UNITED STATE COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-6385

DAVID MARTIN, Executor of the Estate of Dennis B. Martin,	)	
Plaintiff-Appellant,	)	**On Appeal from Order of the USDC, EDKY,**
v.	)	**at Covington entered**
CINCINNATI GAS AND ELECTRIC CO. GENERAL MOTORS CORP.; GENERAL ELECTRIC COMPANY,	)	**October 29, 2007 by the Hon. David L. Bunning**
Defendants-Appellees.	)	

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN CHEMISTRY COUNCIL SUPPORTING AFFIRMANCE OF GRANT OF SUMMARY JUDGMENT TO APPELLEES CINCINNATI GAS AND ELECTRIC COMPANY AND GENERAL ELECTRIC COMPANY

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INDEX

Page

TABLE OF AUTHORITIES i

QUESTION PRESENTED 1

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF FACTS 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT

I. An Overview of the Litigation Environment in Which the Subject Appeal Must Be Considered. 3

II. The Trial Court Correctly Decided That CG&E Owed No Duty to Plaintiff for Secondhand Exposure to Asbestos During the Relevant Time Period 5

A. Courts That Have Recently Considered the Issue Presented Here Rejected Premises Owner Liability for Secondhand Asbestos Exposures. 6

B. Arguments for Liability Rest on a Weak Foundation. 9

C. The Duty Rule Sought by Plaintiffs Is Unsound and Would Have Perverse Results: Asbestos Litigation Would Worsen and Other Claims Would Rise. 13

III. The Trial Court Correctly Decided That GE Owed No Duty to Plaintiff for Secondhand Exposure to Asbestos During the Relevant Time Period 14

CONCLUSION 15

PROOF OF SERVICE

TABLE OF CASES AND AUTHORITIES

CASES **Page**

Adams v. Owens-Illinois, Inc., 705 A.2d 58 (Md. Ct. Spec. App. 1998) 9

Alcoa, Inc. v. Behringer, 235 S.W.3d 456 (Tex. App.-Dallas 2007)..... 6

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997)..... 2

Chaisson v. Avondale Indus., Inc., 947 So. 2d 171 (La. App. 2006)..... 10

CSX Transp., Inc. v. Williams, 608 S.E.2d 208 (Ga. 2005)..... *passim*

Embs v. Pepsi-Cola Bottling Co. of Lexington, Ky.,
528 S.W. 703 (Ky. 1975)..... 14

Exxon Mobil Corp. v. Altimore, 2007 WL 1174447
(Tex. App.-Hous. Apr. 19, 2007) (withdrawn Aug. 9, 3007)..... 7

Fossen v. MidAmerican Energy Co., 2008 WL 141194
(Iowa App. Jan. 16, 2008) (publication decision pending) 8

In re Asbestos Litig. (Riedel v. ICI Americas, Inc.), 2007 WL 4571196
(Del. Super. Ct. Dec. 21, 2007) (unpublished)..... 8

*In re Certified Question from Fourteenth Dist. Ct. of Appeals of Texas
(Miller v. Ford Motor Co.)*, 740 N.W.2d 206 (Mich. 2007) ..... *passim*

In re Combustion Eng'g, Inc., 391 F.3d 190 (3d Cir. 2005)..... 3

In re Eighth Jud. Dist. Asbestos Litig. (Rindfleisch v. AlliedSignal, Inc.),
12 Misc. 3d 936, 815 N.Y.S.2d 815 (N.Y Sup. Ct. 2006)..... 9

In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.),
840 N.E.2d 115 (N.Y. 2005)..... *passim*

Martin v. General Elec. Co., 2007 WL 2682064 (E.D. Ky. Sep. 5, 2007) .... *passim*

Olivo v. Owens-Illinois, Inc., 895 A.2d 1143 (N.J. 2006)..... 9

Pathways, Inc. v. Hammons, 113 S.W.3d 85 (Ky. 2003)..... 5

Rohrbaugh v. Owens-Corning Fiberglas Corp., 965 F.2d 844 (10th Cir. 1992) 15

Thomas v. A.P. Green Indus., Inc., 933 So. 2d 843 (La. App. 2006) 11

Zimko v. American Cyanamid, 905 So. 2d 465 (La. App. 2005), *writ denied*, 925 So. 2d 538 (La. 2006) 10

OTHER AUTHORITIES

American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims and Trends* 5 (Aug. 2007), *available at* http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf 4

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) 13

Stephen J. Carroll *et al.*, *Asbestos Litigation* (RAND Inst. for Civil Justice 2005) ..... *passim*

