SUPREME COURT OF NEW JERSEY

ANTHONY OLIVO, Executor of the Estate of Eleanor Olivo, deceased, and in his own right, Plaintiff-Respondent, v. EXXON MOBIL CORP., Defendant-Petitioner OWENS-ILLINOIS, INC.; OWENS-CORNING CORP.; GAF CORPORATION; GARLOCK, INC.; FIBREBOARD CORP.; ARMSTRONG WORLD INDUSTRIES, INC.; TURNER-NEWALL, LTD.; MONSANTO; UNITED STATES GYPSUM CO.; ASBESTOS CLAIMS MANAGEMENT CORP. (f/k/a National Gypsum Co.); FOSTER WHEELER CORP.; FLINTKOTE CO.; FLEXITALLIC, INC.; A.P. GREEN INDUSTRIES, INC.; BRAND INSULATION CO.; A.C.&S., INC.; MELRATH GASKET, INC.; JAM INDUSTRIES, INC.; DURAMETALLIC, INC.; W.R. GRACE CO.; RAPID AMERICAN CORP.; CROWN, CORK & SEAL, itself and as successor to Mundet Cork; RAYTHEON ENGINEERS (formerly United Engineers); U.S. MINERAL PRODUCTS CO.; U.S. RUBBER CO.; E.I. DUPONT DeNEMOURS and COMPANY, INC.; TEXACO INC.; B.F. GOODRICH; SHELL CHEMICAL CORP., Defendants.	:DOCKET NO. 58,040 : :APPELLATE DIVISION :DOCKET NO. A-4328-03T5 : :TRIAL COURT DOCKET :NO. GLO-L-1459-00 : :SAT BELOW: JUDGES CONLEY :BRATHWAITE & LISA, JJ.A.D. : : Civil Action : **:AMICI CURIAE BRIEF OF** **:COALITION FOR LITIGATION** **:JUSTICE, INC., NATIONAL** **:FEDERATION OF INDEPENDENT** **:BUSINESS LEGAL FOUNDATION,** **:AMERICAN CHEMISTRY COUNCIL,** **:PROPERTY CASUALTY INSURERS** **:ASSOCIATION OF AMERICA,** **:AMERICAN TORT REFORM** **:ASSOCIATION, CHAMBER OF** **:COMMERCE OF THE UNITED** **:STATES OF AMERICA, AND** **:NATIONAL ASSOCIATION OF** **:MANUFACTURERS IN SUPPORT OF** **:DEFENDANT-PETITIONER** **:EXXON MOBIL CORPORATION** :

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STATEMENT OF INTEREST

The Coalition for Litigation Justice, Inc. ("Coalition") was formed by insurers as a nonprofit association to address and improve the toxic tort litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future toxic tort 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 before state courts of last resort and the United States Supreme Court that may have a significant impact on the toxic tort litigation environment.

The National Federation of Independent Business Legal Foundation, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The 600,000 members of NFIB own a

[1] The Coalition for Litigation Justice, Inc. includes the following: ACE-USA companies, Chubb & Son, a division of Federal Insurance Company; CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., General Reinsurance Corp., Liberty Mutual Insurance Group, Everest Reinsurance Company, and the Great American Insurance Company.

wide variety of America's independent businesses from manufacturing firms to hardware stores.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $520 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, 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 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 50 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 U.S. property and casualty insurance industry. In 2003, PCI members accounted for 49.5% of the homeowners' insurance premiums in New Jersey, 61.8% of the personal automobile insurance policies issued in New Jersey and wrote $7,272,667,000 of direct written premiums in New Jersey. Thirty-four PCI members are domiciled in New Jersey. In light of its involvement in New Jersey, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

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.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The

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 Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 1000 amicus curiae briefs in state and federal court.

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 50 states. The 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.

STATEMENT OF FACTS

Amici adopt the Statement of Facts of Defendant-Petitioner Exxon Mobil Corp. ("Exxon Mobil"). To summarize, this case involves an independent contractor who worked as a union welder for thirty-seven years at numerous sites, including a refinery owned by Defendant-Petitioner. During the course of his employment, plaintiff was exposed to asbestos. Plaintiff's decedent (his wife) developed mesothelioma as a result of

secondhand exposure to asbestos from washing plaintiff's work clothes. Plaintiff brings this action as executor of his wife's estate.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The subject claim must be considered against the background of the current asbestos litigation environment and the recent increase in silica litigation. Both asbestos and silica claims principally arise from occupational exposures that could give rise to substantial new litigation if the broad new duty rule advocated by plaintiff is adopted.

