IN THE SUPREME COURT OF TENNESSEE

DOUG SATTERFIELD, as personal representative of the Estate of Amanda Nicole Satterfield, Deceased *Appellee-Plaintiff,* v. BREEDING INSULATION COMPANY INC., and ALCOA INC. f/k/a ALUMINUM COMPANY OF AMERICA *Appellant-Defendants.*	Trial Court: Blount County Circuit Trial Court Case No.: L-14000 Appealed from the Tennessee Court of Appeals- Eastern Section Case No.: E2006-00903-COA-R3-CV Supreme Court No: E2006-00903-SC-R11-CV

AMICI CURIAE BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AMERICAN CHEMISTRY COUNCIL, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF APPELLANT-DEFENDANTS

Mark A. Behrens (*pro hoc*)
SHOOK, HARDY & BACON L.L.P
600 14th Street, NW, Suite 800
Washington, DC 20005
(202) 783-8400

Martin B. Bailey, BPR #015370*
John L. Miller, BPR #022192
WAGNER, MYERS & SANGER, P.C.
1801 First Tennessee Plaza
800 S. Gay Street
P.O. Box 1308
Knoxville, TN 37901
(865) 525-4600

Attorneys for *Amici Curiae*
* Counsel of Record

(*Of Counsel* listed on next page)

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800 S. Gay Street
P.O. Box 1308
Knoxville, TN 37901
(865) 525-4600

Attorneys for *Amici Curiae*
* Counsel of Record

(*Of Counsel* listed on next page)

Of Counsel

Paul W. Kalish
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500
Counsel, Coalition for Litigation Justice, Inc.

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Gregg Dykstra
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Karen R. Harned
Elizabeth A Gaudio
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

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STATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals erred by holding that, under Tennessee law, a premises owner may be held liable for injuries to the family member of an employee as a result of off-site, secondhand exposure to asbestos.

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent Tennessee 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 hold that Appellant-Defendants owed no duty to Appellee-Plaintiff for offsite, secondhand exposure to asbestos.

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

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

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 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 National Federation of Independent Business Legal Foundation (NFIB), 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 is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. NFIB members own a 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. 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 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 Tennessee, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

Founded in 1895, National Association of Mutual Insurance Companies (NAMIC) is a full-service, national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

STATEMENT OF FACTS

Amici adopt Appellant-Defendants' Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 1997, the United States Supreme Court described the asbestos litigation as a "crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). An estimated eighty-five employers have been forced into bankruptcy. More than 8,500 defendants have been named. 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 continues to evolve, the connection to asbestos-containing products is increasingly remote and the liability connection more stretched. It is against this background that the subject must be considered.

The liability of property owners for off-site exposure to asbestos is a newer issue in asbestos litigation. *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). Asbestos litigation has evolved over the years as plaintiffs' lawyers have raised new theories of liability in the attempt to reach new types of defendants. In earlier years, the litigation was focused mostly on the manufacturers of asbestos-containing products, often called "traditional defendants." Most of those companies have been forced to seek bankruptcy court protection. As a result, plaintiffs' lawyers began to target "peripheral defendants," including premises owners, for alleged harms to independent contractors exposed to asbestos. Plaintiffs' lawyers are now targeting property owners for alleged harms to secondarily exposed "peripheral plaintiffs." Like this action, these claims involve workers' family members who have been exposed to asbestos off-site, typically through contact with a directly exposed worker or that worker's soiled work clothes.

Since the beginning of 2005, several courts have decided whether premises owners owe a duty to "take home" exposure claimants. These claims have been rejected by the highest courts in Georgia, New York, and Michigan, a Texas appellate court, and a federal court applying Kentucky law. A Maryland appellate court reached the same conclusion. The New Jersey Supreme Court is the only court of last resort to go the other way; its minority approach was the

one adopted by the appellate court. At the time of the appellate court's ruling in this action, the Michigan, Texas, and Kentucky law cases had not been decided.

As we will explain, a broad new duty requirement for landowners here 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 would have significant negative consequences for employers and homeowners in Tennessee. The decision also could have substantial negative impacts beyond Tennessee when future state courts are asked to permit secondhand exposure recoveries against premises owners in their own jurisdictions.

