STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE CERTIFIED QUESTION
FROM THE FOURTEENTH COURT
OF APPEALS DISTRICT OF TEXAS,
_____/

GLENN MILLER, ESTATE OF CAROLYN MILLER, SHAWN DEAN, JOHN ROLAND AND ALMA ROLAND,

Plaintiffs-Appellees,

-vs-

FORD MOTOR COMPANY,

Defendant-Appellant,
_____/

Supreme Court No. 131517

Court of Appeals for the 14th Judicial District, Houston, Texas
No. 14-05-00026-CV

Appeal from the 239th District Court, Brazoria County, Texas
No. 15077*JG01

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, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AND AMERICAN TORT REFORM ASSOCIATION
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF THE QUESTION PRESENTED 1

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF FACTS 4

INTRODUCTION AND SUMMARY OF THE ARGUMENT 4

ARGUMENT

I. An Overview of the Litigation Environment in Which the Subject Appeal Must Be Considered 6

A. The Current Asbestos Litigation Environment. 6

1. Filings by Claimants Who Are Not Sick 6

2. Bankruptcies and the Economic Impact of the Litigation. 9

3. Peripheral Defendants Are Being Dragged into the Litigation. 10

B. Asbestos Litigation Has Detrimentally Affected Michigan's Economy. 12

II. This Court Should Hold That Landowners Owe No Duty to Remote Plaintiffs Injured Off-Site Through Secondhand Exposure to Hazards on the Property 13

A. Courts That Have Recently Considered the Issue Presented Here Rejected Premises Owner Liability for Secondhand Asbestos Exposures. 14

1. Georgia: *CSX Transportation, Inc. v. Williams* 15

2. New York: *In re New York City Asbestos Litigation (Holdampf v. A.C. & S., Inc.) and In re Eighth Judicial District Asbestos Litigation (Rindfleisch v. AlliedSignal, Inc.)* 16

3. Tennessee: *Satterfield v. Breeding Insulation Co.* 19

4. Texas: *Exxon Mobil Corp. v. Altimore* 19

5. Michigan: *McMullen v. Classic Container Corp.* and *Bordeaux v. Acme Insulations, Inc* 20

B. Arguments for Liability Rest on a Weak Foundation. 21

1. No Relationship Existed Between the Parties. 21

2. Other Authority Provides Weak Support for a New Duty Rule 22

a. New Jersey: *Olivo v. Owens-Illinois, Inc.* 22

b. Louisiana: *Zimko v. American Cyanamid* and *Chaisson v. Avondale Industries, Inc.* 24

c. California: *Condon v. Union Oil Co. of California* .. 25

3. Cases Involving Inherently Dangerous Activities Do Not Support the Duty Sought Here 26

4. Defendant Lacked the Ability to Prevent the Harm 27

5. Product Liability Rules Are Based on a Different Foundation than Premises Liability and Do Not Support the Duty Sought Here 28

6. Other Cases Cited by Plaintiff Do Not Support A New Duty Rule Here 29

a. Adjacent Property Cases. 29

b. *Shepard v. Redford Community Hospital.* 30

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. 30

CONCLUSION 32

APPENDIX A

APPENDIX B

TABLE OF AUTHORITIES

CASES **Page**

Adams v. Owens-Illinois, Inc., 705 A.2d 58 (Md. Ct. Spec. App. 1998) 14

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STATEMENT OF THE QUESTION PRESENTED

The question certified to this Court by the Fourteenth District Court of Appeals, in Houston, Texas, is as follows:

> Whether, under Michigan Law, Ford, as the owner of property on which asbestos-containing products were located, owed to Carolyn Miller, who was never on or near that property, a legal duty specified in the jury charge submitted by the trial court, to protect her from exposure to any asbestos fibers carried home on the clothing of a member of Carolyn Miller's household who was working on that property as the employee of an independent contractor.

Defendant-Appellant Ford Motor Company answers "No."

Plaintiffs-Appellees answer "Yes."

Amici Curiae Coalition for Litigation Justice et al. answer "No."

The 239th Judicial District Court, Brazoria County, Texas, answered "Yes."