The United States Supreme Court has said that this country is in the midst of an "asbestos-litigation crisis," Amchem Products, Inc. v. Windsor, 521 U.S. 591, 597 (1997), as a result of the "elephantine mass" of claims that have been filed. Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999). Claims continue to pour in at an extraordinary rate.[2] Over seventy-three employers have been forced into bankruptcy. Due to these bankruptcies, payments to the sick are threatened.[3] More than 8,500 defendants have been named in asbestos cases.

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[2] See Paul F. Rothstein, What Courts Can Do in the Face of the Never-Ending Asbestos Crisis, 71 Miss. L.J. 1 (2001).

[3] See also Mark A. Behrens, Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation, 54 Baylor L. Rev. 331, 333 (2002).

Recently, there has been a marked increase in litigation against industrial sand companies, respirator (dust mask) manufacturers, and makers of other protective safety equipment.[4] These lawsuits are primarily brought by workers who allegedly developed silicosis after being occupationally exposed to silica. Some plaintiffs' lawyers appear to have modified their "asbestos litigation kits" to bring silica claims;[5] some claims are even asbestos "re-treads" - brought by claimants that have already obtained recoveries for asbestos exposure.[6] In June 2005, the manager of the federal silica docket, U.S. District Court Judge Janis Graham Jack of the Southern District of Texas, issued an opinion in which she recommended that all but one of the 10,000 claims on the silica MDL docket should be dismissed on remand because the diagnoses were fraudulently prepared. *See*

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[4] See Mark A. Behrens et al., Silica: An Overview of Exposure and Litigation in the United States, 20:2 Mealey's Litig. Rep.: Asbestos 33 (Feb. 21, 2005); Victor E. Schwartz & Leah Lorber, A Letter to the Trial Judges of America: Help the True Victims of Silica Injuries and Avoid Another Litigation Crisis, 28 Am. J. of Trial Advoc. 296 (2004).

[5] See Susan Warren, Silicosis Suits Rise Like Dust/ Lawyers in Asbestos Cases Target Many of the Same Companies, Wall St. J., Sept. 4, 2003, at B5.

[6] See David Hechler, Silica Plaintiffs Suffer Setbacks: Broad Effects Seen in Fraud Allegations, Nat'l L.J., Feb. 28, 2005, at 18 ("One of the most explosive revelations that has emerged from the [federal silica MDL proceeding] is that at least half of the approximately 10,000 plaintiffs in the silica MDL had previously filed asbestos claims.").

In re Silica Prods. Liab. Litig. (MDL No. 1553), Order No. 29, 2005 WL 1593936 (S.D. Tex. June 30, 2005).

It is against this background that the instant case must be considered. Here, this Court must decide whether a landowner may be held liable for injuries to the spouse of an independent contractor as a result of secondhand exposure to asbestos. The appeal involves injuries allegedly sustained by plaintiff's decedent as a result of handling her husband's asbestos-contaminated clothes during the period he worked at various facilities, including the Defendant-Petitioner's site.

Premises owner liability for off-site exposures to asbestos is a new issue in asbestos litigation, as plaintiffs' lawyers attempt to extend tort law in an improper and unsound way. In late October 2005, New York's highest court, with one justice abstaining, unanimously held that an employer does not owe a duty of care to the spouse of an employee who is harmed as a result of "take home" exposure to asbestos carried home on an employee's work clothes. The New York Court of Appeal's decision, In re New York City Asbestos Litigation (Holdampf v. Port Auth. of N.Y. & N.J.), No. 07863, 2005 WL 2777559 (N.Y. Oct. 27, 2005), marks the second time this year that a state high court has rejected an invitation to impose liability on premises owners in a secondhand asbestos exposure suit. In January, the Georgia Supreme Court unanimously held in CSX

Transportation, Inc. v. Williams, 608 S.E.2d 208, 210 (Ga. 2005), 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." Decided within the year, these cases represent the proper judicial response to the issue.

