COMMONWEALTH OF KENTUCKY
SUPREME COURT
2023-SC-0436-DG and 2023-SC-0440-DG

SCHNEIDER ELECTRIC USA INC., F/K/A SQUARE D COMPANY — APPELLANT

v.

PAUL WILLIAMS, INDIVIDUALLY, ET AL. — APPELLEES

AND

UNION CARBIDE CORPORATION — APPELLANT

v.

SCHNEIDER ELECTRIC USA INC., F/K/A SQUARE D COMPANY — APPELLEES

AMICI CURIAE BRIEF OF KENTUCKY CHAMBER OF COMMERCE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR LITIGATION JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION

Mark A. Behrens
(*pro hac vice* motion pending)
SHOOK, HARDY & BACON L.L.P.
1800 K Street, NW, Suite 1000
Washington, DC 20006
(202) 639-5621
mbehrens@shb.com

Whitney Frazier Watt
Bethany A. Breetz
STITES & HARBISON, PLLC
400 West Market Street, Suite 1800
Louisville, KY 40202
(502) 587-3400
wwatt@stites.com, bbreetz@stites.com

Counsel for Amici Curiae

Certificate of Service

I certify that on July 23, 2024, copies of this brief were sent by U.S. Mail to: Hon. Kimberly Bunnell, Fayette Circuit Court, 120 N. Limestone, Lexington, KY 40507; Joseph D. Satterley, Paul J. Kelley, Paul J. Ivie, SATTERLEY & KELLY, 8700 Westport Rd., Louisville, KY 40242; Kevin C. Burke, BURKE NEAL, 2200 Dundee Rd., Louisville, KY 40205; R. Scott Masterson, Brantley C. Rowlen, LEWIS BRISBOIS BISGAARD & SMITH, 1180 Peachtree St., N.E., Suite 2900, Atlanta, GA 30309; Craig A. Woods, MAYER BROWN, 71 South Wacker Dr., Chicago, IL 60606; and Michael P. Abate, Burt A. Stinson, KAPLAN JOHNSON ABATE & BIRD, 710 W. Main St., Louisville, KY 40202.

/s/ Bethany A. Breetz
Bethany A. Breetz

STATEMENT OF POINTS AND AUTHORITIES

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. TORT LIABILITY FOR SECONDARY ASBESTOS EXPOSURE IS UNSOUND POLICY 4

In re Certified Question from Fourteenth District Court of Appeals of Texas (Miller v. Ford Motor Co.), 740 N.W.2d 206 (Mich. 2007) 4

CSX Transp., Inc. v. Williams, 608 S.E.2d 208 (Ga. 2005) 4

Georgia Pacific, LLC v. Farrar, 69 A.3d 1028 (Md. 2013) 4

Quiroz v. ALCOA, Inc., 416 P.3d 824 (Ariz. 2018) 4

Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 Widener L.J. 59 (2013) 4

Frieder v. Long Is. R.R, 40 Misc. 3d 685 (N.Y. Sup. Ct. 2013) 5

In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.), 840 N.E.2d 115 (N.Y. 2005) 5

In re Certified Question from Fourteenth District Court of Appeals of Texas (Miller v. Ford Motor Co.), 740 N.W.2d 206 (Mich. 2007) 5

CSX Transp., Inc. v. Williams, 608 S.E.2d 208 (Ga. 2005) 5

Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689 (Iowa 2009) 5

Quiroz v. ALCOA, Inc., 416 P.3d 824 (Ariz. 2018) 5

Palmer v. 999 Quebec, Inc., 874 N.W.2d 303 (N.D. 2016) 5

Adams v. Owens-Illinois, Inc., 705 A.2d 58 (Md. Ct. Spec. App. 1998) 5-6

Kan. Stat. Ann. § 60-4905(a) 6

Ohio Rev. Code Ann. § 2307.941(a)(1) 6

In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.), 840 N.E.2d 115 (N.Y. 2005) 6

In re Eighth Judicial District Asbestos Litig. (Rindfleisch v. AlliedSignal, Inc.), 12 Misc. 3d 936 (N.Y Sup. Ct. 2006).....6

In re Certified Question from Fourteenth District Court of Appeals of Texas (Miller v. Ford Motor Co.), 740 N.W.2d 206 (Mich. 2007) 7

Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689 (Iowa 2009) 7

CSX Transp., Inc. v. Williams, 608 S.E.2d 208 (Ga. 2005).....7

Widera v. Ettco Wire & Cable Corp., 204 A.D.2d 306 (2d Dep't 1994) 7

Satterfield v. Breeding Insulation, Inc., 266 S.W.3d 347 (Tenn. 2008).....8

Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 Widener L.J. 59 (2013) 8

CertainTeed Corp. v. Fletcher, 794 S.E.2d 641 (Ga. 2016).....8

Georgia Pacific, LLC v. Farrar, 69 A.3d 1028 (Md. 2013).....8

Martin v. Cincinnati Gas & Elec. Co., 561 F.3d 439 (6th Cir. 2009) 9

Rohrbaugh v. Owens-Corning Fiberglass Corp., 965 F.2d 844 (10th Cir. 1992).....9

Neumann v. Borg-Warner Morse Tec LLC, 168 F. Supp. 3d 1116 (N.D. Ill. 2016).....9