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent Michigan 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 answer the question certified to it by the Fourteenth District Court of Appeals in Houston, Texas, by confirming that, under Michigan law, Defendant-Appellant Ford Motor Company did not owe a duty to protect Carolyn Miller from exposure to asbestos fibers allegedly carried home on the clothing of a member of her household who was working on Ford's property as the employee of an independent contractor.

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking

to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1] The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

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

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

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 Michigan, 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.

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 state and federal courts that have addressed important liability issues.

STATEMENT OF FACTS

Amici adopt Defendant-Appellant Ford Motor Company's Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The United States Supreme Court has described the asbestos litigation in this country as a "crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Claims have poured in at an extraordinary rate. An estimated eighty-five employers have been forced into bankruptcy. More than 8,500 defendants have been named. 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, *Premises Owner Liability for Secondhand Asbestos Exposure: The Next Wave?*, 7:2 Engage – The J. of the Federalist Society's Prac. Groups 145 (Oct. 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. Premises owner liability for secondhand asbestos exposures has been rejected by the highest courts in Georgia and New York, New York and Tennessee trial courts, a Texas appellate court. The duty also has been rejected in unpublished opinions by the Michigan Court of Appeals and Michigan's Bay County Circuit Court.

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 Michigan. The decision also could have substantial negative impacts beyond Michigan 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 Ford owed no duty to Carolyn Miller for secondhand exposure to asbestos away from Ford's property.

ARGUMENT

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

A. The Current Asbestos Litigation Environment

Courts and commentators have recognized since the early 1990s the extraordinary problems created by the "elephantine mass" of asbestos cases. *Norfolk & W. Ry. Co., v. Ayers*, 538 U.S. 135, 166 (2003) (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005) ("For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits."); 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).

1. Filings by Claimants Who Are Not Sick

While the plaintiff here alleges asbestos-related mesothelioma, the vast majority of recent asbestos claimants—up to ninety percent—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). The RAND Institute for Civil Justice recently concluded that "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." Stephen J. Carroll *et al., Asbestos Litigation* 76 (RAND Inst. for Civil Justice 2005), *available at* http://www.rand.org/ publications/MG/MG162 [hereinafter RAND Rep.].

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). "There often is no medical purpose for these screenings and claimants receive no medical follow-up." *Id.* *U.S. News & World Report* has described the claimant recruiting process:

> To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: 'Find out if YOU have MILLION DOLLAR LUNGS!'

Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36, *available at* 2001 WLNR 7718069. 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 Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms."). It is estimated that over one million workers have undergone attorney-sponsored screenings. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and*

Reality?, 31 Pepp. L. Rev. 33, 69 (2003); *see also* Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 Hofstra L. Rev. 833 (2005).

Many X-ray interpreters (called "B Readers") hired by plaintiffs' lawyers are "so biased that their readings [are] simply unreliable." *Owens Corning*, 322 B.R. at 723; *see also* American Bar Association Commission on Asbestos Litigation, *Report to the House of Delegates* (2003), *available at* http://www.abanet.org/leadership/full_report.pdf (litigation screening companies find X-ray evidence that is "consistent with" asbestos exposure at a "startlingly high" rate, often exceeding 50% and sometimes reaching 90%).[2] Joseph N. Gitlin *et al.*, *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiology 843 (2004) (B Readers hired by plaintiffs claimed asbestos-related lung abnormalities in 95.9% of the X-rays sampled, but independent B Readers found abnormalities in only 4.5% of the same X-rays); John M. Wylie II, *The $40 Billion Scam*, Reader's Digest, Jan. 2007, at 74.[3]

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2 As a result of its findings, the Commission proposed the enactment of federal legislation to codify the evidence that physicians recognize is needed to show impairment. The ABA's House of Delegates adopted the Commission's proposal in February 2003. *See Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong., Appen. A (Mar. 5, 2003) (statement of Hon. Dennis Archer, President-Elect, Am. Bar Ass'n), *available at* 2003 WL 785387.

