pa. Dec. 16, 2003) 2003 WL 25518083 (magistrate judge recommending grant of summary judgment to Duquesne Light Co., finding that the company owed no duty to plaintiff), *adopted* (W.D. Pa. Feb. 17, 2004) 2004 WL 5267498, *aff'd on other grounds* (3d Cir. 2008) 287 Fed. Appx. 968 (unpublished), *cert. denied* (2009) 129 S. Ct. 1614. Earlier, a Maryland appellate court reached the same conclusion. *See Adams v. Owens-Illinois, Inc.* (Md. Ct. Spec. App. 1998) 705 A.2d 58, 66 ("If liability for exposure to asbestos could be premised on [decedent's] handling of her husband's clothing, presumably Bethlehem [the premises owner] would owe a duty to others who came into close contact with [decedent's husband], including other family members, automobile passengers, and co-workers. Bethlehem owed no duty to strangers based upon providing a safe workplace for employees."). In Kansas, as in Ohio, claims

against premises owners for off-site asbestos exposures are statutorily barred. *See* Kan. Stat. Ann. § 60-4905(a).

"In nearly every instance where courts *have* recognized a duty of care in a take home exposure case, the decision turned on the court's conclusion that the foreseeability of risk was the primary (if not only) consideration in the duty analysis." *In re Asbestos Litig.*, 2007 WL 4571196, at *11 (emphasis in original).[3] As stated, this is not the approach utilized in Ohio.

For instance, the New Jersey Supreme Court in *Olivo v. Owens-Illinois, Inc.* (N.J. 2006) 895 A.2d 1143, described the "foreseeability of harm" as "a crucial element in determining whether imposition of a duty on an alleged tortfeasor is appropriate." *Id.* at 1148. The court said, "to the extent [defendant] owed a duty to workers on its premises for the foreseeable risk of exposure to friable asbestos and asbestos dust, similarly, [defendant] owed a duty to spouses handling the workers' unprotected work clothing . . . ." *Id.* at 1149. Likewise, the Tennessee Supreme Court in *Satterfield v. Breeding Insulation, Inc.* (Tenn. 2008) 266 S.W.3d 347, said, "It is foreseeable that the adverse effects of repeated, regular, and extended exposure to asbestos on an employee's work clothes could injure [other] persons. . . . Accordingly, the duty we recognize today extends to those who regularly and repeatedly come into close contact with an employee's contaminated work clothes over an extended period of time, regardless of whether they live in the employee's home or are a family member." *Id.* at 374. In *Condon v. Union Oil Co. of Cal.* (Cal. App. Aug. 31, 2004) 2004 WL 1932847, at *5 (unpublished), the court did not engage in a thorough duty analysis, but relied exclusively on the foreseeability factor to summarily conclude

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[3] *But see Alcoa, Inc. v. Behringer* (Tex. App.—Dallas 2007) 235 S.W.3d 456; *Van Fossen v. MidAmerican Energy Co.*, (Iowa Ct. App. Jan. 16, 2008) 746 N.W.2d 278, 2008 WL 141194 (unpublished table decision), *review granted*, No. 06-1691 (Iowa Apr. 3, 2008); *Martin v. Cincinnati Gas & Elec. Co.* (6th Cir. 2009) 561 F.3d 439 – all rejecting claims against premises owners.

"it was foreseeable" that workers' family members were at risk of exposure if the workers were exposed.[4] As explained, Ohio law requires more.

Two Louisiana cases, *Chaisson v. Avondale Indus., Inc.* (La. App. 2006) 947 So. 2d 171, and *Zimko v. American Cyanamid* (La. App. 2005) 905 So. 2d 465, *writ denied* (La. 2006) 925 So. 2d 538, also found a duty to exist, but Louisiana relies "heavily upon foreseeability when finding a duty." *Chaisson*, 947 So. 2d at 182.[5] Moreover, in *Zimko*, the court said it found the New York appellate court's decision in *Holdampf* to be "instructive." *Id.* at 483. As explained, that decision was overturned by the New York Court of Appeals after *Zimko* was decided. The Michigan Supreme Court noted this history when it declared, "we do not find *Zimko* to be persuasive." *Miller*, 740 N.W.2d at 215. Furthermore, the validity of *Zimko* has been called into question in Louisiana:

> *One must clearly understand the factual and legal basis upon which Zimko was premised and its history.*
>
> *Zimko* was a 3 to 2 decision of this court. [The father's employer] was found liable to the plaintiff and [plaintiff's' employer] was found not liable to the plaintiff. Neither [company] sought supervisory review from the Louisiana Supreme Court, but the plaintiff did on the issue of the liability of [his employer]. . . . Thus, the Supreme Court was not reviewing the correctness of the majority opinion respecting [the liability of the father's employer]. . . . *Any person citing Zimko in the future should be wary of the majority's opinion in Zimko in view of the Louisiana Supreme Court never being requested to review the correctness of the liability of American Cyanamid.*
>
> The Court of Appeals of New York (that state's highest court) briefly alluded to the problem in *Zimko* in the case of *In re New York City Asbestos Litigation*. . . and chose not to follow *Zimko*.

