UNITED STATE COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-3102

KAREN JESENSKY and ANTHONY JESENSKY, her husband,	
Appellants,	**On Appeal from the Final Orders of the United States District Court for the Western District of Pennsylvania**
v.	
DUQUESNE LIGHT COMPANY, GATEWAY INDUSTRIAL SUPPLY, McCARLS, INC. and THIEM CORP.,	
Appellees.	

MOTION FOR LEAVE TO FILE BRIEF AND *AMICI CURIAE* BRIEF OF THE COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND AMERICAN CHEMISTRY COUNCIL SUPPORTING AFFIRMANCE OF GRANT OF SUMMARY JUDGMENT TO APPELLEE DUQUESNE LIGHT COMPANY

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MOTION OF THE COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND AMERICAN CHEMISTRY COUNCIL FOR LEAVE TO FILE *AMICI CURIAE* BRIEF SUPPORTING AFFIRMANCE OF GRANT OF SUMMARY JUDGMENT TO APPELLEE DUQUESNE LIGHT COMPANY

The Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, National Association of Manufacturers, American Insurance Association, Property Casualty Insurers Association of America, and American Chemistry Council – collectively "*amici*" – request leave to file the accompanying brief supporting affirmance of the trial court's grant of summary judgment to Appellee Duquesne Light Company.

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.

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. 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 1,000 *amicus curiae* briefs in state and federal courts.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every

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[1] The Coalition for Litigation Justice includes ACE-USA companies, 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.

industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto

premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry. In light of its involvement in Pennsylvania, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

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.

* * *

The United States Supreme Court has echoed this Court in describing the asbestos litigation environment as a "crisis," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997); *see also In re Congoleum Corp.*, 426 F.3d 675, 693 (3d Cir. 2005) ("The flood of asbestos litigation has been a serious problem for the courts of this country. . . ."). The Pennsylvania Supreme Court has expressed concern with "the heavy toll that asbestos litigation is visiting upon certain Commonwealth

corporations," *Ieropoli v. AC&S Corp.*, 842 A.2d 919, 932 (Pa. 2004), and has noted the "unprecedented avalanche" of claims that have been filed. *Id.* at 936 (Saylor, J., dissenting). The court was a pioneer in restricting mass filings by the non-sick, holding that asymptomatic claimants have no cause of action. *See Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996).[2] The subject action must be considered against this background.

Here, the Court must decide whether a premises owner may be liable under Pennsylvania law for injuries to remote plaintiffs as a result of secondhand exposure to asbestos or other substances emitted in the workplace. Premises owner liability for off-site exposure is a newer issue in asbestos litigation. In earlier years, the litigation was focused mostly on the manufacturers of asbestos-containing products. After most of those "traditional defendants" declared bankruptcy, plaintiffs' lawyers began to target "peripheral defendants," including premises owners for alleged harms to independent contractors. This case will determine whether Pennsylvania premises owners will be subjected to a new round of claims involving secondarily exposed "peripheral plaintiffs."

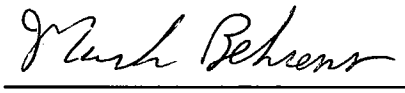
---

[2] *See also* Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, 6:6 Briefly 4 (Nat'l Legal Center for the Pub. Interest June 2002); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002).

A broad new duty rule for landowners could allow plaintiffs' lawyers to begin to name countless scores of employers and other landowners directly in asbestos and other toxic tort suits. The impact would be to augment these litigations and create potentially limitless liability for *amici*'s members.

For these reasons, *amici* request leave to file a brief in this action.

Respectfully submitted,



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Dated: March 12, 2007

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The Coalition for Litigation Justice, Inc., Chamber of Commerce of the United States of America, National Association of Manufacturers, American Insurance Association, Property Casualty Insurers Association of America, and American Chemistry Council – collectively "*amici*" (Appendix A) – ask this Court to affirm the trial court's order granting summary judgment to Appellee Duquesne Light Company.

STATEMENT OF INTEREST

As associations representing asbestos premises defendants and their insurers, *amici* have a significant interest in ensuring that tort rules follow traditional principles and reflect sound public policy. Here, the Court must decide whether a premises owner may be liable under Pennsylvania law for injuries to remote

plaintiffs as a result of secondhand exposure to asbestos or other substances emitted in the workplace. The action involves a family member of an independent contractor who carried asbestos home from work on his person and work clothes.