Meghan E. Flinn, Note, *Continuing War With Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 Wash. & Lee L. Rev. 707 (2014).....9

Patrick M. Hanlon, *Asbestos Litigation in the 21st Century: Developments in Premises Liability Law in 2005*, SL041 ALI-ABA 665 (2005) 9

James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223 (2006) 10

S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299 (2013).....10

Meghan E. Flinn, Note, *Continuing War With Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 Wash. & Lee L. Rev. 707 (2014).....10

Commonwealth ex rel. Cowan v. Wilkinson, 828 S.W.2d 610 (Ky. 1992).....10

Schork v. Huber, 648 S.W.2d 861 (Ky. 1983).....10

Gillen v. Boeing Co., 40 F. Supp. 3d 534 (E.D. Pa. 2014) 11

Waters Kraus Paul & Siegel, *Asbestos Litigation is Expected to Last Until 2050: What You Need to Know* (Mar. 21, 2017) 11

C. Anne Malik, et al., *The Asbestos Over-naming and Trust Transparency Problem: A Philadelphia Case Study* (U.S. Chamber Inst. for Legal Reform Mar. 2024) 11

Stanton v. Battelle Energy Alliance, Inc., 89 F. Supp. 3d 937 (D. Idaho 2015) 11

Doe v. Pharmacia & Upjohn Co., Inc., 879 A.2d 1088 (Md. 2005) 11

Widera v. Ettco Wire & Cable Corp., 204 A.D.2d 306 (2d Dep't 1994) 11

Ruffing v. Union Carbide Corp., 1 A.D.3d 339 (2d Dep't 2003) 12

Ruiz v. ConAgra Foods Packaged Foods LLC, 606 F. Supp. 3d 881 (E.D. Wis. 2022) 12

KCIC, A*sbestos Litigation: 2020 Year in Review* (2021).....12

II. TAKE-HOME EXPOSURE LIABILITY ENCOURAGES GROUNDLESS ASBESTOS LITIGATION 12

William L. Anderson, *The Unwarranted Basis for Today's Asbestos "Take Home" Cases*, 39 Am. J. of Trial Advoc. 107 (2015) 12

A. True Instances of Take-Home Mesotheliomas Are Rare.....13

Ellen Donovan, et al., *Evaluation of Take Home (Para-Occupational Exposure to Asbestos and Disease: A Review of the Literature*, 42 Critical Rev. in Toxicology 703 (2012).....13

Emily Goswami, et al., *Domestic Asbestos Exposure: A Review of Epidemiologic and Exposure Data*, 10 Int'l J. Env't Rsch. & Pub. Health 5629 (2013) 13

Curtis W. Noonan, *Environmental Asbestos Exposure and Risk of Mesothelioma*, 5 Annals of Translational Med. 234 (2017) 13

Muriel Newhouse & Hilda Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, 22 Brit. J. Indus. Med. 261 (1965).....13

Nicholas Vianna & Adele Polan, *Non-Occupational Exposure to Asbestos and Malignant Mesothelioma in Females*, 1 Lancet 1061 (1978).....13

Jennifer Sahmel, et al., *Airborne Asbestos Take-Home Exposures During Handling of Chrysotile-Contaminated Clothing Following Simulated Full Shift Workplace Exposures,* 26 J. of Exposure Sci. & Env't Epidemiology 48 (2016) 14

Jennifer Sahmel., et al., *Evaluation of Take-Home Exposure and Risk Associated with the Handling of Clothing Contaminated With Chrysotile Asbestos,* 34 Risk Analysis 1448 (Feb. 2014).....14

B. Today's Take-Home Cases Involve Spontaneous Cancers 14

Stanley Venitt, *Mechanisms of Spontaneous Human Cancers,* 104 Env't Health Perspectives 633 (1996) 14

Suresh Moolgavkar, et al., *Pleural and Peritoneal Mesotheliomas in SEER: Age Effects and Temporal Trends,* 20 Cancer Causes & Control 935 (2009).....14

Mathieu Boniol & Mary Heanue, "Chapter 7: Age-Standardisation and Denominators," in *Cancer Incidence in Five Continents, Vol. IX,* IARC Sci. Pub. No. 160 (2015) 14

Robert A. Weinberg, *One Renegade Cell: How Cancer Begins* (1998).....15

Cristian Tomasetti & Bert Vogelstein, *Variation in Cancer Risk Among Tissues Can Be Explained by the Number of Stem Cell Divisions,* 347 Sci. 78 (Jan. 2015) 15

Stanley Venitt, *Mechanisms of Spontaneous Human Cancers,* 104 Env't Health Perspectives 633 (1996) 15