The New York and Georgia cases, and this appeal, so closely in succession, provide clear evidence that the plaintiffs' asbestos bar intends to pursue premises owner liability for off-site asbestos exposures as a potential "next wave" in the litigation. Lawyers are attempting to reach into the "deep pockets" of "peripheral defendant" premises owners to supplement product liability claims against "traditional defendants" (i.e., former asbestos product manufacturers) that have now mostly been forced into bankruptcy as a result of the avalanche of claims against them.[7]

A broad new duty requirement for landowners could allow plaintiffs' lawyers to begin to name countless scores of employers and other landowners directly in asbestos, silica, and

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[7] See In re Joint E. & S. Dists. Asbestos Litig., 129 B.R. 710, 751 (E.D.N.Y. & S.D.N.Y. 1991) ("Overhanging this massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims."), vacated, 982 F.2d 721 (2d Cir. 1992).

other personal injury suits. The impact would be to exacerbate the current asbestos litigation "crisis" and augment silica as well as other toxic tort claims.

If this Court were to create a duty on premises owners for off-site exposure-related injuries, the decision would have significant negative consequences for employers and homeowners in New Jersey. The decision also could have substantial negative impacts beyond New Jersey when future state courts are asked to permit secondhand exposure recoveries against premises owners in their own jurisdictions.

For these reasons, amici curiae ask this Court to reverse the Appellate Division and reinstate the trial court's grant of summary judgment to Defendant-Petitioner Exxon Mobil Corp.

ARGUMENT

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

A. The Current Asbestos Litigation Crisis: An Overview

When asbestos product liability lawsuits emerged almost thirty years ago, nobody could have predicted that courts today would be facing an ever growing "asbestos-litigation crisis." Amchem, 521 U.S. at 597. Instead of easing, "the crisis is worsening at a much more rapid pace than even the most pessimistic projections." Hon. Griffin B. Bell, Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help

Solve The Asbestos Litigation Crisis, 6:6 Briefly 2 (Nat'l Legal Center for the Pub. Interest June 2002) [hereinafter Bell, Courts' Duty]; see also Stephen J. Carroll et al., Asbestos Litigation xxiv (RAND Inst. for Civil Justice 2005), available at http://www.rand.org/publications/MG/MG162 ("The number of claims filed annually has increased sharply in the past few years.") [hereinafter RAND Rep.]. At least 300,000 asbestos claims are now pending. See S. Rep. 108-118 (2003).

1. Mass Filings by the Non-Sick Threaten Payments to the Truly Sick

Today, the vast majority of new asbestos claimants - up to 90% - are "people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be." The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong., at 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School); see also Roger Parloff, Asbestos, Fortune, Sept. 6, 2004, at 186 ("According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are 'unimpaireds' - that is, they have slight or no physical symptoms."); RAND Rep., supra, at 76 ("[A] large and growing proportion of the claims entering the system

in recent years were submitted by individuals who had not at the time of filing suffered an injury that had as yet affected their ability to perform the activities of daily living."); Alex Berenson, A Surge in Asbestos Suits, Many by Healthy Plaintiffs, N.Y. Times, Apr. 10, 2002, at A15.

Mass screenings conducted by plaintiffs' lawyers and their agents have "driven the flow of new asbestos claims by healthy plaintiffs." Hon. Griffin B. Bell, Asbestos & The Sleeping Constitution, 31 Pepp. L. Rev. 1, 5 (2003); 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 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.").[8]

These screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos. See Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co., 718 F. Supp. 1053, 1057 (D. Mass. 1989). Plaintiffs are recruited through exaggerated ads, such as: "Find out if YOU have MILLION DOLLAR LUNGS!" Pamela

[8] See also Lester Brickman, On The Theory Class's Theories of Asbestos Litigation: The Disconnnect Between Scholarship and Reality?, 31 Pepp. L. Rev. 33 (2003); Lester Brickman, Ethical Issues in Asbestos Litigation, 33 Hofstra L. Rev. 833 (2005).

Sherrid, Looking for Some Million Dollar Lungs, U.S. News & World Rep., Dec. 17, 2001, at 36.

Many of the x-ray interpreters (called B-readers) are "so biased that their readings [are] simply unreliable." Owens Corning, 322 B.R. at 723; see also Am. Bar Ass'n Comm'n on Asbestos Litig., Report to the House of Delegates 8 (2003) (finding that the rate of findings consistent with prior asbestos exposure generated by litigation screening companies is "startlingly high," often exceeding 50% and sometimes reaching 90%). As one physician has explained, "the chest x-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's behalf." David E. Bernstein, Keeping Junk Science Out of Asbestos Litigation, 31 Pepp. L. Rev. 11, 13 (2003) (quoting Lawrence Martin, M.D.).[9]

[9] In 2004, researchers at Johns Hopkins University re-evaluated 551 x-rays and 492 matching interpretive reports used as a basis for an asbestos claim. The x-ray readers who had been retained by plaintiffs' lawyers found that 95.9% of the films revealed abnormalities. When six independent radiologists reinterpreted the x-rays, they found abnormalities in only 4.5% of the cases. Joseph N. Gitlin et al., Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes, 11 Acad. Radiology 843 (2004).