Premises owner liability for off-site exposure to asbestos is a newer issue in asbestos litigation. In earlier years, the litigation was focused mostly on the manufacturers of asbestos-containing products. After most of those "traditional defendants" declared bankruptcy, plaintiffs' lawyers began to target "peripheral defendants," including premises owners. This case will determine whether Pennsylvania law would subject premises owners to a new round of claims involving secondarily exposed "peripheral plaintiffs." Imposition of a duty here could create limitless and indefinite liability for *amici*'s members.

STATEMENT OF FACTS

Amici adopt Appellee Duquesne Light's Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The United States Supreme Court has echoed this Court in describing the asbestos litigation environment as a "crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). The Pennsylvania Supreme Court has expressed concern with "the heavy toll that asbestos litigation is visiting upon certain Commonwealth corporations," *Ieropoli v. AC&S Corp.*, 842 A.2d 919, 932 (Pa. 2004), and has

noted the "unprecedented avalanche" of claims. *Id.* at 936 (Saylor, J., dissenting). The court was a pioneer in restricting mass filings by the non-sick. *See Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996) (asymptomatic claimants have no cause of action). The subject action must be considered against this background. A new duty rule for premises owners could subject employers, landlords, and even private homeowners to asbestos and other toxic tort lawsuits. The asbestos litigation environment would worsen.

ARGUMENT

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

Nationally, the vast majority of recent asbestos claimants are not impaired and likely never will be. *See* Stephen J. Carroll *et al., Asbestos Litigation* 76 (RAND Inst. for Civil Justice 2005) [hereinafter RAND Rep.]. Mass screenings have "driven the flow of new asbestos claims by healthy plaintiffs." Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 5 (2003).[1] It is

[1] *See also Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms."). Many X-ray interpreters hired to screen cases are "so biased that their readings [are] simply unreliable." *Id.* at 723; *see also* Am. Bar Ass'n Comm'n on Asbestos Litig., *Report to the House of Delegates* (2003); Joseph N. Gitlin *et al., Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiology 843 (2004).

estimated that over one million workers have undergone attorney-sponsored screenings. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33, 69 (2003).

The crush of asbestos filings, both nationally and in Pennsylvania, has "pushed otherwise viable companies into bankruptcy," *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2005), including an estimated eighty-five employers. *See* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29. The impacts have been devastating for the companies' employees, retirees, shareholders, and for the affected communities. *See* Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms,* 12 J. Bankr. L. & Prac. 51 (2003); Jesse David, *The Secondary Impacts of Asbestos Liabilities* (Nat'l Econ. Research Assocs., Jan. 23, 2003).

As a result, "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. One well-known 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).[2] Nontraditional defendants now account for more than one-half of asbestos expenditures. *See* RAND Rep. at 94.

II. THIS COURT SHOULD HOLD THAT LANDOWNERS OWE NO DUTY TO REMOTE PLAINTIFFS INJURED OFF-SITE THROUGH SECONDHAND EXPOSURE TO ASBESTOS

A. Most Courts Have Rejected Such Liability

Since 2005, several courts have had the opportunity to decide whether landowners may be liable to non-employees for harms allegedly caused by remote exposures to asbestos and other substances emitted in the workplace. Most of the courts rejected this duty. The few decisions that imposed liability reflect unsound policy and are distinguishable from Pennsylvania law.

1. Georgia: *CSX Transportation, Inc. v. Williams*

The Georgia Supreme Court in *CSX Transp., Inc. v. Williams,* 608 S.E.2d 208, 210 (Ga. 2005), unanimously held that "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." The court said an employer's responsibility to provide a safe

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[2] *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1; Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1.

workplace does not extend to non-employees or persons injured off-site. The court also distinguished decisions holding landowners liable for the release of toxins into the environment, explaining the defendant did not "spread[] asbestos dust among the general population, thereby creating a dangerous situation in the world beyond the workplace." *Id.* at 210. The court concluded, "we decline to extend on the basis of foreseeability the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace." *Id.*

2. New York: *In re New York City Asbestos Litigation (Holdampf v. A.C. & S., Inc.) and In re Eighth Judicial District Asbestos Litigation (Rindfleisch v. AlliedSignal, Inc.)*

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.)*, 840 N.E.2d 115 (N.Y. 2005). The court explained duty determinations should not be defined solely by the foreseeability of harm, "otherwise a defendant would be subjected to 'limitless liability to an indeterminate class of persons conceivably injured' by its negligent acts." *Id.* at 119 (quoting *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1060 (N.Y. 2001)). Rather, courts must balance a variety of factors, including the reasonable expectation of parties and society generally, the likelihood of unlimited liability, and public policy.