For these reasons, *amici* ask this Court to avoid setting a dangerous precedent and hold that Appellant-Defendants owed no duty to Appellee-Plaintiff.

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).[2] By 2002, approximately 730,000 claims had been filed. *See* Stephen J. Carroll *et al., Asbestos Litigation* xxiv (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/publications/MG/MG162 [hereinafter RAND Rep.]. In August 2006, the Congressional Budget

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[2] *See also* 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), *available at* http://www.nlcpi.org; 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); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

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), *available at* http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf [hereinafter Am. Acad. of Actuaries].[3]

"For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy," *In re Combustion Eng'g, Inc.*, 391 F.3d at 201, including an estimated eighty-five employers. *See* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29; *see also* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 392 (1993) (each time a defendant declares bankruptcy, "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited."). 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.

Nobel Prize-winning economist Joseph Stiglitz of Columbia University and two colleagues studied the direct impact of asbestos bankruptcies on workers and 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*

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[3] "By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic." James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 823 (2002). Recently, courts and legislatures have taken meaningful steps to set aside or suspend the claims of the non-sick. *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears To Be Turning*, 12 Conn. Ins. L.J. 477 (2006).

Bankrupt Firms, 12 J. Bankr. L. & Prac. 51 (2003). Those workers and their families lost up to $200 million in wages, *see id.* at 76, and employee retirement assets declined roughly twenty-five percent. *See id.* at 83.

Another study, which was prepared 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 a decline in real estate values, and lower federal, state, and local tax receipts. *See id.* at 11-13.

Bankrupt companies and communities are not the only ones affected:

> The uncertainty of how remaining claims may be resolved, how many more may ultimately be filed, what companies may be targeted, and at what cost, casts a pall over the finances of thousands and possibly tens of thousands of American businesses. The cost of this unbridled litigation diverts capital from productive purposes, cutting investment and jobs. Uncertainty about how future claims may impact their finances has made it more difficult for affected companies to raise capital and attract new investment, driving stock prices down and borrowing costs up.

George S. Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981, 998 (2003). A Managing Director at Goldman Sachs also explained, "the large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their shareholders and employees, and the economy as a whole." *Solving the Asbestos Litigation Crisis: Hearing on S. 1125, the Fairness in Asbestos Injury Act of 2003, Before the Sen. Comm. on the Judiciary*, 107th Cong. (June 4, 2003) (statement of Scott Kapnick, Managing Director, Goldman Sachs).

RAND has estimated that $70 billion was spent in asbestos litigation through 2002; future costs could reach $195 billion. *See* RAND Rep., *supra*, at 92, 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." 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), *available at* http://www.nlcpi.org.

As a result of the large number of asbestos-related 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. The Congressional Budget Office observed 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." Congress of the United States, Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003); *see also* 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 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).

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); Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*,

Columns – Raising The Bar In Asbestos Litig., Aug. 2004, at 5. 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 include small businesses facing potentially devastating liability. *See* Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1. At least one company in nearly every U.S. industry is now involved in asbestos litigation. *See* Am. Acad, of Actuaries, *supra*, at 5. Nontraditional defendants now account for more than half of asbestos expenditures. *See* RAND Rep., *supra*, at 94. Appellant-Defendants are an example of this trend at work.

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. The existence and scope of a duty of care, if any, is a question of law to be determined by the court. *See Glenn v. Conner*, 533 S.W.2d 297, 302 (Tenn. 1976). 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. *See Biscan v. Brown*, 160 S.W.3d 462, 479 (Tenn. 2005) ("[W]e will weigh public policy considerations, which 'are crucial in determining whether a duty of care existed in a particular case.'").

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. To make this determination, the Court must balance a variety of factors, including "the foreseeable probability of the harm or injury occurring; the

possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct." *Biscan*, 160 S.W.3d at 480.

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

Since the beginning of 2005, three state courts of last resort – the Georgia Supreme Court, New York Court of Appeals, and Michigan Supreme Court – a Texas appellate court, and a federal court applying Kentucky law have declined to impose liability on premises owners for secondhand exposure to asbestos emitted in the workplace. A Maryland appellate court reached the same conclusion. At the time of the appellate court's ruling in this action, the Michigan, Texas, and Kentucky law cases had not been decided.