3 One of the earliest detailed reviews of B Reads in litigation arose out of information distributed to tire workers, which said that 94% of the workers screened at one location and 64% at another were found to have asbestosis. *See Raymark Indus., Inc. v. Stemple*, 1990 WL 72588 (D. Kan. May 30, 1990). In 1986, the National Institute for Occupational Safety and Health looked into the matter and found that only 0.2% of the workers they evaluated had physical changes consistent with asbestosis. *See* J. Jankovic & R.B. Reger, *Health Hazard Evaluation Report*, NIOSH Rep. No. HETA 87–017–1949 (Dep't Health & Human Servs., NIOSH 1989). In 1998, an audit by the Manville Settlement Trust determined that 59% of X-ray readings relied upon by plaintiffs' counsel to show asbestos-related abnormalities were inaccurate. *See In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E.D.N.Y. & S.D.N.Y. 2002). Another review conducted by medical experts appointed by an Ohio federal judge found that 65% of the claimants reviewed had no asbestos-related conditions and 20% presented only pleural plaques. *See* Hon. Carl Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 37-39 (1991).

As one physician 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.); *see also* Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, Am. Law Inst. – Am. Bar Ass'n Continuing Legal Educ., Nov. 30 – Dec. 1, 2006, *available at* SM038 ALI-ABA 1815 (Westlaw).

2. Bankruptcies and the Economic Impact of the Litigation

"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 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.

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.

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. 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. Nontraditional defendants now account for more than half of asbestos expenditures. *See* RAND Rep., *supra*, at 94. Defendant-Appellant Ford Motor is an example of this trend at work.

B. Asbestos Litigation Has Detrimentally Affected Michigan's Economy

Asbestos litigation trends in Michigan reflect those occurring elsewhere. Like other states, Michigan has witnessed a dramatic increase in asbestos filings. *See, e.g., Detroit Businesses Ask for Relief from Burden of Asbestos Litigation*, PR Newswire, June 6, 2005 (citing Richard E. Blouse, Jr., President and CEO of the Detroit Regional Chamber). Many asbestos-related claims continue to be filed in Michigan each year, with 1,153 filed in Wayne County in 2004, according to former Governor John Engler. *See* Editorial, *Engler's Right About Asbestos Liability Cases*, Crain's Detroit Bus., May 16, 2005, at 8.

Moreover, some of the largest employers in Michigan are being targeted in the new wave of litigation. *See, e.g.*, Mark Truby, *Asbestos Suits Haunt Carmakers,* Detroit News, Mar. 31, 2002, at A1. At one point, the "Big Three" automakers, General Motors, Ford, and DaimlerChrysler were subject to 3,500 new asbestos-related lawsuits per month. *See* PR Newswire, *supra; see also* Steven Hantler, *Judges Must Play Key Role in Stemming Tide of Asbestos Litigation*, 10:5 Andrews Class Action Litig. Rep. 26 (June 2003) ("Ford, General Motors and DaimlerChrysler have seen claims alleging injury by auto mechanics from asbestos in brakes rise significantly recently, although about a dozen, well-controlled epidemiological studies have found no relationship between brake-repair work and asbestos-related disease.") (internal citations omitted). As a result, the Michigan workers and retirees who rely on those companies for their livelihood and retirement security risk losing their jobs and their savings.

Most notably, Southfield-based Federal Mogul, an auto parts company that peaked at 56,000 employees and $6.6 billion in sales, became subject of the "solvent bystander" approach when it was forced to seek the protection of the bankruptcy courts after acquiring a British

company in 1998 that previously had a connection with asbestos. *See* Editorial, *Cleaning Up Asbestos Suits,* Wash. Times, Sept. 24, 2003, at A20. By 2001, Federal Mogul was facing 365,000 lawsuits claiming hundreds of millions in damages because of asbestos. The company's shares fell from $65 per share in 1998 to 45 cents per share in October 2001. *See* Jamie Butters, *Asbestos Suits Bankrupt Another: Federal-Mogul; Auto Supplier Says It Won't Cut Jobs, Shut Plants*, Detroit Free Press, Oct. 2, 2001. Federal Mogul announced that it would cut ten percent of its workforce and consider closing twenty-five plants. *See* Jason Roberson, *Parts Maker Plans Job Cuts*, Detroit Free Press, Jan. 7, 2006. "[S]ome of the biggest corporations in Michigan are worried they could be next." Rick Haglund, *Asbestos Threat Hangs Over Business,* Grand Rapids Press, Dec. 4, 2002, at A12.