The court said an employer's duty to provide a safe workplace is limited to employees.[3] The court also held the defendant did not owe a duty to the plaintiff as a landowner. New York recognizes a landowner's duty of reasonable care can run to the surrounding community, such as when mining practices carried out on the landowner's property cause the negligent release of toxins into the ambient air, but the off-site exposure in *Holdampf* was "far different from" those situations. *Id.* at 121. Plaintiff's exposure came from handling her husband's work clothes, not from the release of "asbestos into the community generally." *Id.*

The court concluded the duty rule sought by plaintiffs would not only upset traditional tort law rules, but would be unworkable in practice and unsound as a matter of policy. The 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. The court also expressed skepticism regarding plaintiffs' contention that the incidence of disease from secondhand

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[3] *See also Widera v. Ettco Wire and Cable Corp.*, 611 N.Y.S.2d 569 (N.Y. App. Div. 1994), *leave denied*, 650 N.E.2d 414 (N.Y. 1995) (employer had no duty to employee's family member as a result of exposure to toxins brought home from the workplace on employee's work clothes); *Ruffing v. Union Carbide Corp.*, 766 N.Y.S.2d 439 (2d Dept. 2003) (worker whose pregnant wife was exposed to toxic substances carried home by worker, resulting in daughter's birth defects, failed to state cause of action against employer).

asbestos exposure is limited. That court said, "experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality." *Id.*

Recently, a New York trial court in *In re Eighth Judicial Dist. Asbestos Litig. (Rindfleisch v. AlliedSignal, Inc.),* 815 N.Y.S.2d 815 (N.Y. Sup. Ct. 2006), refused to distinguish *Holdampf* and found no duty for harms caused by secondary asbestos exposures that occurred after the adoption of federal Occupational Safety & Health Act (OSHA) regulations that required employers to provide workers with protective work clothing, changing rooms, or shower and laundry facilities, and to inform workers that soiled work clothing could contain asbestos. Plaintiff argued it was foreseeable that if OSHA regulations were not followed, asbestos-laden materials could be carried into the household, causing harm to third parties.

The court again held the creation of a duty did not depend on the mere foreseeability of harm: "A line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of expending exposure to tort liability almost without limit." *Id.* at 820 (quoting *DeAngelis v. Lutheran Med. Center*, 449 N.E.2d 406, 407-08 (N.Y. 1983)). The court concluded it must be "cautious of creating an indeterminate class of potential plaintiffs" and, therefore, declined to find a duty owed to the plaintiff. *Id.*

3. Tennessee: *Satterfield v. Breeding Insulation Co.*

A Tennessee trial court reached the same conclusion in *Satterfield v. Breeding Insulation Co.*, No. L-14000 (Tenn. Cir. Ct., Blount County, Mar. 21, 2006) (Appendix B), arising from the death of a child from secondhand asbestos exposure. The court held Tennessee law "does not stand for the broad extension of the duty of an employer to third parties as argued by the Plaintiffs in this case."

4. Texas: *Exxon Mobil Corp. v. Altimore*

More recently, a Texas appellate court in *Exxon Mobil Corp. v. Altimore*, 2006 WL 3511723 (Tex. App.-Hous. Dec. 7, 2006), unanimously overturned an almost $2 million trial verdict and held a premises owner owed no duty to an employee's wife injured by pre-1972 exposure to asbestos brought home on her husband's work clothing. The court said the defendant could not be charged with knowledge of the take-home risk of exposure until after OSHA adopted an asbestos exposure standard in 1972 and prohibited employers from allowing workers to take their work clothes home if the worker had been exposed to asbestos. Earlier studies supporting a connection between direct exposure and harm could not support a duty with respect to household exposures prior to 1972, because "there were still mixed messages from the medical and scientific community on the risks associated with asbestos exposure" for secondarily exposed persons. *Id.* at *8. The court said: "[Plaintiff] argues that knowledge of

a risk of harm to someone creates a duty of care to everyone. We disagree this is the law of Texas." *Id.*

The court then found after the 1972 OSHA regulations were adopted, "the risk to [plaintiff] of contracting a serious illness had become foreseeable, triggering, for the first time a duty to protect [plaintiff] and those persons similarly situated." *Id.* By that time, however, the employee was not exposed to asbestos, so no duty was owed.

B. Arguments for Liability Rest on a Weak Foundation

This Court should find Pennsylvania would follow the Georgia and New York decisions and reject the adoption of a new duty rule here.