Robert A. Weinberg, *One Renegade Cell: How Cancer Begins* (1998).....15

Mary Jane Teta, et al., *US Mesothelioma Patterns 1973-2002: Indicators of Change and Insights into Background Rates,* 17 Eur. J. Cancer Prevention 525 (2008).....15

Christine Rake, et al., *Occupational, Domestic and Environmental Mesothelioma Risks in the British Population: A Case-Control Study,* 100 Brit. J. Cancer 1175 (2009).....16

III. THERE IS NO NEED FOR TAKE-HOME EXPOSURE LIABILITY, GIVEN RECOVERY AVAILABLE THROUGH ASBESTOS TRUSTS 16

Manville Trust, 2002 Trust Distribution Process (TDP) § B(C)(11) (Revised May 2021), https://www.claimsres.com/wp-content/uploads/2016/11/2002-TDP-May-2021-Revision-1.pdf.....16

William P. Shelley, et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675 (2014) 16

U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* (Sept. 2011).....16

Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases* (2015) 16

Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 The Advocate 80 (2007).....17

Dionne Searcy & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1 17

Thomas M. Wilson, *Institutionalized Fraud in Asbestos Bankruptcy Trusts*, 29 Mealey's Litig. Rep. Asb. 36 (May 7, 2014).....17

Lloyd Dixon, et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (Rand Corp. 2010) 17

In re Garlock Sealing Techs., LLC, 504 B.R. 71 (W.D.N.C. Bankr. 2014).....18

Mark A. Behrens, *Asbestos Trust Transparency*, 87 Fordham L. Rev. 107 (2018).....18

CONCLUSION.....18

CERTIFICATE OF WORD COUNT.....End

INTEREST OF *AMICI CURIAE*

The Kentucky Chamber of Commerce ("Kentucky Chamber"),[1] Chamber of Commerce of the United States of America ("U.S. Chamber"),[2] Coalition for Litigation Justice, Inc. ("Coalition"),[3] National Association of Manufacturers ("NAM"),[4] National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center"),[5] American Tort Reform Association ("ATRA"),[6] National Association of

[1] The Kentucky Chamber is the largest business association in the state working to ensure prosperous business climate in the Commonwealth and to advance Kentucky through advocacy, information, program management and customer service to promote business retention and recruitment.

[2] The U.S. Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. The U.S. Chamber regularly files *amicus* briefs in cases like this one that raise issues of concern to the nation's business community.

[3] The Coalition is a nonprofit association formed by insurers in 2000 to address the litigation environment for asbestos and other toxic tort claims. The Coalition has filed over 200 *amicus* briefs and includes Century Indemnity Company; Allianz Reinsurance America, Inc.; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

[4] The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and every industrial sector. Manufacturing employs nearly 13 million men and women, contributes $2.89 trillion to the United States economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda and liability laws that help manufacturers compete in the global economy and create jobs across the United States.

[5] The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the nation's leading small business association. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

Mutual Insurance Companies ("NAMIC"),[7] and American Property Casualty Insurance Association ("APCIA")[8] are interested in this case because imposition of liability on an employer, such as Square D Co., or a manufacturer of a product used in a workplace, such as Union Carbide Corp., for non-employees' secondary, off-site exposure to asbestos or other toxic substances would lead to groundless litigation and potentially limitless, indefinite liability. Such crippling liability is all the more unwarranted given the frequent availability of recovery through extant asbestos trusts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Asbestos litigation has been ongoing for over half a century and is expected to continue for several more decades, costing many billions of dollars. Originally focused on claims by plaintiffs directly exposed to friable asbestos insulation products, asbestos litigation expanded and evolved after most of the primary historical defendants went bankrupt by the early 2000s. Since then, asbestos litigation has focused increasingly on novel theories of tort liability, defendants with increasingly peripheral responsibility for

---

[6] ATRA is a broad-based coalition of 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 three decades, ATRA has filed *amicus* briefs in cases involving important liability issues.

[7] NAMIC consists of more than 1,500 member companies, including seven of the top ten property/casualty insurers in the United States. The association supports local and regional mutual insurance companies on main streets across America as well as many of the country's largest national insurers. NAMIC member companies write $391 billion in annual premiums and represent 68% of homeowners, 56% of automobile, and 31% of the business insurance markets.

[8] APCIA is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent more than 65% of the total U.S. property-casualty insurance market, and more than 79% of the commercial P&C market in Kentucky.

asbestos-related injury, and plaintiffs with increasingly peripheral asbestos exposure. Cases alleging "take-home" exposure to asbestos reflect these trends.

Cases such as this one have been filed throughout the country against employers of asbestos workers, owners of premises where asbestos was used, and manufacturers of asbestos-containing products. Courts in many jurisdictions have declined to recognize a cause of action for secondary asbestos exposure, citing, among other reasons, public policy considerations against expanding tort liability to encompass the essentially unlimited universe of potential plaintiffs who may have had contact with an occupationally exposed worker. In the context of products liability, courts also cite policy considerations against imposing a duty to warn upon manufacturers under circumstances where it would be infeasible, if not impossible, to provide effective warnings.