Jesse David, *The Secondary Impacts of Asbestos Liabilities* (Nat'l Econ. Research Assocs. Jan. 23, 2003) 4

Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *abstract available at* 2001 WLNR 1993314 4

Patrick M. Hanlon, *Asbestos Litigation in the 21st Century: Developments in Premises Liability Law in 2005*, SL041 ALI-ABA 665, 694 (2005) 13

Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin's Columns – Raising The Bar In Asbestos Litig., Aug. 2004, at 5 4

'Medical Monitoring and Asbestos Litigation' — A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) 5

Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26 4

Joseph E. Stiglitz *et al.*, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003) 4

QUESTION PRESENTED

Whether the district court correctly held that, under Kentucky law, Defendants-Appellees Cincinnati Gas and Electric Co. ("CG&E"), a premises owner, and General Electric Company ("GE"), a supplier of asbestos-containing products, owed no duty to Plaintiff-Appellant with regard to secondhand exposure to asbestos carried home on the clothing and person of Plaintiff's father, a former CG&E employee, between 1951 and 1963.[1]

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent Kentucky companies that are frequently involved in asbestos litigation as defendants, and their insurers. *Amici* are well suited to provide a broad perspective to this Court and explain why this Court should affirm the district court's order.

STATEMENT OF FACTS

Amici adopt Defendant-Appellees' Statement of Facts.

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[1] *Amici* limit their brief to this issue and do not address the district court's grant of summary judgment to Defendant-Appellee General Motors on the ground that decedent's exposure to engines manufactured by General Motors was insufficient to cause mesothelioma.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The United States Supreme Court has described the asbestos litigation as a "crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Now in its fourth decade, the litigation has been sustained by the plaintiffs' bar search for new defendants coupled with new theories of liability. As the litigation evolves, the connection to asbestos-containing products is increasingly remote and the liability connection more stretched. This appeal is an example.

Plaintiff-Appellant seeks to recover from CG&E and GE for injuries allegedly caused by secondhand exposure to asbestos between 1951 and May 1963. The district court found, "Although the general danger of prolonged occupational asbestos exposure to asbestos manufacturing workers was known by at least the mid-1930's, the extension of that harm was not widely known until at least 1972, when OSHA regulations recognized a causal connection." *Martin v. General Elec. Co.*, 2007 WL 2682064, *5 (E.D. Ky. Sep. 5, 2007). Consequently, the court held that, "because it was not reasonably foreseeable to either CG&E or GE during the relevant time period herein that intermittent, nonoccupational exposure to asbestos could put those person [sic] at risk of contracting a serious illness, no duty existed." *Id.* at *9.

The district court's decision is consistent with recent rulings by the highest courts in Michigan, Georgia, and New York; Texas and Iowa appellate courts; a Delaware trial court; and an earlier decision by a Maryland appellate court. The New Jersey Supreme Court is the only court of last resort to go the other way. As we will explain, however, the New Jersey case and others cited by Plaintiff-Appellant are distinguishable and do not support the finding of a duty here. We will also explain how the duty requirement sought here would result in countless scores of employers and landowners being named in asbestos and other toxic tort suits. The impact would be to augment these litigations.

ARGUMENT

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

"For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005). By 2002, approximately 730,000 claims had been filed. *See* Stephen J. Carroll *et al., Asbestos Litigation* xxiv (RAND Inst. for Civil Justice 2005).[2] In August 2006, the Congressional Budget Office estimated that there were about 322,000 asbestos bodily injury cases in state and federal courts. *See*

Am. Acad. of Actuaries' Mass Torts Subcomm., *Overview of Asbestos Claims and Trends* 5 (Aug. 2007).

The litigation has pushed an estimated eighty-five employers into bankruptcy, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, and has had devastating impacts on the companies' employees, retirees, shareholders, and 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 of these 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. One well-known

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[2] RAND has estimated that $70 billion was spent in the litigation through 2002; future costs could reach $195 billion. *See* RAND Rep. at 92, 106.

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). Defendant-Appellee CG&E is an example.

II. THE TRIAL COURT CORRECTLY DECIDED THAT CG&E OWED NO DUTY TO PLAINTIFF FOR OFF-SITE SECONDHAND EXPOSURE TO ASBESTOS DURING THE RELEVANT TIME PERIOD

It is well established that before a defendant may be liable in tort it must owe a duty to the plaintiff. Duty determinations involve issues of "law and policy" and present a "question of law" to be decided by the court. *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). In Kentucky, "[t]he most important factor in determining whether a duty exists is foreseeability." *Id.*

Here, the district court held that the potential for harm from *nonoccupational* asbestos exposure was not foreseeable to a premises owner such as CG&E during the relevant time period (1951-1963). The court explained: "Although the general danger of prolonged occupational asbestos exposure to asbestos manufacturing workers was known by at least the mid-1930's, the extension of that harm was not widely known until at least 1972, when OSHA regulations recognized a causal connection." *Martin*, 2007 WL 2682064, at *5.