1. Louisiana: *Zimko v. American Cyanamid* and *Chaisson v. Avondale Industries, Inc.*

Plaintiff cites a Louisiana case, *Chaisson v. Avondale Indus., Inc.*, 2006 WL 3849920 (La. Ct. App., Dec. 20, 2006, and another Louisiana case the *Chaisson* court relied upon, *Zimko v. Am. Cyanamid*, 905 So. 2d 465 (La. Ct. App. 2005), *writ denied*, 925 So. 2d 538 (La. 2006), which found a duty to exist for off-site, secondhand asbestos exposure.

Zimko involved a plaintiff who claimed he developed mesothelioma from household exposure to asbestos fibers that clung to his father and his father's work clothes. The *Zimko* plaintiff also attributed his disease to exposures at his own

place of employment. The Louisiana appellate court, without engaging in an independent analysis, concluded the father's employer owed a duty of care to the son. In recognizing this duty, the court said it found the New York appellate court's decision in *Holdampf* to be "instructive." *Id.* at 483.

Zimko provides only flimsy support for plaintiff's theory here. First, the New York appellate court decision the *Zimko* court found to be "instructive" was overturned by the New York Court of Appeals after *Zimko* was decided. Furthermore, the validity of *Zimko* was recently called into question in *Thomas v. A.P. Green Indus., Inc.*, 933 So. 2d 843 (La. Ct. App. 2006). The case did not involve secondhand asbestos exposure, but was a typical premises owner liability case brought by an exposed worker. A justice who wrote a concurring opinion warned against any reliance *on Zimko*:

> *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*.

Thomas, 933 So. 2d at 871-72 (Tobias, J., concurring) (emphasis added).

Chaisson also appears to depart from Pennsylvania law in that Louisiana jurisprudence relies heavily upon the foreseeability of harm in determining the existence of a duty. Pennsylvania law is more closely aligned with Georgia and New York law and requires an analysis of various factors in addition to mere foreseeability. *See Sharpe v. St. Luke's Hosp.*, 821 A.2d 1215, 1219 (Pa. 2003).

2. New Jersey: *Olivo v. Owens-Illinois, Inc.*

Plaintiff also cites a New Jersey Supreme Court decision, *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006), which departed from the Georgia and New York high court decisions and held, "to the extent that Exxon Mobil owed a duty to workers on its premises for the foreseeable risk of exposure to [asbestos], similarly, Exxon Mobil owed a duty to spouses handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos brought home on contaminated clothing." *Id.* at 1149.

Importantly, the court emphasized that, unlike other states, New Jersey law views forseeability as "determinant" in establishing the defendant's duty of care. *Id.* at 1148. The court remanded the case for further consideration, concluding

there were genuine issues of material fact about the extent of the duty Exxon Mobil owed to the plaintiff, and whether Exxon Mobil satisfied that duty.

Again, however, Pennsylvania law is more closely aligned with Georgia and New York law – and departs from New Jersey – by requiring an analysis of various factors in addition to mere foreseeability in deciding the existence of a duty: (1) the relationship of the parties; (2) the utility of the defendant's conduct; (3) the nature and foreseeability of the risk in question; (4) the consequences of imposing the duty; and (5) the overall public interest in the proposed solution. *See Sharp*, 821 A.2d at 1219; *Althaus v. Cohen*, 756 A.2d 1166, 1169 (Pa. 2000). "No one of these five factors is dispositive," *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1008 (Pa. 2003), but social policy has been described as "the most important factor." *McCandless v. Edwards*, 908 A.2d 900, 904 (Pa. Super. Ct. 2006). Thus, Pennsylvania courts have declined to impose liability even where the injury was foreseeable. *See Lindstrom v. City of Corry*, 763 A.2d 394, 397 (Pa. 2000); *Salvatore v. State Farm Mut. Auto. Ins. Co.*, 869 A.2d 511, 515 (Pa. Super. Ct. 2005); *Cruet v. Certain-Teed Corp.*, 639 A.2d 478, 479-480 (Pa. Super. Ct. 1994).

C. The Broad New Duty Rule Sought by Appellants Is Unsound and Would Have Perverse Results: Asbestos Litigation Would Worsen and Other Claims Would Rise

As a practical matter, judicial adoption of a new cause of action against landowners by remote plaintiffs injured off-site would exacerbate the current

asbestos litigation and augment other toxic tort claims. A broad new duty requirement for landowners would allow plaintiffs' lawyers to begin to name countless premises owners directly in asbestos and other suits.