2. Bankruptcies Are Placing a Heavy Toll on Workers and their Employers

Asbestos has forced at least 73 employers into bankruptcy. See RAND Rep., supra, at xxvii. The "process is accelerating," In re Collins, 233 F.3d 809, 812 (3d Cir. 2000), cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc., 532 U.S. 1066 (2001), due to the "piling on" nature of asbestos liabilities. See In re Combustion Eng'g, Inc., 391 F.3d 190, 201 (3d Cir. 2005) ("For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy."); Christopher Edley, Jr. & Paul C. Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. on Legis. 383, 392 (1993) (stating that each time a defendant declares bankruptcy, "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited.").

For instance, RAND found: "Following 1976, the year of the first bankruptcy attributed to asbestos litigation, 19 bankruptcies were filed in the 1980s and 17 in the 1990s. Between 2000 and mid-2004, there were 36 bankruptcy filings, more than in either of the prior two decades." RAND Rep., supra, at xxvii. A study by Nobel Prize-winning economist Joseph Stiglitz of Columbia University and two colleagues on the direct impact of asbestos bankruptcies on workers found that bankruptcies resulting from asbestos litigation put up to 60,000

people out of work between 1997 and 2000. See Joseph E. Stiglitz et al., The Impact of Asbestos Liabilities on Workers in Bankrupt Firms, 12 J. Bankr. L. & Prac. 51 (2003). Those workers and their families lost $175 million to $200 million in wages, see id. at 76, and employee retirement assets declined roughly 25%. See id. at 83.

A study by National Economic Research Associates found that workers, communities, and taxpayers will bear as much as $2 billion in additional costs due to indirect and induced impacts of company closings related to asbestos. See Jesse David, The Secondary Impacts of Asbestos Liabilities (Nat'l Econ. Research Assocs., Jan. 23, 2003). For every ten jobs lost directly, the community may lose eight additional jobs. See id. at 8. The shutting of plants and job cuts decrease per capita income, leading to declining real estate values, and lower federal, state and local tax receipts. See id. at 11-13.

RAND has estimated that $70 billion was spent in asbestos litigation through the end of 2002. See RAND Rep., supra, at 92. "[T]he future costs of asbestos litigation could total $130 billion to $195 billion." Id. at 106. To put these vast sums in perspective, former United States Attorney General Griffin Bell has pointed out that asbestos litigation costs will exceed the cost of "all Superfund sites combined, Hurricane

Andrew, or the September 11th terrorist attacks." Bell, Courts' Duty, supra, at 4.

3. Peripheral Defendants Are Being Dragged into the Litigation

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; see also The Congress of the United States, Congressional Budget Office, The Economics of U.S. Tort Liability: A Primer 8 (Oct. 2003) (stating that asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities."); Steven B. Hantler et al., Is the Crisis in the Civil Justice System Real or Imagined?, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to "peripheral defendants"). One well-known plaintiffs' attorney has remarked that the litigation has turned into the "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). The defendant in this appeal is an example.

More than 8,500 defendants have now become "ensnarled in the litigation." In re Joint E. & S. Dists. Asbestos Litig.,

129 B.R. 710, 747-48 (E.D.N.Y. & S.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992). 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. Other defendants are 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. Nontraditional defendants now account for more than half of asbestos expenditures. See RAND Rep., supra, at 94.

As described later, the new duty rule sought by the plaintiffs in this action could exacerbate the spread of the litigation to even more defendants.

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

It is well established that before a defendant may be liable for negligence it must be shown that the defendant owes a duty to the plaintiff. See Kahalili v. Rosecliff Realty, Inc., 26 N.J. 595, 603 (1958); Stanley Co. of Am. v. Hercules Powder Co., 16 N.J. 295, 315 (1954). The existence and scope of a duty of care, if any, is a question of law to be determined by the court. See Clohesy v. Food Circus Supermarkets, Inc., 149 N.J. 496, 502 (1997). Duty questions involve "policy-laden" judgments in which a line must be drawn between the competing policy

considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit. "A person may have a moral duty to prevent injury to another, but no legal duty." Pulka v. Edelman, 358 N.E.2d 1019, 1022 (1976), reargument denied, 362 N.E.2d 640 (N.Y. 1977).