In addition, the science regarding take-home asbestos exposure raises questions as to whether many claimants have sufficient exposure to cause their disease. Studies suggest that many of today's take-home exposure litigants frequently sue over spontaneously generated cancers unrelated to asbestos. Liability would open a path for speculative claims against only remotely related Kentucky asbestos defendants.

Finally, tort liability is not required to provide a remedy to most take-home exposure plaintiffs. Scores of trusts established in bankruptcy by former asbestos defendants collectively hold tens of billions of dollars to pay asbestos claimants outside the tort system. The availability of asbestos trust recoveries for take-home asbestos claimants further weighs against stretching Kentucky law to impose liability in this case.

For these reasons, *amici* urge this Court to reverse the Court of Appeals, hold that Kentucky law bars claims for secondary exposure to asbestos, regardless of the theory of liability alleged, and affirm the trial court's grant of summary judgment for Square D and Union Carbide.

ARGUMENT

I. TORT LIABILITY FOR SECONDARY ASBESTOS EXPOSURE IS UNSOUND POLICY

The proposition that secondary exposures to asbestos should give rise to tort liability under any theory is highly controversial because these claims "expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs." *In re Certified Question from Fourteenth District Court of Appeals of Texas (Miller v. Ford Motor Co.),* 740 N.W.2d 206, 222 (Mich. 2007) (quoting *CSX Transp., Inc. v. Williams,* 608 S.E.2d 208, 210 (Ga. 2005)).

These cases are frequently referred to as "take-home" exposure cases, but they are not limited to the worker's household. Potential plaintiffs might include anyone who has come into contact with an occupationally exposed worker, that individual's clothing, or potentially even furniture or carpeting connected to the worker: household members, extended family living in the household[9] or visiting the home, co-workers, dating partners, renters, houseguests, house cleaners, carpool members, bus drivers, laundry workers, "neighbors and friends, babysitters and cab drivers, waiters and bartenders, dentists and physicians, and fellow church members" (*Quiroz v. ALCOA, Inc.*, 416 P.3d 824, 841 (Ariz. 2018)), among others. *See* Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 Widener L.J. 59,

[9] *See, e.g., Georgia Pacific, LLC v. Farrar,* 69 A.3d 1028 (Md. 2013) (grandchild).

87 (2013) ("A premises owner's duty to guard against secondhand asbestos exposures could potentially cover anyone who might come into contact with a dusty employee or that person's dirty clothes, such as a babysitter, relative, neighbor, or laundry service employee."); *see also Frieder v. Long Is. R.R,* 40 Misc. 3d 685 (N.Y. Sup. Ct. 2013) (plaintiff was cashier at diner frequented by workers).

The highest courts of New York, Michigan, Georgia, Iowa, Arizona, and North Dakota have expressly declined to recognize negligence claims against employers or premises owners for secondary asbestos exposures. They concluded that take-home exposure liability would constitute an unwarranted expansion of tort law. *See In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.),* 840 N.E.2d 115, 122 (N.Y. 2005) ("plaintiffs are, in effect, asking us to upset our long-settled common-law notions of an employer's and landowner's duties"); *In re Certified Question from Fourteenth District Court of Appeals of Texas,* 740 N.W.2d at 220 (imposing a duty "would create a potentially limitless pool of plaintiffs"); *Williams,* 608 S.E.2d at 210 ("adher[ing] to the position that an employer's duty to provide a safe workplace does not extend to persons outside the workplace"); *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 699 (Iowa 2009) ("We conclude such a dramatic expansion of liability would be incompatible with public policy, and therefore reject it"); *Quiroz v. ALCOA, Inc.*, 416 P.3d 824, 843 (Ariz. 2018) ("a limitless duty framework is impractical, unmanageable, and has never been the law in this state"); *Palmer v. 999 Quebec, Inc.*, 874 N.W.2d 303, 310 (N.D. 2016) ("regardless of whether the focus is on foreseeability of injury, relationship of the parties or a combination of both," plaintiff failed to raise fact issue as to alleged duty of father's employer); *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 Mary Wild's handling of her husband's clothing, presumably Bethlehem would owe a duty to others who came in close contact with Edwin Wild, including other family members, automobile passengers, passengers, and co-workers. Bethlehem owed no duty to strangers . . . .").[10]

For example, New York's highest court in *In re New York City Asbestos Litigation (Holdampf v. A.C. & S., Inc.)* recognized the potential for "limitless liability" flowing from cases such as this one when it held that a premises owner did not owe a duty of care to a former employee's wife allegedly injured from asbestos on her husband's clothes. 840 N.E.2d at 122. The court appreciated that potential plaintiffs in secondhand exposure cases might include a "babysitter (or maybe an employee of a neighborhood laundry) [who] launders the family members' clothes" in addition to household members. *Id.* The plaintiff tried to appease these concerns by suggesting that new cases would be limited, but the court said "experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality." *Id.*; *see also In re Eighth Judicial District Asbestos Litig. (Rindfleisch v. AlliedSignal, Inc.),* 12 Misc. 3d 936, 942 (N.Y Sup. Ct. 2006) (no duty owed to spouse of employee who handled husband's work clothes from 1984 through 1990, stating that "[a] line must be drawn