In addition, "[t]he big business of asbestos litigation is encroaching upon the livelihood of Michigan's small businesses," which typically includes "a staggering number of hardware stores, construction-related businesses, car repair shops, not to mention plumbers and various other trades." Karen Kerrigan, Editorial, *Asbestos Suits Imperil Small Michigan Firms*, Detroit Free Press, Nov. 3, 2002.

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 Moning v. Alfono*, 400 Mich. 425, 254 N.W.2d 759 (1977). 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. To make this determination, the Court must balance a variety of factors, including: (1) the foreseeability of harm to the injured party; (2) the degree of certainty he or she suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury; (4) the moral blame attached to the defendant's conduct; (5) the public policy of preventing future harm; and (6) the extent of the burden to the defendant and the consequences to the community of imposing a duty of care with resulting liability for breach. *See Buczkowski v. McKay*, 441 Mich. 96, 101 n.4, 490 N.W.2d 330, 333 n.4 (1992).

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

Since 2005, two state courts of last resort – the Georgia Supreme Court and the New York Court of Appeals – Tennessee and New York trial courts, and a Texas appellate court have declined to impose liability on premises owners for secondhand exposure to asbestos emitted in the workplace. Previously, the duty was rejected in unpublished opinions by the Michigan Court of Appeals and Michigan's Bay County Circuit Court. *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. 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 concluded, "we decline to extend on the basis of

foreseeability the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace." *Id.*

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

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; *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.

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. But 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.*

Subsequent to the New York high court's decision in *Holdampf*, a New York trial court in *In re Eighth Judicial District Asbestos Litigation (Rindfleisch v. AlliedSignal, Inc.),* 12 Misc. 3d 936, 815 N.Y.S.2d 815 (N.Y Sup. Ct. 2006), refused to distinguish *Holdampf* and found no duty for harms caused by secondary asbestos exposures that occurred after the adoption of Occupational Safety and Health Administration ("OSHA") 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.

Plaintiff argued that it was foreseeable that if OSHA regulations were not followed, asbestos-laden materials could be carried into the household, causing harm to third parties. The court, however, said that the creation of a duty did not depend on the mere foreseeability of the harm. As the court explained, "The courts of New York have repeatedly refused to extend liability to proposed tortfeasors where plaintiffs have suffered grave consequences in the absence of a duty owed." 12 Misc. 3d at 942, 815 N.Y.S. 2d at 820. The court went on to state, "[a] line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of expending exposure to tort liability almost without limit." *Id.* (quoting *DeAngelis v. Lutheran Med. Center*, 58 N.Y.2d 1053, 1055, 462 N.Y.S.2d 626, 627-28, 449 N.E.2d 406, 407-08 (1983)). The court concluded it must be "cautious of creating an indeterminate class of potential plaintiffs" and, therefore, declined to find a duty of care owed to the plaintiff.

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

A Tennessee trial court reached the same conclusion in *Satterfield v. Breeding Insulation Co.*, No. L-14000 (Tenn. Cir. Ct., Blount County Mar. 21, 2006) (attached at Appendix A), arising from the death of a child from secondhand asbestos exposure. The court held that Tennessee law "does not stand for the broad extension of the duty of an employer to third parties as argued by the Plaintiffs in this case." Accordingly, the court granted the defendant's motion for summary judgment, "leaving it to consideration by the Tennessee legislature as to whether it is wise to establish the duty sought by Plaintiffs in the case at bar."

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

In *Exxon Mobil Corp. v. Altimore*, 2006 WL 3511723 (Tex. App. Dec. 7, 2006), a Texas appellate court unanimously overturned an almost $2 million trial verdict and held that a premises owner owed no duty to an employee's wife injured by pre-1972 exposure to asbestos

brought home on her husband's work clothing. The court said that the defendant could not be charged with knowledge of the take home risk of exposure until after OSHA adopted an asbestos exposure standard in 1972 and prohibited employers from allowing workers to take their work clothes home if the worker has been exposed to asbestos. Earlier studies supporting a connection between direct exposure and harm could not support a duty with respect to household exposures prior to 1972, because "there were still mixed messages from the medical and scientific community on the risks associated with asbestos exposure" for secondarily exposed persons. *Id.* at *8. The court said: "[Plaintiff] argues that knowledge of a risk of harm to someone, creates a duty of care to everyone. We disagree this is the law of Texas." *Id.*

The court then found that after the 1972 OSHA regulations were adopted, "the risk to [plaintiff] of contracting a serious illness had become foreseeable, triggering, for the first time a duty to protect [plaintiff] and those persons similarly situated." *Id.* By that time, however, the subject employee was no longer being exposed to asbestos, so no duty was owed.