A. Courts That Have Recently Considered the Issue Presented Here Rejected Premises Owner Liability for Secondhand Asbestos Exposures

In the most recent pronouncement from a state's highest court, the Michigan Supreme Court in *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller v. Ford Motor Co.),* 740 N.W.2d 206 (Mich. 2007), 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 in the 1950s and 1960s. The primary basis for the court's decision was that plaintiff had never been on Ford's property and had no relationship with Ford. The court also examined the foreseeability of the harm and concluded that no duty should be imposed on that basis. The court said: "From 1954 to 1965, the period during which [plaintiff's stepfather] worked at defendant's plant, *we did not know what we do today* about the hazards of asbestos." *Id.* at 218 (emphasis added). The court concluded, "the risk of 'take home' asbestos exposure was, in all likelihood, *not foreseeable* by defendant while [plaintiff's stepfather] was working at defendant's premises from 1954 to 1965." *Id.* (emphasis added).

In what is perhaps the most analogous case to this one, a Texas appellate court in *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456 (Tex. App.-Dallas 2007), reversed a nearly $15.6 million judgment awarded to the ex-wife of a smelting

plant employee who regularly washed her husband's soiled work clothes from 1953 to 1959 and later developed mesothelioma. The court said that while there was evidence in the record that Alcoa was aware that *occupational* exposure to asbestos posed health risks, "*the danger of nonoccupational exposure to asbestos dust on workers' clothes was neither known nor reasonably foreseeable to Alcoa in 1950s.*" *Id.* at 462 (emphasis added). The record reflected that it was not until 1972 that OSHA regulations recognized a causal connection, and not until 1978 that the first epidemiological study was published on the link between females with mesothelioma and nonoccupational asbestos exposure. *See id.* at 461.[3] As is the case under Kentucky law, foreseeability under Texas law is the "central question" and the "foremost and dominant consideration" in a legal duty analysis. *Id.* at 462.[4]

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[3] The court noted that the first published case study of nonoccupational asbestos exposure was in 1965. Epidemiology studies, however, are the "gold standard" for establishing causation. A case report is nothing more than an occurrence in which a person with a particular exposure also develops a particular disease. If epidemiology has established the link, a case report can potentially reflect a real causative source. In most instances, however, case reports are at best suggestive of a possible link and frequently represent unrelated incidents.

[4] *See also Exxon Mobil Corp. v. Altimore*, 2007 WL 1174447 (Tex. App. Apr. 19, 2007) (withdrawn Aug. 9, 2007) (premises owner owed no duty to an employee's wife injured by exposure to asbestos brought home on her husband's work clothing prior to adoption of 1972 OSHA regulations).

Some courts have rejected duty obligations for even more recent "take home" asbestos exposures. For example, the Iowa Court of Appeals in *Fossen v. MidAmerican Energy Co.*, 2008 WL 141194 (Iowa Ct. App. Jan. 16, 2008) (publication decision pending), affirmed summary judgment in favor of electric utilities at which decedent's husband worked from as late as 1973 to 1977. The court held, "there is no evidence which creates a fact issue as to whether a company in the position of [the utilities] knew or should have known that such exposure to the microscopic fibers created a risk of harm to persons in the position of Mrs. Van Fossen." *Id.* at *2.[5]

Still other courts have rejected the duty sought here without a significant discussion of foreseeability. *See CSX Transp., Inc. v. Williams,* 608 S.E.2d 208, 210 (Ga. 2005) ("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."); *In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.)*, 840 N.E.2d 115 (N.Y. 2005) (employers owe no duty to "take home" asbestos

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[5] *See also In re Asbestos Litig. (Riedel v. ICI Americas, Inc.)*, 2007 WL 4571196, *12 (Del. Super. Ct. Dec. 21, 2007) (unpublished) (concluding that "[e]ven when the foreseeability prong is incorporated into the duty analysis," plaintiffs' "position at the time of the alleged wrong, far removed from [defendant's property], is such that she cannot be considered a reasonably foreseeable victim. . . .").

exposure claimants);[6] *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 [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.").

Amici believe that premises owners should not be found to owe a duty to remote peripheral plaintiffs for off-site, secondhand exposure to asbestos; the district court reached the right result.