---

[10] Other states have enacted legislation barring take-home exposure claims against premises owners. *See* Kan. Stat. Ann. § 60-4905(a) ("No premises owner shall be liable for any injury to any individual resulting from silica or asbestos exposure unless such individual's alleged exposure occurred while the individual was at or near the premises owner's property"); Ohio Rev. Code Ann. § 2307.941(a)(1) ("A premises owner is not liable for any injury to any individual resulting from asbestos exposure unless that individual's alleged exposure occurred while the individual was at the premises owner's property").

between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit.").

The Michigan Supreme Court in *In re Certified Question from Fourteenth District Court of Appeals of Texas (Miller v. Ford Motor Co.)* held that Ford Motor Company did not owe a duty to protect a plaintiff from asbestos fibers carried home on the clothing of a family member who worked at a Ford plant. The court said that "no duty should be imposed because protecting every person with whom a business's employees . . . come into contact, or even with whom their clothes come into contact, would impose an extraordinarily onerous and unworkable burden." 740 N.W.2d at 217.

Policy reasons also led the Iowa Supreme Court to reject a duty of care requiring a premises owner to warn the wife of an independent contractor's employee of the hazards of asbestos. In *Van Fossen v. MidAmerican Energy Co.*, the court said such a duty arguably would extend "to a large universe of other potential plaintiffs who never visited the employers' premises but came into contact with a contractor's employee's asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a laundromat." 777 N.W.2d at 699. The court "conclude[d] such a dramatic expansion of liability would be incompatible with public policy." *Id.*

The Georgia Supreme Court in *CSX Transportation, Inc. v. Williams* "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." 608 S.E.2d at 210. The court said that such a duty would "create an almost infinite universe of potential plaintiffs." *Id.* at 209 (quoting *Widera v. Ettco Wire & Cable Corp.*, 204 A.D.2d 306, 307 (2d Dep't 1994)).

In fact, in jurisdictions where the duty analysis focuses on the relationship between the plaintiff and the defendant and on public policy, and not simply the foreseeability of injury, the courts *uniformly* hold that an employer/premises owner owes *no* duty to a member of a household injured by take-home exposure to asbestos.[11] Kentucky falls in this camp, as Square D and Union Carbide explain in their briefs.

Courts have been equally inhospitable to take-home exposure claims brought against manufacturers of asbestos-containing products on products liability theories. For example, in *CertainTeed Corp. v. Fletcher*, 794 S.E.2d 641, 645 (Ga. 2016), the Georgia Supreme Court said it would be "unreasonable to impose a duty on CertainTeed to warn all individuals in [plaintiff's] position, whether those individuals be family members or simply members of the public who were exposed to asbestos-laden clothing, as the mechanism and scope of such warnings would be endless." The Maryland Supreme Court in *Georgia Pacific, LLC v. Farrar*, 69 A.3d 1028, 1038 (Md. 2013), said that even if the defendant manufacturer "should have foreseen" the danger to the plaintiff from asbestos carried home on her grandfather's clothes, "there was no practical way that any warning given by it to any of the suggested intermediaries would or could have avoided that danger."

---

[11] Where courts have recognized a duty of care in a take-home exposure case, the decision turned on the court's conclusion that, unlike in Kentucky, the foreseeability of risk was the primary (if not only) consideration in the duty analysis. *See, e.g.*, *Satterfield v. Breeding Insulation, Inc.*, 266 S.W.3d 347, 366-67 (Tenn. 2008) (in case alleging a misfeasance theory for exposures occurring after OSHA's 1972 asbestos regulations took effect, the court said "the foreseeability factor has taken on paramount importance in Tennessee" and held that the plaintiff fell "within a class of persons that could, with reasonable foreseeability, be harmed by exposure to asbestos."). "Relying on foreseeability alone—particularly without a careful analysis of what was known about *non-occupational* exposure risks in the relevant time period—can create an infinite pool of potential plaintiffs." Schwartz & Behrens, 23 Widener L.J. at 87.

Federal courts in products-based take-home cases have reached similar conclusions. *See Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 447 (6th Cir. 2009) (affirming summary judgment on strict liability take-home claim under Kentucky law where there was "no evidence that the danger from secondary exposure was reasonably foreseeable at the time of Mr. Martin's exposure"); *Rohrbaugh v. Owens-Corning Fiberglass Corp.*, 965 F.2d 844, 846-47 (10th Cir. 1992) ("To hold that Appellants could reasonably foresee that [plaintiff] would be affected by their products would be an overextension of Oklahoma manufacturer's products liability law"); *Neumann v. Borg-Warner Morse Tec LLC*, 168 F. Supp. 3d 1116, 1125 (N.D. Ill. 2016) (asbestos products manufacturer did not owe a duty to take-home plaintiff under Illinois law "in light of the magnitude of the burden of protecting [plaintiff] and the ramifications of imposing that burden on [manufacturer]").