Here, the Court must determine whether it is "fair and reasonable" to require landowners to protect against off-site injuries resulting from secondhand exposures to asbestos and other substances emitted in the workplace. See Kuzmicz v. Ivy Hill Park Apartments, Inc., 147 N.J. 510, 515 (1997). To make this determination, the Court must balance a variety of factors, including: (1) the relationship of the parties, (2) the nature of the risk involved, (3) the opportunity and ability of the defendant to exercise due care, and (4) the effect on the public. See id.; see also Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993); Carvalho v. Toll Bros. & Devs., 143 N.J. 565, 573 (1996).

A. Both State High Courts to Consider the Issue Presented Here Rejected Premises Owner Liability for Secondhand Asbestos Exposures

Two state courts of last resort - the New York Court of Appeals and the Georgia Supreme Court - have decided the issue of premises owner liability for secondhand exposures to asbestos emitted in the workplace. As stated, both cases were decided this year, and both courts steadfastly rejected the duty the

plaintiff invites this Court to adopt here. See also 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."). This Court should follow the sound reasoning of these courts.

1. New York: In re New York City Asbestos Litigation (Holdampf v. Port Authority of N.Y. & N.J.)

In late October 2005, the New York Court of Appeals in In re New York City Asbestos Litigation (Holdampf v. Port Auth. of N.Y. & N.J.), No. 07863, 2005 WL 2777559 (N.Y. Oct. 27, 2005) (publication page references unavailable), reversed a lower appellate court and, with one justice abstaining, unanimously ruled that a premises owner does not owe a duty of care to remote plaintiffs injured off-site through secondhand asbestos exposures. The New York plaintiff's husband was a 36-year Port Authority employee who handled asbestos-containing products in various Port Authority sites. For convenience, he frequently opted to bring his dirty work clothes home to wash rather than leave them at work. As a result, his wife often handled his

asbestos-soiled clothing; she was later diagnosed with mesothelioma.

At the outset, the court said that a defendant cannot be held liable for injuries to a plaintiff unless a "specific duty" exists, because "otherwise a defendant would be subjected to 'limitless liability to an indeterminate class of persons conceivably injured' by its negligent acts." (quoting Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1060 (N.Y. 2001)). That duty, the court said, is not defined solely by the foreseeability of harm. Rather, courts must balance a variety of factors, including the reasonable expectation of parties and society generally, the likelihood of unlimited or insurer-like liability, and public policy.

The "key consideration" critical to deciding third-party liability, the court said, is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm, and that the "specter of limitless liability" is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship. The court then considered whether the Port Authority owed a duty to the plaintiff, either as her spouse's employer or as a landowner.

The court held that the Port Authority did not owe a duty as her husband's employer. The court noted that at common-law,

now codified in New York, an employer's duty to provide a safe workplace is limited to employees. The court said that in Widera v. Ettco Wire and Cable Corp., 204 A.D.2d 306, 611 N.Y.S.2d 569 (N.Y. App. Div. 1994), leave denied, 650 N.E.2d 414 (N.Y. 1995), the appellate court "properly refused" to recognize a cause of action for negligence against an employer for injuries suffered by its employee's family member as a result of exposure to toxins brought home from the workplace on the employee's work clothes. The Widera court had concluded: "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." 204 A.D.2d at 307-08, 611 N.Y.S.2d at 571. See also Ruffing v. Union Carbide Corp., 1 A.D.3d 339, 766 N.Y.S.2d 439 (2d Dept. 2003) (worker whose wife and daughter in utero were exposed to toxic substances carried home by worker, resulting in daughter's birth defects, failed to state cause of action against employer).

The New York Court of Appeals in Holdampf explained that the case did not involve the Port Authority's failure to control the conduct of a third-party tortfeasor, because there was no third-party tortfeasor in the case. Compare Pulka v. Edelman, 358 N.E.2d 1019 (1976) (defendant garage owner and third party tortfeasor customer), reargument denied, 362 N.E.2d 640 (N.Y.

1977); D'Amico v. Christie, 518 N.E.2d 896 (N.Y. 1987) (defendant employer and third party tortfeasor ex-employee). Nor did the appeal involve a relationship between the plaintiff and defendant that would require the defendant to protect the plaintiff from the conduct of others. "Specifically," the court said, there was "no relationship between the Port Authority and Elizabeth Holdampf - 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. See Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001) (citing cases).