B. Arguments for Liability Rest on a Weak Foundation

Plaintiff relies on the New Jersey Supreme Court's decision in *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006), which involved a union welder/steamfitter employed by more than fifty contractors between 1947 and 1984 at numerous sites including a refinery owned by Exxon Mobil. During the course of his employment, plaintiff was exposed to asbestos, and his late wife developed mesothelioma as a result of handling his work clothes. The court held

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[6] *See also In re Eighth Jud. Dist. Asbestos Litig. (Rindfleisch v. AlliedSignal, Inc.),* 12 Misc. 3d 936, 815 N.Y.S.2d 815 (N.Y Sup. Ct. 2006).

that the wife's injury was foreseeable and found that Exxon Mobil owed her a duty of care. Here, Plaintiff's alleged exposures took place much earlier. In contrast to the exposures in *Olivo*, which reached into the early 1980's, Plaintiff's exposure here ended in 1963 – years before the 1972 OSHA regulations that recognized a causal connection and several more years before the 1978 publication of the first epidemiological study linking females with mesothelioma and nonoccupational asbestos exposure.

Plaintiff also cites two Louisiana cases, *Chaisson v. Avondale Indus., Inc.*, 947 So. 2d 171 (La. App. 2006), and *Zimko v. American Cyanamid*, 905 So. 2d 465 (La. 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 that 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 that the *Zimko* court found to be "instructive" 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." *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas,* 740 N.W.2d at 215.

Second, the validity of *Zimko* was recently called into question in *Thomas v. A.P. Green Indus., Inc.*, 933 So. 2d 843 (La. 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).

Third, like *Olivo*, the *Zimko* decision is factually distinguishable from this action because the alleged bystander exposure there occurred "from 1977 until 1990." *Zimko*, 905 So. 2d at 471.

Likewise, *Chaisson* is factually distinguishable from this action because the alleged bystander exposure there occurred "from 1976 to 1978." *Chaisson*, 947 So. 2d at 181. Indeed, the *Chaisson* court noted that the "facts of this case are analogous to *Olivo* and *Zimko*." *Id.* at 183. The court concluded, "[a] reasonable company in similar circumstances as [defendant], *a company aware of the 1972 OSHA standards regarding the hazards of household expose to asbestos*, had a duty to protect third party household members from exposure to asbestos from a jobsite it knew contained asbestos." *Id.* Here CG&E obviously could not have been aware of those standards during the relevant time period because they did not exist and were not promulgated until several years after the exposure ended.

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

A broad new duty requirement for landowners would allow plaintiffs' lawyers to begin to name countless premises owners directly in asbestos and other suits. 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. *See* 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, *Asbestos Litigation in the 21st Century: Developments in Premises Liability Law in 2005*, SL041 ALI-ABA 665, 694 (2005).

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 that handled the worker's clothes. *See In re Certified Question from Fourteenth Dist. Court of Appeals of Texas,* 740 N.W.2d at 219; *In re New York City Asbestos Litig.,* 840 N.E.2d at 122.[7]

Moreover, potential defendants may not be limited to corporate property owners like CG&E. 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.

III. THE TRIAL COURT CORRECTLY DECIDED THAT GE OWED NO DUTY TO PLAINTIFF FOR SECONDHAND EXPOSURE TO ASBESTOS DURING THE RELEVANT TIME PERIOD

Plaintiff states that under strict product liability, the establishment of a bystander duty owed by GE (a product seller) is "*fait accompli,*" citing *Embs v. Pepsi-Cola Bottling Co. of Lexington, Ky.,* 528 S.W. 703 (Ky. 1975), and apparently suggesting that somehow absolute liability may apply. *Embs,* which

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[7] The mid-level appellate court in the New York litigation tried to avoid the potential for open-ended liability by limiting its holding to members of the employee's household. The Court of Appeals wisely appreciated, however, that the "line is not so easy to draw." 840 N.E.2d at 122.

involved a manufacturing flaw, not duty to warn, merely stands for the proposition that strict product liability applies "to bystanders whose injury from the defect is *reasonably foreseeable.*" *Id.* at 706. The bystanders described in *Embs* are those who "purchase most of the same products to which they are exposed as bystanders." *Id.* That is not the case here. *Amici* believe that strict liability should not extend to household exposure claimants because their claims are too attenuated. *See Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844 (10th Cir. 1992) (Oklahoma law). A further reason to deny liability here, as the district court correctly held, is that the hazards of take home asbestos exposure were not reasonably foreseeable during the relevant time period (1937-1955) for GE.

CONCLUSION

For these reasons, *amici* ask this Court to affirm the district court's order granting summary judgment to Defendants-Appellees CG&E and GE.

Respectfully submitted,

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