These cases demonstrate that "the courts are . . . wary of the consequences of extending employers' liability too far, especially when asbestos litigation has already rendered [over 140] corporations bankrupt." Meghan E. Flinn, Note, *Continuing War With Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure*, 71 Wash. & Lee L. Rev. 707, 710 (2014); *see also* Patrick M. Hanlon, *Asbestos Litigation in the 21st Century: Developments in Premises Liability Law in 2005*, SL041 ALI-ABA 665, 694 (2005) ("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."). The potential for crushing liability is still a major concern in asbestos litigation today, even as the defendants generally have become more remotely involved after scores of major defendants exited the tort system in bankruptcy. *See* James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 238 (2006) ("As leading plaintiffs' counsel Ron Motley and Joe Rice observed some time ago, the first seventeen asbestos defendants to go into bankruptcy represented 'one-half to three-quarters of the original liability share.'") (citation omitted). Professor Todd Brown has noted that "Defendants who were once viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years." S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 306 (2013).

The Court of Appeals below attempted to address some of these concerns by asserting that it was "not talking about an unbounded duty," but a duty to "household members who regularly and repeatedly came into close contact with an employee's asbestos-contaminated work clothes over an extended period."[12] Trying to limit liability in this manner, however, may be unworkable in practice and would require the type of line-drawing that is typically the role of legislators. *See* Flinn, 71 Wash. & Lee L. Rev. at 746 ("[T]he problem of take-home asbestos exposure is best suited for the legislature"). Indeed, in Kentucky, public policy decisions are reserved to the General Assembly and not to the courts. *See Commonwealth ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992); *Schork v. Huber*, 648 S.W.2d 861, 863 (Ky. 1983).

---

[12] This standard would spawn litigation. For example, is a child of divorced parents who lives with a parent every other weekend a "household member"? How often is "regularly and repeatedly"? Once a week? What qualifies as an "extended period"? A few weeks?

Moreover, if liability is imposed in this case under either general negligence law or products liability law, the "specter of limitless liability" for defendants would stretch decades into the future. *Gillen v. Boeing Co.*, 40 F. Supp. 3d 534, 542 (E.D. Pa. 2014). As a prominent asbestos plaintiffs' firm explains, "Some believe that asbestos exposure is becoming less and less of a problem but this is simply not the case. The reality of the situation is that asbestos injury and litigation is expected to continue until at least 2050." Waters Kraus Paul & Siegel, *Asbestos Litigation is Expected to Last Until 2050: What You Need to Know* (Mar. 21, 2017). Asbestos personal injury litigation already costs industry and insurers billions of dollars annually. *See* C. Anne Malik, et al., *The Asbestos Over-naming and Trust Transparency Problem: A Philadelphia Case Study* 3 (U.S. Chamber Inst. for Legal Reform Mar. 2024) (asbestos "suits continue to cost defendant companies billions of dollars in verdicts, settlements, and legal defense fees each year").

It is also important to note that imposition of liability here presumably would not be limited to mesothelioma cases, but could spark lawsuits by plaintiffs with numerous other asbestos-related diseases, from lung cancer to non-malignant conditions, and open the door to lawsuits against employers over any number of hazards that workers carry off-site. *See Stanton v. Battelle Energy Alliance, Inc.*, 89 F. Supp. 3d 937, 946 (D. Idaho 2015) (policy factors weighed against duty on nuclear operator for wife of employee exposed to radioactive chemical elements); *Doe v. Pharmacia & Upjohn Co., Inc.*, 879 A.2d 1088, 1096-97 (Md. 2005) (employer owed no duty to wife of employee who became infected with HIV through her spouse, because imposition of a duty of care "would create an indeterminate class of potential plaintiffs"); *Widera*, 204 A.D.2d at 307 (employer not liable to infant exposed in utero to toxic chemicals emitted at work);

Ruffing v. Union Carbide Corp., 1 A.D.3d 339, 440 (2d Dep't 2003) (worker whose pregnant wife was exposed to toxic substances carried home by worker, resulting in daughter's birth defects, failed to state cause of action against employer); *Ruiz v. ConAgra Foods Packaged Foods LLC*, 606 F. Supp. 3d 881, 889 (E.D. Wis. 2022) (employer not liable for COVID death of worker's spouse that could "open[] the door to potentially unlimited liability" as plaintiff "could also have been a neighbor, a houseguest, or someone [the worker] drove with in a vehicle").