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

In January 2005, the Georgia Supreme Court in *CSX Transportation, Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005), became the first state court of last resort to consider the liability of an employer for off-site, exposure-related injuries to non-employees. The court 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 appeal involved a wrongful death action on behalf of a woman and negligence claims by three children who were exposed to asbestos emitted from the clothing of family members employed at the defendant's facilities.

The court held that the duty of employers to provide their employees with a reasonably safe work environment does not encompass individuals who were neither employees nor exposed to any danger in the workplace; there would have to be a basis for extending the employer's duty beyond the workplace. The court noted that "mere foreseeability" of harm had been rejected as a basis for creating third-party liability in previous cases. *Id.* at 209. The court also cited New York law for the proposition that duty rules must be based on policy considerations, including the need to limit the consequences of wrongs to a controllable degree because of 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 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 "we decline[d] 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..)***

In October 2005, New York's highest court, with one justice abstaining, unanimously reached the same conclusion and reversed an appellate court in *In re New York City Asbestos Litigation* (*Holdampf v. A.C. & S., Inc.*), 840 N.E.2d 115 (N.Y. 2005). The action was brought by a former Port Authority employee and his wife after the wife developed mesothelioma from washing her husband's asbestos-soiled work clothes.

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." *Id.* at 119 (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 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.

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. 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.

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, such as when mining practices carried out on the landowner's property cause the negligent release of toxins into the ambient air. The off-site exposure in *Holdampf* was "far different from" those situations. *Id.* at 121. 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." *Id.*

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." *Id.* 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 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." *Id.*[4]

3. Michigan: *In re Certified Question from the Fourteenth District Court of Appeals of Texas (Miller v. Ford Motor Co.)*

In the most recent pronouncement from a state's highest court, the Michigan Supreme Court found no duty under Michigan law. The court held in *In re Certified Question from Fourteenth Dist. Court of Appeals of Texas (Miller v. Ford Motor Co.)*, 2007 WL 2126516 (Mich. July 25, 2007), that the property owner (Ford Motor) did not owe the decedent, who was never on or near the property, a duty to protect her from asbestos fibers carried home on the clothing of a family member. The court was answering a certified question from the Texas Fourteenth District Court of Appeals, which was reviewing a $9.5 million jury verdict awarded to the family of decedent Carolyn Miller. The family alleged that Miller developed mesothelioma from childhood exposure to asbestos on her stepfather's work clothes. Miller's stepfather worked for an independent contractor at a Ford plant in Dearborn, Michigan, in the 1950s and 1960s. Finding the connection between Ford and Carolyn Miller "highly tenuous," and because Miller had never been on Ford's property and had no further relationship with Ford, the Michigan Supreme Court held that the harm to Miller was not foreseeable. *Id.* at *7. Accordingly, no legal duty was owed.

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[4] Subsequent to *Holdampf*, a New York trial court in *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), found no duty for harms caused by secondary asbestos exposures that occurred after the adoption of federal regulations in 1986 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.

4. Kentucky: *Martin v. General Electric Co.*

The United States District Court for the Eastern District of Kentucky, in *Martin v. General Electric Co.*, 2007 WL 2682064 (E.D. Ky. Sep. 5, 2007), recently joined the growing list of jurisdictions to reject a property owner duty in cases of non-occupational asbestos exposure occurring away from the property. The case involved a child of the defendant's employee; the child was allegedly exposed to asbestos while playing in the basement of the family's home when his mother washed her husband's soiled work clothes. The court found that although the effects of prolonged occupational asbestos exposure were known by the mid-1930's, the harm to others was not widely known until at least 1972 when OSHA regulations recognized the causal connection. *See id.* at *5.