5. Michigan: *McMullen v. Classic Container Corp.* and *Bordeaux v. Acme Insulations, Inc.*

Two unpublished Michigan cases provide additional support for Ford's position. *McMullen v. Classic Container Corp.*, 1997 WL 33344482 (Mich. App. July 15, 1997), involved off-site, secondhand asbestos exposure claims by family members of exposed employees. The family members alleged claims of negligence per se, ordinary negligence, and strict liability for abnormally dangerous activities. The Court of Appeals affirmed a trial court order dismissing plaintiffs' tort claims. First, the court held that the family members could not recover under a negligence per se theory because they were not in the class of persons intended to be protected by the Michigan and federal Occupational Safety and Health Acts. Second, and more

importantly for purposes of this appeal, the appellate court held that plaintiffs' ordinary negligence claims failed. The court said: "Plaintiffs' negligence claim was based upon the aforementioned statutory violations and the fact that defendants' asbestos removal activities exposed them to asbestos dust brought home by [their husbands]. Under the facts asserted we find defendants owed no duty to the family-member plaintiffs." *Id.* at *2. Finally, the court upheld dismissal of the strict liability claim, holding that defendants were not engaged in an abnormally or inherently dangerous activity that would subject them to strict liability. *See id.*

Similarly, the Bay County Circuit Court in *Bordeaux v. Acme Insulations, Inc.*, No. 02-3855 NP-S (Mich. Cir. Ct., Bay County, June 14, 2004) (attached at Appendix B), held that a premises owner owed no duty to a worker's family member who was exposed to asbestos away from its premises. The court granted summary judgment to the defendant premises owner.

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 Defendant-Appellant'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-Appellant 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.

2. Other Authority Provides Weak Support for a 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.

Importantly, the New Jersey Supreme Court emphasized that, unlike other states, New Jersey views forseeability as "determinant" in establishing the defendant's duty of care. *Id.* at 1148. The court remanded the case for further consideration, concluding there were "genuine issues of material fact about the extent of the duty that Exxon Mobil owed to [the plaintiff], and whether Exxon Mobil satisfied that duty." *Id.* at 1151.

Michigan law, however, is more closely aligned with Georgia and New York law – and departs from New Jersey – by requiring an analysis of various factors in addition to mere foreseeability in deciding the existence of a duty. *See Buczkowski*, 441 Mich. at 101 n.4, 490 N.W.2d at 333 n.4 (listing the factors, discussed *supra*, for courts to consider); *Murdock v.*

Higgins, 454 Mich. 46, 53, 559 N.W.2d 639, 643 (1997) (analyzing the relationship between parties for the imposition of a duty); *Moning*, 400 Mich. at 438, 254 N.W.2d at 765 (Mich. 1977) (discussing consideration of "overriding legislatively or judicially declared public policy" objectives when courts decide duty questions).

Like Georgia and New York, and unlike New Jersey, Michigan courts have held that foreseeability is not coterminous with duty. *See Buczkowski*, 441 Mich. at 101, 490 N.W.2d at 333 (considerations other than foreseeability "may be, and usually are, more important."); *Robrahn v. RFN Group, Inc.*, 2006 WL 509772, *4 (Mich. App. Mar. 2, 2006) ("Subjecting a [defendant] to liability solely on the basis of a foreseeability analysis is misbegotten."); *Terry v. Detroit*, 226 Mich. App. 418, 424, 573 N.W.2d 348, 352 (Mich. App. 1997) ("The mere fact that an event is foreseeable is insufficient to impose a duty."); *Marr v. Yousif,* 167 Mich. App. 358, 361, 422 N.W.2d 4, 6 (1988) ("While foreseeability of the harm is an important consideration in determining whether a duty exists, courts must also assess the competing public policy considerations for and against recognizing the asserted duty in any individual case.").