Lastly, take-home exposures lawsuits that could flow from a finding of liability in this action—whether from asbestos or some other workplace hazard capable of transmission—may not be limited to corporate defendants such as Square D or Union Carbide. Landlords and private homeowners could be sued for secondary exposures that originate on their properties in an attempt to tap their insurance. This is not far-fetched as "more than 11,000 individual defendant company entities were named on asbestos complaints" in a recent year. KCIC, *Asbestos Litigation: 2020 Year in Review* 13 (2021).

II. TAKE-HOME EXPOSURE LIABILITY ENCOURAGES GROUNDLESS ASBESTOS LITIGATION

Tort law should recognize reasonable boundaries around liability and reserve recovery for the most direct injuries and tortious actions. Here, those boundaries do not require cutting off a large class of meritorious mesothelioma claims. The science behind mesothelioma suggests that today's take-home asbestos claimants are frequently suing over spontaneously generated cancers that have nothing to do with asbestos exposures. *See* William L. Anderson, *The Unwarranted Basis for Today's Asbestos "Take Home" Cases*, 39 Am. J. of Trial Advoc. 107, 121 (2015).

A. True Instances of Take-Home Mesotheliomas Are Rare

Historically, take-home cases have arisen out of workplace settings involving high dose exposures: "asbestos miners, asbestos factory workers, shipyard/dock workers, textile workers, furnace/engine boiler room workers, railway carriage workers, pipefitters, and insulators." Ellen Donovan, et al., *Evaluation of Take Home (Para-Occupational Exposure to Asbestos and Disease: A Review of the Literature*, 42 Critical Rev. in Toxicology 703, 716 n.11 (2012); *see also* Emily Goswami, et al., *Domestic Asbestos Exposure: A Review of Epidemiologic and Exposure Data*, 10 Int'l J. Env't Rsch. & Pub. Health 5629 (2013) (citing studies); Curtis W. Noonan, *Environmental Asbestos Exposure and Risk of Mesothelioma*, 5 Annals of Translational Med. 234 (2017) (industries associated with para-occupational exposure to asbestos and mesothelioma "included mining, shipbuilding, asbestos cement manufacturing and insulators, among others."). Even in those settings, it is difficult to encounter a case of take-home mesothelioma.

For instance, a 1965 study referred to as the first take-home exposure study found only nine spouse cases across the entire population served by the London Hospital, at a time when asbestos factories with uncontrolled exposures were common. *See* Muriel Newhouse & Hilda Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, 22 Brit. J. Indus. Med. 261, 261 n.5 (1965). A later study of all mesotheliomas in New York found only ten spouses with apparent take-home disease in a decade. *See* Nicholas Vianna & Adele Polan, *Non-Occupational Exposure to Asbestos and Malignant Mesothelioma in Females*, 1 Lancet 1061, 1062 (1978).

Additionally, Union Carbide's phenolic molding compounds contained chrysotile asbestos, to the extent they had any asbestos at all, and more recent simulation studies measuring air concentrations of chrysotile asbestos from clothes-handling activity suggest that potential take-home exposures are a tiny fraction—perhaps 1%—of occupational exposures. *See* Jennifer Sahmel, et al., *Airborne Asbestos Take-Home Exposures During Handling of Chrysotile-Contaminated Clothing Following Simulated Full Shift Workplace Exposures*, 26 J. of Exposure Sci. & Env't Epidemiology 48 (2016) (abstract) ("Consistent with previously published data," simulated take-home exposures to chrysotile asbestos from clothes-handling activity for a full shift day were "approximately 1.0% of workplace concentrations" and only about "0.20% of workplace concentrations" over a week); *see also* Jennifer Sahmel., et al., *Evaluation of Take-Home Exposure and Risk Associated with the Handling of Clothing Contaminated With Chrysotile Asbestos*, 34 Risk Analysis 1448 (Feb. 2014).

B. Today's Take-Home Cases Involve Spontaneous Cancers

So where are today's take-home cases coming from? Mesotheliomas, like all cancers, are increasingly a function of age—the older the population becomes, the more cancers we have. *See* Stanley Venitt, *Mechanisms of Spontaneous Human Cancers*, 104 Env't Health Perspectives 633, 633, 635 (1996); *see also* Suresh Moolgavkar, et al., *Pleural and Peritoneal Mesotheliomas in SEER: Age Effects and Temporal Trends*, 20 Cancer Causes & Control 935, 943 (2009); Mathieu Boniol & Mary Heanue, "Chapter 7: Age-Standardisation and Denominators," in *Cancer Incidence in Five Continents, Vol. IX*, IARC Sci. Pub. No. 160, at 9 (2015).

Most cancers are produced by our own bodies generating errors in our genes during the billions of replications of our DNA that occur in our cells on a daily basis. *See*

Robert A. Weinberg, *One Renegade Cell: How Cancer Begins* at 89-90 (1998). These types of cancers are called "spontaneous" because they are self-generating, the result of a series of two or more spontaneous cell mutations in a given cell sufficient to turn that cell cancerous. *See* Cristian Tomasetti & Bert Vogelstein, *Variation in Cancer Risk Among Tissues Can Be Explained by the Number of Stem Cell Divisions*, 347 Sci. 78 (Jan. 2015); *see also* Venitt, *supra*, at 633, 635; Weinberg, *supra*, at 89-90.