5. Texas: *Alcoa, Inc. v. Behringer*

Most recently, a Texas appellate court in *Alcoa, Inc. v. Behringer*, 2007 WL 2949524 (Tex. App. Oct. 11, 2007), reversed a nearly $15.6 million judgment awarded to the ex-wife of a smelting plant employee who regularly washed her husband's work clothes and later developed mesothelioma. Plaintiffs alleged the defendant failed to provide adequate safety measures at its plant when Behringer's former husband periodically worked there from 1953 to 1959. In reversing the trial court, the Houston appellate court found that, although there was evidence in the record that Alcoa was aware that occupational exposure to asbestos was hazardous to one's health, because the dangers of non-occupational exposure were neither known nor reasonably foreseeable to Alcoa in the 1950s, no legally recognized duty existed. *See id.* at *5.[5]

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[5] *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 pre-1972 exposure to asbestos brought home on her husband's work clothing).

6. Maryland: *Adams v. Owens-Illinois, Inc.*

A Maryland court in *Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998), similarly held that an employer did not owe a duty to the wife of one of its employees, who alleged she was exposed to asbestos carried home by the employee from his job at Bethlehem Steel. The court cautioned that placing Bethlehem Steel under a duty to the wife, who was never on its property, would entail imposing a broad duty to strangers who had no relationship to the defendant. The court stated: "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." *Id.* at 66.

B. Arguments for Liability Rest on a Weak Foundation

Plaintiffs' arguments supporting the creation of a new duty rule are unsound as a matter of law and policy. They should be rejected.

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 consider the relationship of the parties. Here, as in the cases cited above, there is *no* relationship between the parties that could support a finding of a duty.

This case does not involve Appellant-Defendants' 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 Appellant-Defendants that would require it to protect plaintiff from the conduct of others, such as master and servant (employer and employee), parent

and child, or common carrier and passenger. Here, the Plaintiff alleges that as a child she was exposed to her father's soiled work clothes from his place of employment.

2. Only Minority Support Exists for a Broad New Duty Rule

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

Plaintiff relies heavily on the New Jersey Supreme Court's decision in *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143 (N.J. 2006), which departed from the Georgia and New York high court decisions and found a duty to exist. *Olivo* involved an independent contractor who worked as a union welder at a refinery owned by Exxon Mobil. During the course of his employment, the plaintiff was exposed to asbestos, and his late wife developed mesothelioma as a result of handling his work clothes. The court 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.

The New Jersey court essentially equated foreseeability with duty, overriding all other public policy factors. In Tennessee, however, the duty analysis requires more. There must be a foreseeable "probability" of harm. *See West v. E. Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 550 (Tenn. 2005) ("The plaintiff must show that the injury was a reasonably foreseeable **probability**, not just a remote possibility, and that some action within the [defendants's] power more probably than not would have prevented the injury.") (emphasis added).

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

The appellate court also cited a Louisiana case, *Chaisson v. Avondale Indus., Inc.*, 947 So. 2d 171 (La. App. 2006), which relied upon *Zimko v. American Cyanamid*, 905 So. 2d 465 (La. App. 2005), *writ denied*, 925 So. 2d 538 (La. 2006), and 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. Furthermore, 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).

Moreover, in *Chaisson*, the court made crystal clear that its holding was limited to the facts and circumstances of that particular case. The court did not find a categorical duty rule. *See Chaisson*, 947 So. 2d at 184, *see also id.* at 200 ("the Court's opinion does not create a categorical duty rule as the majority stated in our opinion." (per curiam opinion on rehearing).

c. California: *Condon v. Union Oil Co. of California*

In addition, plaintiff cites an unpublished California case, *Condon v. Union Oil Co. of California*, 2004 WL 1932847 (Cal. App. Aug. 31, 2004), which involved a plaintiff who allegedly developed mesothelioma as a result of exposure to asbestos fibers on her former husband, an independent contractor who worked as a steamfitter and welder at several places, including a UNOCAL refinery.

Condon provides weak support for plaintiff's position here. First, California Rule of Court 977(a) prohibits courts and parties from citing or relying on unpublished opinions, so the case has no authoritative value, even in California. Second, the issue before the court was whether substantial evidence supported the jury's finding of liability against UNOCAL. The court did not engage in a thorough duty analysis, summarily concluding "it was foreseeable" that workers' family members were at risk of exposure if the workers were exposed.