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, babysitters, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he was dirty, as well as local laundry workers or others that handled the worker's clothes.[4]

Moreover, potential defendants may not be limited to corporate property owners like Appellees. 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. Any attempt to limit a rule of liability to reasonably foreseeable plaintiffs is likely to be no limit

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[4] *See Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) ("If liability for exposure to asbestos could be premised on [plaintiff's] handling of her husband's clothing, presumably [the premises owner] would owe a duty to others who came into close contact with [plaintiff's husband], including other family members, automobile passengers, and co-workers. [Defendant] owed no duty to strangers based upon providing a safe workplace for employees.").

at all. Creation of a new duty rule for premises owners based on secondary exposures to asbestos could generate a "next wave" in asbestos litigation, resulting in significant negative consequences for courts and premises owners.

CONCLUSION

For these reasons, *amici* ask this Court to affirm the trial court's order granting summary judgment to Appellee Duquesne Light.

Respectfully submitted,

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Dated: March 12, 2007

APPENDIX A

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.

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. 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 1,000 *amicus curiae* briefs in state and federal courts.

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[1] The Coalition for Litigation Justice includes ACE-USA companies, 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 National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies.

PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry. In light of its involvement in Pennsylvania, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

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.

APPENDIX B

State of Tennessee

Fifth Judicial District

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W. Dale Young
Judge

CIRCUIT COURT
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MEMORANDUM

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FROM:	W. Dale Young	
DATE:	March 22, 2006	
SUBJECT:	**Satterfield vs. Breeding Insulation Co., et al.** **Blount Circuit No. L-14000**	

Before the Court is a Motion for Judgment on the Pleadings on behalf of ALCOA, Inc. and Plaintiff's Motion to Strike filings of ALCOA, Inc. which supplement the Motion for Judgment on the Pleadings. Oral argument in connection with these Motions was heard by the Court on January 30, 2006 and taken under advisement.

The death of a child inflicts upon the child's parents the most terrible pain imaginable. The Court's heart goes out to the Satterfield family and to the friends, relatives and acquaintances of Amanda Nicole Satterfield. While no words will ever suffice, the parents, friends, relatives and acquaintances of Ms. Satterfield should know that the Court understands this case to be one about an invaluable life taken long before its time.

It is not, however, sympathy for this fine family that this Court can consider; the legal issues are the only issues to be considered by the Court.

As to Plaintiff's Motion to Strike Defendant ALCOA's filings in connection with its Motion for Judgment on the Pleadings, the Court has carefully considered those filings and finds the Motion is not well-taken and is overruled.

The sole and only issue remaining before the Court is whether or not, as a matter of law, ALCOA, Inc. owed a legal duty to Amanda Nicole Satterfield.

At first blush, the Court readily concludes that there is no provision in Tennessee law (either through the Legislature or Court interpretation) which imposes on Defendant ALCOA, Inc. a legal duty to a third party under the facts and circumstance of this case.

Plaintiff insists that the case of **West, et al v. East Tennessee Pioneer Oil, d/b/a Exxon Convenience Store, 172 S.W. 3rd 545 (Supreme Court of Tennessee, 2005)** stands for authority that the aforesaid duty has been established in Tennessee and applies to the case at bar.

The Court has read and re-read the **West** case and concludes that there are many distinguishing factors between the case at bar and the **West** situation. While Defendant's brief does not specifically address the **West** case, the distinguishing factors were readily pointed out by Counsel for the Defendant at oral argument.

The Court respectfully concludes that **West** does not stand for the broad extension of the duty of an employer to third parties as argued by the Plaintiffs in this case.

Accordingly, the Court most respectfully grants Defendant ALCOA's Motion for Judgment on the Pleadings, leaving it to consideration by the Tennessee Legislature as to whether it is wise to establish the duty sought to be imposed by Plaintiff in the case at bar.

Mr. Lucas will prepare an appropriate Order, pursuant to the provisions of this Memorandum, submit same to Ms. Wallace for her approval as to form, and the Order will be tendered for entry not later than twenty (20) days from the date of this Memorandum, reserving all issues not herein decided.

CERTIFICATIONS AND PROOF OF SERVICE

I certify that the foregoing brief complies with this Court's type/volume limitation. The brief contains 2,904 words according to the word processing program used to prepare the brief. I also certify that a pdf E-copy of the foregoing was sent electronically to the Clerk's office (electronic_briefs@ca3.uscourts.gov) and that the E-brief and hard copy are identical. A virus check was performed on the E-brief using McAfee VirusScan Enterprise Version 8.0.0. I am a member of the Bar of the United States Court of Appeals for the Third Circuit. I served two hard copies of the subject motion and brief by U.S. Mail, first-class, postage-prepaid, addressed to each of the following:

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