In fact, Michigan courts may find that no duty exists, despite foreseeability of harm. *See, e.g.*, *Evans v. City of Taylor*, 2004 WL 2360578, *3 (Mich. App. Oct. 21, 2004) ("With only one of the factors, foreseeability, favoring the finding of the existence of a duty, we conclude that the trial court did not err in finding that no duty was owed by defendants to plaintiff."); *Halbrook v. Honda Motor Co., Ltd.*, 224 Mich. App. 437, 442, 569 N.W.2d 836, 839 (1997) ("[T]he determination of whether a duty exists does not turn solely on foreseeability."); *Henry v. Dow Chem. Co.*, 473 Mich. 63, 701 N.W.2d 684 (2005) (rejecting medical monitoring claim). Plaintiffs' attempt to equate New Jersey's analytical framework, where foreseeability is

controlling, to this Court's multi-factor analysis is mistaken and less analogous to the present case than the decisions that have rejected the new duty rule sought here.

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

Plaintiff also cites a Louisiana case, *Chaisson v. Avondale Indus., Inc.*, 947 So. 2d 171 (La. App. 2006), and another Louisiana case the *Chaisson* court relied upon, *Zimko v. American Cyanamid*, 905 So. 2d 465 (La. App. 2005), *writ denied*, 925 So. 2d 538 (La. 2006), which found a duty to exist for off-site, secondhand asbestos exposure.

Zimko involved a plaintiff who claimed he developed mesothelioma from household exposure to asbestos fibers that clung to his father and his father's work clothes. The *Zimko* plaintiff also attributed his disease to exposures at his own place of employment. The Louisiana appellate court, without engaging in an independent analysis, concluded that the father's employer owed a duty of care to the son. In recognizing this duty, the court said it found the New York appellate court's decision in *Holdampf* to be "instructive." *Id.* at 483.

Zimko provides only flimsy support for plaintiff's theory here. First, the New York appellate court decision that the *Zimko* court found to be "instructive" was overturned by the New York Court of Appeals after *Zimko* was decided. 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).

The other Louisiana case, *Chaisson,* departs from Michigan law in that Louisiana jurisprudence relies heavily upon the foreseeability of harm in determining the existence of a duty. As explained, Michigan law is more closely aligned with Georgia and New York law and requires an analysis of various factors in addition to mere foreseeability. Moreover, the *Chaisson* 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* 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. As explained, Michigan law requires more. Finally, the issue of premises owner liability for secondhand asbestos exposure is currently before another California appellate court. It is inappropriate to speculate as to California law – one way or another – until that court is given an opportunity to publish its opinion. *See Honer v. Ford Motor Co.*, No. B189160 (Cal. App., pending).

3. Cases Involving Inherently Dangerous Activities Do Not Support the Duty Sought Here

Plaintiff and allied *amici* refer to cases imposing a duty on landowners for damages occurring off-site for inherently dangerous activities or conditions. Reliance on such cases, however, is misplaced and easily distinguished.

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 in *Williams*, *supra*, where the court declined to impose liability, because the case 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*. Similarly, in *McMullen, supra,* which involved asbestos removal activity, the Michigan Court of Appeals stated: "The facts asserted by plaintiffs do not show that defendants were engaged in an

abnormally or inherently dangerous activity which would subject them to strict liability." 1997 WL 33344482, at *2.[4]

4. 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 Respondents to exercise due care to prevent the harm at issue. The plaintiff's stepfather 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 entirely dependent upon the exposed worker's willingness to comply with and carry out risk-reduction measures. The court appreciated that imposition of a duty of care is unfair where a 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 in *Holdampf*, Ford had little or no ability to enforce risk-reduction measures. The exposed workers here were not even employed by Ford; they were independent contractors. Ford could not directly discipline or discharge the workers if they failed to carry out risk-reduction measures. Thus, imposition of a duty rule would result in insurer-like liability for Ford and other premises owners. That result would be unjust.