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

Here, the Court's duty analysis should also consider the public interest. 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. 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. Moreover, people who claim to be injured from take-home exposure, especially children, have very appealing facts and tend to be much younger than other claimants. These factors all flow together in support of high values for these claims.

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 when he was dirty, as well as local laundry workers or others that handled the worker's clothes. The Court must consider all potential filings that might occur, including those by unimpaired claimants. The history of

asbestos litigation makes clear that with respect to those types of claims, "if you build it, they will come."

Moreover, potential defendants may not be limited to corporate property owners like Appellant-Defendants. 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.

Finally, any attempt to limit a rule of liability to reasonably foreseeable plaintiffs would likely be no limit 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 Tennessee courts and premises owners.

CONCLUSION

For these reasons, *amici* ask this Court to hold that Appellant-Defendants owed no duty to Appellee-Plaintiff for offsite, secondhand exposure to asbestos.

Respectfully submitted,

Martin B. Bailey, BPR #015370*
John L. Miller, BPR #022192
WAGNER, MYERS & SANGER, P.C.
1801 First Tennessee Plaza
800 S. Gay Street
P.O. Box 1308
Knoxville, TN 37901
(865) 525-4600

Mark A. Behrens (*pro hoc*)
SHOOK, HARDY & BACON, L.L.P.
600 14th Street, NW, Suite 800
Washington, DC 20005-2004
(202) 783-8400

Attorneys for *Amici Curiae*
* Counsel of Record

Paul W. Kalish
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 624-2500
Counsel to the Coalition for Litigation Justice, Inc

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Jan Amundson
Quentin Riegel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 637-3000

Karen R. Harned
Elizabeth A Gaudio
NATIONAL FEDERATION OF INDEPENDENT
BUSINESS LEGAL FOUNDATION
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 314-2061

Donald D. Evans
AMERICAN CHEMISTRY COUNCIL
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

Gregg Dykstra
NATIONAL ASSOCIATION OF
MUTUAL INSURANCE COMPANIES
3601 Vincennes Road
Indianapolis, IN 46268
(317) 875-5250

Ann W. Spragens
Sean McMurrough
PROPERTY CASUALTY INSURERS
ASSOCIATION OF AMERICA
2600 South River Road
Des Plaines, IL 60018-3286
(847) 553-3826

Of Counsel

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CERTIFICATE OF SERVICE

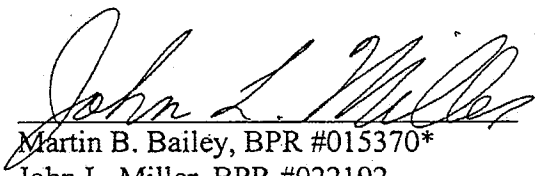
I hereby certify that a true and correct copy of the foregoing Brief was served by U.S. Mail, postage prepaid, and by telecopy upon the following:

John Lucas, Esq.
HUNTON & WILLIAMS LLP
2000 Riverview Tower
900 South Gay Street
Knoxville, TN 37902
Counsel for Petitioner-Defendant, Alcoa, Inc.
Telecopy: (865) 549–7704

Gregory Coleman, Esq.
COLEMAN & EDWARDS, P.C.
4800 Old Kingston Pike, Suite 120
Knoxville, TN 37919
Counsel for Respondent-Plaintiff, Doug Satterfield
Telecopy: (865) 247-0081

Timothy D. Patterson, Esq.
HARRIS SHELTON HANOVER WALSH, PLLC
One Commerce Square, Suite 2700
Memphis, TN 38103
Telephone: (901) 525-1455
Counsel for Amicus, Pacific Legal Foundation
Telecopy: (901) 526-4084

Deborah La Fetra, Esq.
Timothy Sandefur, Esq.
PACIFIC LEGAL FOUNDATION
3900 Lennane Drive, Suite 200
Sacramento, CA 95834
Telecopy: (916) 419-7747



Martin B. Bailey, BPR #015370*
John L. Miller, BPR #022192
WAGNER, MYERS & SANGER, P.C.
1801 First Tennessee Plaza
800 S. Gay Street
P.O. Box 1308
Knoxville, TN 37901