Furthermore, imposition of plaintiff's "novel" duty rule would be unsound, the court suggested, because the defendant was dependent upon the husband's willingness to comply with any risk-reduction measures, such as changing into clean clothes at work.

The court also held that the Port Authority did not owe a duty to the plaintiff as a landowner. The court noted that New York recognizes that a landowner's duty of reasonable care can run to the surrounding community when mining practices carried out on the landowner's property cause the negligent release of toxins into the ambient air. See Baker v. R.T. Vanderbilt Co., Inc., 260 A.D.2d 750, 688 N.Y.S.2d 726 (N.Y. App. Div. 1999). But the off-site exposure in Holdampf was "far different from

the facts in Baker." Mrs. Holdampf's exposure came from handling her husband's work clothes; none of the Port Authority's activities released "asbestos into the community generally."[10] The court also considered and rejected the Appellate Division's decision in this case. See Holdampf, supra.

The court concluded that the duty rule sought by plaintiffs would not only upset traditional tort law rules, but also 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 Court of Appeals said that the "line is not so easy to draw." 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. The court also considered the likely consequences of adopting the expanded duty urged by plaintiffs: despite

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[10] Moreover, Baker contains no discussion of the "important role" that public policy must play "[i]n fixing the bounds of . . . duty." DeAngelis v. Lutheran Med. Center, 449 N.E.2d 406, 407-08 (N.Y. 1983). Here that consideration is critical because "[t]he recognition of a common-law cause of action . . . would . . . expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs." Widera, 204 A.D.2d at 307-08, 611 N.Y.S.2d at 571.

plaintiffs' contention that the incidence of asbestos-related disease caused by the kind of secondhand exposure at issue is rather low, the court wrote, "experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality."

2. Georgia: CSX Transportation, Inc. v. Williams

The Georgia Supreme Court in CSX Transportation, Inc. v. Williams, 608 S.E.2d 208 (Ga. 2005), was presented with issues virtually identical to those in Holdampf and in this case. In Williams, three plaintiffs brought negligence actions against CSX Transportation ("CSXT") based on each plaintiff's claim that he was exposed at home as a child to airborne asbestos emitted from the clothing his father wore on the job at CSXT. A fourth plaintiff brought a wrongful death action based on his late wife's exposure at home to asbestos on clothes he wore to work at CSXT facilities. The Georgia Supreme Court, on a certified question from the Eleventh Circuit Court of Appeals, 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." Id. at 210.

The Georgia Supreme Court declined to rely simply on the potential foreseeability of the plaintiffs' harms "as a basis for extending the employer's duty beyond the workplace." Id. at

209. Instead, the court cited Widera for the negative policy implications that would result from holding employers liable for exposure-related harms to non-employees. The court also distinguished decisions holding landowners liable for the release of toxins into the environment, explaining that CSXT did not "spread[] asbestos dust among the general population, thereby creating a dangerous situation in the world beyond the workplace." Id. at 210.

B. Appellate Division's Ruling Rests on a Weak Foundation

The Appellate Division in this case did not have the benefit of the New York Court of Appeal's Holdampf decision at the time the case was decided. This Court should follow the New York and Georgia decisions in this appeal rather than affirm the decision below, because the Appellate Division's decision rests on a weak foundation and is unsound as a matter of law and public policy.

1. No Relationship Existed Between the Parties

In determining whether it is "fair and reasonable" to require landowners to protect against off-site exposures to asbestos, the Court must first consider the relationship of the parties. See Kuzmicz v. Ivy Hill Park Apartments, Inc., 147 N.J. 510, 515 (1997). Here, as in the New York and Georgia cases,

there is no relationship between the parties that could support a finding of a duty.

This case does not involve the Defendant-Petitioner's failure to control the conduct of a third-party tortfeasor. No third-party tortfeasor is involved. This case also does not involve a relationship between the Plaintiff and Defendant-Petitioner that would require the Defendant to protect Plaintiff from the conduct of others, such as master and servant (employer and employee), parent and child, or common carrier and passenger. See, e.g., Kelly v. Gwinnell, 96 N.J. 538 (1984) (social host liable for providing liquor to intoxicated guest, but applying liability prospectively and in the instant action).

a. Product Liability Rules Are Based on a Different Foundation Than Premises Liability and Do Not Support the Duty Sought Here

The Appellate Division and plaintiffs have tried to overcome the lack of any relationship between the parties by making an intellectual leap that is deeply flawed. Namely, both the Appellate Division and plaintiffs suggest that because product liability law may permit liability to be imposed for injuries to bystanders, the same duty must exist with respect to premises owners. They are wrong.