Spontaneous cancers produce as much as two-thirds of the cancers in today's population, and are increasingly accounting for mesotheliomas. *See* Mary Jane Teta, et al., *US Mesothelioma Patterns 1973-2002: Indicators of Change and Insights into Background Rates*, 17 Eur. J. Cancer Prevention 525, 526 (2008) ("[S]cientific evidence suggests that a portion of cases occurred with no apparent history of asbestos exposure . . . . It is generally well accepted, therefore, that there is a background rate of mesothelioma, unrelated to asbestos exposure"); Christine Rake, et al., *Occupational, Domestic and Environmental Mesothelioma Risks in the British Population: A Case-Control Study*, 100 Brit. J. Cancer 1175, 1175 (2009) (14% of male and 62% of female cases of mesothelioma "not attributable to occupational or domestic asbestos exposure").

In short, today's population of persons with mesothelioma are decreasingly individuals who had sufficient asbestos exposure to cause their disease and increasingly people who may have had inconsequential asbestos exposure but have incurred unrelated, spontaneous mesotheliomas. Nonetheless, partly due to some courts' acceptance of speculative asbestos causation theories, virtually every instance of mesothelioma has the potential to become an asbestos lawsuit. By rejecting take-home asbestos exposure

liability in Kentucky, this Court will prevent further unwarranted expansion of an already massive area of litigation.

III. THERE IS NO NEED FOR TAKE-HOME EXPOSURE LIABILITY, GIVEN RECOVERY AVAILABLE THROUGH ASBESTOS TRUSTS

In addition to the above reasons not to recognize take-home exposure liability, doing so is not required to provide a remedy for claimants with bona fide injuries. Trusts established by former asbestos defendants in bankruptcy exist to pay truly injured claimants outside the tort system, including for secondary exposures. *See, e.g.*, Manville Trust, 2002 Trust Distribution Process § B(C)(11) (May 2021) (secondary exposure claims).

Today, billions of dollars in assets are available in asbestos trusts to "answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades." William P. Shelley, et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675 (2014). There are at least 60 trusts in operation. *See* U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011). Plaintiff attorney websites routinely advertise that the trusts hold over $30 billion to pay claimants. The trusts operate independently of the civil tort system, providing a separate avenue of recovery for claimants with true injuries. *See* Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases* iii (2015) (Plaintiffs "often receive compensation both from the trusts and through a tort case").

It is "much easier to collect against a bankruptcy trust than a solvent defendant." Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 The Advocate 80, 80 (2007). As the *Wall Street Journal* explained:

> Unlike court, where plaintiffs can be cross-examined and evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys.

Dionne Searcy & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1. For claimants meeting the payment criteria, the trusts "give asbestos firms an almost automatic guarantee of settlements . . . ." *Id*. at 82; *see also* Thomas M. Wilson, *Institutionalized Fraud in Asbestos Bankruptcy Trusts*, 29 Mealey's Litig. Rep. Asb. 36 (May 7, 2014) ("[T]he trusts, designed by the same individuals who are now submitting claims, contain 'loopholes' allowing for ease of payment, often without the need for any real proof.").

Further, it is common for claimants to receive multiple trust payments, as each trust operates independently and workers were often exposed to multiple asbestos products. *See* Lloyd Dixon, et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 15 (Rand Corp. 2010) ("Trust claimants can and frequently do file claims with, and collect money from, multiple trusts"). For instance, in a significant bankruptcy case involving gasket and packing manufacturer Garlock Sealing Technologies, a typical mesothelioma plaintiff's

total recovery was estimated to be $1-1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts." *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014); *see also* Mark A. Behrens, *Asbestos Trust Transparency*, 87 Fordham L. Rev. 107 (2018) (discussing trust claim system and *Garlock* case).

CONCLUSION

For these reasons, the Court should reverse the Court of Appeals and affirm the trial court's grant of summary judgment for Square D and Union Carbide.

/s/ Bethany A. Breetz
Whitney Frazier Watt
Bethany A. Breetz
STITES & HARBISON, PLLC
400 West Market Street, Suite 1800
Louisville, KY 40202
(502) 587-3400
wwatt@stites.com
bbreetz@stites.com

Mark A. Behrens
(*pro hac vice* motion pending)
SHOOK, HARDY & BACON L.L.P.
1800 K Street, NW, Suite 1000
Washington, DC 20006
(202) 639-5621
mbehrens@shb.com

Counsel for Amici Curiae

CERTIFICATE OF WORD COUNT

This Brief complies with the word limit of RAP 34 because, excluding the parts of the document exempted by RAP 15, this Brief contains 5,152 words (out of 5,250 maximum word count).

/s/ Bethany A. Breetz