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[4] Furthermore, California Rule of Court 977(a) prohibits courts and parties from citing or relying on unpublished opinions, so *Condon* has no authoritative value, even in California.

[5] In *Chaisson,* the court made crystal clear that its holding was limited to the facts and circumstances of that particular case. The court did not find a categorical duty rule. *See Chaisson*, 947 So. 2d at 184, *see also id.* at 200 (*per curiam* opinion on rehearing).

Thomas v. A.P. Green Indus., Inc. (La. App. 2006) 933 So. 2d 843, 871-72 (Tobias, J., concurring) (emphasis added).

Finally, an unpublished Washington appellate decision, *Rochon v. Saberhagen Holdings, Inc.* (Wash. App. Aug 13, 2007) 140 Wash. App. 1008, 2007 WL 2325214 (unpublished), applied a different analytical approach than the one used in Ohio. See *In re Asbestos Litig.*, 2007 WL 4571196, *11 n.83. ("It is . . . clear that, like Tennessee, New Jersey, and Louisiana, Washington emphasizes the foreseeability of injury when determining whether a duty exists.").

In sum, R.C. § 2307.941(A)(1) was written broadly enough to bar all of plaintiffs' claims. The statute is dispositive. It also rests on a solid foundation. Should the Court look further, it should apply traditional Ohio law and reject Appellants' theory, joining the many recent courts that uniformly rejected similar claims when applying an Ohio-like duty test.

V. THE BROAD NEW DUTY RULE SOUGHT BY PLAINTIFF IS UNSOUND AND WOULD HAVE PERVERSE RESULTS: ASBESTOS LITIGATION WOULD WORSEN AND OTHER CLAIMS WOULD RISE

When the General Assembly adopted R.C. § 2307.941(A)(1), it clearly appreciated that allowing claims against landowners by remote plaintiffs injured off-site would exacerbate the current asbestos litigation. *See, e.g.,* Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for "Take Home" Exposure Claims*, 21:11 Mealey's Litig. Rep.: Asbestos 32 (July 5, 2006). As one commentator has explained,

> If the law becomes clear that premises-owners or employers owe a duty to the family members of their employees, the stage will be set for a major expansion in premises liability. The workers' compensation bar does not apply to the spouses or children of employees, and so allowing those family members to maintain an action against the employer would greatly increase the number of potential claimants.

Patrick M. Hanlon, *Developments in Premises Liability Law 2005*, *in* Asbestos Litigation in the 21st Century (ALI-ABA Course of Study, 2005), *available at* SL041 ALI-ABA 665, at *694 (Westlaw).

R.C. § 2307.941(A)(1) should be interpreted to bar Plaintiffs-Appellants' claim. Otherwise, future potential plaintiffs might include anyone who came into contact with an exposed worker or his or her clothes. Such plaintiffs could include co-workers, children living in the house, extended family members, renters, house guests, baby-sitters, carpool members, bus drivers, and workers at commercial enterprises visited by the worker while wearing work clothes, as well as local laundry workers or others who handled the worker's clothes. *See Miller*, 740 N.W.2d at 219; *see also In re Asbestos Litig.*, 2007 WL 4571196, at *12 ("[T]here is no principled basis in the law upon which to distinguish the claim of a spouse or other household member . . . from the claim of a house keeper or laundry mat operator who is exposed while laundering the clothing, or a co-worker/car pool passenger who is exposed during rides home from work, or the bus driver or passenger who is exposed during the daily commute home, or the neighbor who is exposed while visiting with the employee before he changes out of his work clothing at the end of the day."), *Holdampf*, 840 N.E.2d at 122 (fearing that to expand duty would raise the "specter of limitless liability," perhaps resulting in liability to family babysitter or employees of a neighborhood laundry). The history of asbestos litigation makes clear that, with respect to those types of claims, "if you build it, they will come."

Moreover, potential defendants would not be limited to corporate property owners like Goodyear. Landlords and private homeowners also might be liable for secondhand exposures that originate from their premises. In an attempt to reach for homeowners' insurance policies,

private individuals could be swept into the "dragnet search" for potentially responsible parties in asbestos cases.

CONCLUSION

For these reasons, the Court should affirm the trial court's decision granting summary judgment to Defendant-Appellee Goodyear.

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Dated: September 18, 2009

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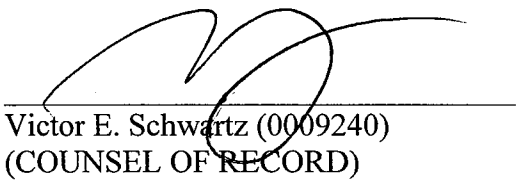

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