For instance, plaintiffs cite a Texas appellate court decision from Texas, Fuller-Austin Insulation Co., Inc. v. Bilder, 960 S.W.2d 914 (Tex. Ct. App. 1998), and two Maryland

appellate court decisions, AC&S, Inc. v. Abate, 710 A.2d 944 (Md. Ct. Spec. App.), cert. denied sub nom. Crane v. Abate, 713 A.2d 979 (Md. 1998), cert. denied, 525 U.S. 1171 (1999), and Anchor Packing Co. v. Grimshaw, 692 A.2d 5 (Md. Ct. Spec. App. 1997), rev'd on other grounds sub nom. Porter Hayden Co. v. Bullinger, 713 A.2d 962 (Md. 1998), that involved product liability claims against asbestos product manufacturers and suppliers for secondhand exposures to asbestos by workers' spouses and family members. But see Rohrbaugh v. Owens-Corning Fiberglas Corp., 965 F.2d 844 (10th Cir. 1992) (holding that 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).

Likewise, the Appellate Division cited New Jersey cases involving product liability claims for bystander injuries. See Tirrell v. Navistar Int'l, Inc., 248 N.J. Super. 390, cert. denied, 126 N.J. 390 (1991) (tractor trailer manufacturer liable to bystander run over by a trailer that did not have a back-up alarm); Monsanto Co. v. Alden Leeds, Inc., 130 N.J. Super. 245 (Law Div. 1974) (landlord recovered from chemical maker when product purchased by tenant ignited a fire that destroyed plaintiff's building); Lamendola v. Mizell, 115 N.J. Super. 514 (Law Div. 1971) (driver struck by car with faulty accelerator pedal could recover from the manufacturer). None of these cases

addressed the liability of premises owners.[11] This case is not a product liability case; rather, it is a premises liability case. Product liability law is based on entirely different rationales than the law of premises liability 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).

Here, plaintiff's wife allegedly was exposed to asbestos dust carried home from work on plaintiff's work clothes. Plaintiff did not buy asbestos from the Defendant-Petitioner. No sales transaction was involved. As Defendant-Petitioner has

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[11] Plaintiffs also cite an unreported Delaware trial court decision, Shewbrooks v. AC&S Co., Inc., 1987 Del. Super. LEXIS 1397 (Del. Super. Ct. 1987), where the defendant argued that it was not liable in a tort action brought by a worker's spouse for secondhand asbestos exposure injuries because the defendant had no privity of contract with the plaintiff. The court simply held that privity of contract "is not an available consideration" in a tort claim.

explained: Unlike the manufacturers of the asbestos-containing products to which the plaintiff alleges exposure, the Defendant had no meaningful way to incorporate the costs of any risk posed by those products into the pricing of its wholly unrelated products. Therefore, the Defendant cannot be said to have "undertaken and assumed" a duty to the plaintiff or his wife.

This Court should follow the New York and Georgia high court decisions that are directly on point rather than try to fit a square peg into a round hole and import holdings from product liability cases. Those cases rest on an entirely different foundation than the law of premises owner liability and do not support the novel duty rule presented here.

b. Cases Involving Law of Nuisance and Strict Liability for Abnormally Dangerous Activity Do Not Support the Duty Sought Here

Plaintiff also cites a number of cases imposing a duty on landowners for damages occurring off-site under the law of nuisance and strict liability for abnormally dangerous activity. See T&E Indus., Inc. v. Safety Light Corp., 123 N.J. 371 (1991) (landowner liable for contaminating land of neighboring property owners); State Dept. of Envtl. Prot. v. Ventron Corp., 94 N.J. 473 (1983) (landowner liable for toxic wastes that flowed onto the property of others); Berg v. Reaction Motors Div., Thiokol Chem Corp., 37 N.J. 396 (1962) (nearby property owners could

recover damages for sonic vibrations to their property stemming from defendant's rocket testing facility); Harris v. Peridot Chem. (N.J.), Inc., 313 N.J. Super. 257 (1998) (chemical plant owner liable for injuries to workers at neighboring chemical plant as a result of negligently emitted fumes). Reliance on those cases is misplaced.

The situation presented here does not involve release of asbestos into the community generally. This important difference mirrors the distinction made by the Georgia Supreme Court when it stated that the case before it did not "involve [the landowner] itself spreading asbestos dust among the general population, thereby creating a dangerous situation in the world beyond the workplace." Williams, 608 S.E.2d at 210. As described, the New York Court of Appeals came to the same conclusion in Holdampf.

2. Defendant Lacked the Ability to Prevent the Harm

In determining whether it is "fair and reasonable" to require landowners to protect against off-site exposures to asbestos, the Court also must consider the opportunity and ability of the Defendant-Petitioner to exercise due care to prevent the harm at issue. See Kuzmicz, 147 N.J. at 515. Below, the Appellate Division concluded that Defendant-Petitioner was in the best position to prevent the harm, because the Defendant-Petitioner could have warned the worker of the risk to him and

his wife and provided the worker with a changing room at work. The Appellate Division's conclusion missed the mark in a number of key respects. Perhaps most importantly, the Appellate Division wrongly concluded that the Defendant-Petitioner was in the best position to prevent the harm. As the New York Court of Appeals said in Holdampf, where the defendant did provide workers with a changing room, "the [defendant] was, in fact, entirely dependent upon [the exposed worker's] willingness to comply with and carry out . . . risk-reduction measures." See Holdampf, supra. The court appreciated that imposition of a duty of care is unfair where a defendant premises owner cannot control the conduct of directly exposed workers so as to prevent harm to third parties secondarily exposed off-site.

For the reasons explained above in Holdampf, Defendant-Petitioner had little or no ability to enforce the risk-reduction measures that the Appellate Division said should have been in place. The exposed worker here was not even employed by the Defendant-Petitioner; he was an independent contractor. Defendant-Petitioner could not directly discipline or discharge the worker if he failed to carry out risk-reduction measures. Thus, the duty rule created by the Appellate Division would result in insurer-like liability for Defendant-Petitioner and other premises owners. That result would be unfair.

Furthermore, the Appellate Division may have been mistaken in its assumption that if Defendant-Petitioner had provided a changing room the harm here would have been prevented. After all, the Port Authority defendant in Holdampf provided workers with a changing room and the worker in that case frequently chose not to use it. As the New York Court of Appeals explained: "About half of the time, . . . [the exposed worker] opted to bring his dirty work clothes home for cleaning for reasons of 'convenience' and because there were no showers available at work." See Holdampf, supra.

Finally, the Appellate Division apparently presumed that the directly exposed worker was ignorant of the risks of asbestos exposure. Here, the worker had a thirty-seven year career as a union welder. It is almost inconceivable that the worker's employer or his union - as well as the worker himself - were unaware of the long understood risks of asbestos exposure.

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

Finally, the Court's "fair and reasonable" duty analysis must consider the public interest. See Kuzmicz, 147 N.J. at 515. The Appellate Division below concluded that the duty imposed extended only to the decedent but declined to address

other potential plaintiffs that may pour into New Jersey courts if a novel new duty rule is recognized for premises owners.

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 crisis and augment silica as well as other claims. A broad new duty requirement for landowners would allow plaintiffs' lawyers to begin to name countless premises owners directly in asbestos and other personal injury 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, baby-sitters, 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 his clothes.

The New York Court of Appeals appreciated this fact in Holdampf. Like the Appellate Division here, the New York appellate court tried to avoid the potential for open-ended liability by limiting its holding to members of the employee's household. But as the Court of Appeals wisely appreciated in reversing the appellate court, that "line is not so easy to draw."

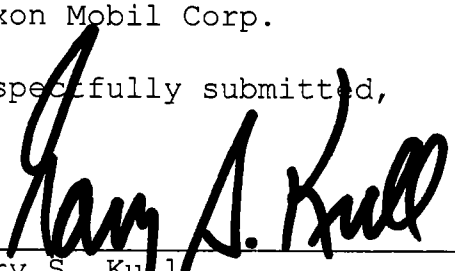
Moreover, potential defendants may not be limited to corporate property owners like Defendant-Petitioner. Landlords and private homeowners also might be liable for secondhand exposures that originate from their premises. In an attempt to reach for homeowners' insurance policies, private individuals could be swept into the "dragnet search" for potentially responsible parties in asbestos cases.

Thus, the proposed limit on liability suggested by the Appellate Division is likely to be no limit at all. Creation of a new duty rule for premises owners based on secondary exposures to asbestos could generate a vast "next wave" in asbestos litigation, resulting in significant negative consequences for New Jersey courts and premises owners.

CONCLUSION

For these reasons, amici curiae ask this Court to reverse the Appellate Division and reinstate the trial court's grant of summary judgment to Defendant Exxon Mobil Corp.

Respectfully submitted,



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