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[4] *See also PSI Energy Inc. v. Roberts*, 829 N.E.2d 943, 955 (Ind.), *reh'g granted*, 834 N.E.2d 665 (Ind. 2005) ("We agree that working with asbestos can be perilous, but that is not enough to render it intrinsically dangerous as that term is used to establish liability for actions of an independent contractor."), *abrogated on other grounds by Helms v. Carmel High School Voc. Bldg. Trades Corp.*, 854 N.W.2d 345 (Ind. 2006); *Gordon v. Nat'l R.R. Passenger Corp.*, 2002 WL 550472, *18 (Del. Ch. Apr. 5, 2002) (installation, removal and use of asbestos not abnormally dangerous (ultrahazardous) activities); *Rudy v. A-Best Prods. Co.*, 870 A.2d 330 (Pa. Super.) ("asbestos is an inherently dangerous product, but this does not in and of itself establish a peculiar risk to someone such as [a plumber who routinely worked around asbestos]."), *appeal denied*, 885 A.2d 533 (Pa. 2005).

Plaintiff also apparently presumes that the directly exposed workers in this case were ignorant of the risks of asbestos exposure. It is almost inconceivable that the workers' employers or union - as well as the exposed workers - were unaware of the risks of asbestos exposure.

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

Plaintiffs appear to attempt to overcome the lack of any relationship between the parties by making an intellectual leap that is flawed. Namely, plaintiffs suggest that because product liability law may permit liability to be imposed for injuries to bystanders,[5] the same duty must exist with respect to premises owners. They are wrong. Out-of state cases imposing liability (sometimes strict liability, which is contrary to Michigan product liability law) on asbestos product *manufacturers and sellers* for secondary exposures to workers' family members provide no support for the duty rule plaintiffs want this Court to create here.

This is not a product 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,*

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[5] *See Lunsford v. Saberhagen Holdings, Inc.*, 106 P.3d 808 (Wash. App. 2005); *Stegemoller v. ACandS, Inc.*, 767 N.E.2d 974 (Ind. 2002); *Fuller-Austin Insulation Co., Inc. v. Bilder*, 960 S.W.2d 914 (Tex. App. 1998); *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). *But see Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844 (10th Cir. 1992) (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); *cf. Vince v. Crane Co.*, 2007 WL 766114 (Ohio App. Mar. 15, 2007) (family members alleging secondhand asbestos exposure failed to show that exposure to defendants' products constituted a substantial factor in her disease).

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 allegedly was exposed to asbestos dust carried home from work by a family member. She did not buy asbestos from the Appellant. No sales transaction was involved. Unlike asbestos product manufacturers, the Appellant 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 Appellant cannot be said to have "undertaken and assumed" a duty to the plaintiff. *Id.*

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

6. Other Cases Cited by Plaintiff Do Not Support A New Duty Rule Here

a. Adjacent Property Cases

The duty of a landowner generally ends at the property line. *See Rodriguez v. Detroit Sportsmen's Congress*, 159 Mich. App. 265, 406 N.W.2d 207 (1987); *Swartz v. Huffmaster Alarms Sys., Inc.*, 145 Mich. App. 431, 377 N.W.2d 393 (1985); *Stevens v. Drekich*, 178 Mich. App. 273, 443 N.W.2d 401 (1989). There are cases, cited by plaintiff, where a narrow exception has been created to impose a duty to persons on an *immediately adjoining street or sidewalk* to protect against dangerous conditions on the property. *See Johnson v. Bobbie's Party Store*, 189 Mich. App. 652, 473 (1991); *Langen v. Rushton*, 138 Mich. App. 672, 360 N.W.2d 270 (1984).

This is not the situation here. Plaintiff was never near Ford's premises and was never exposed to a condition on the premises. Thus, these cases do not support a finding of a duty in this action.

b. *Shepard v. Redford Community Hospital*

Plaintiff also cites *Shepard v. Redford Community Hospital,* 151 Mich. App. 242, 390 N.W.2d 239 (1986), where the court imposed a duty on the defendant hospital for injuries sustained by a household family member. Plaintiff died of spinal meningitis transmitted by his mother after she was discharged from the hospital without proper treatment for her highly infectious condition. The court held that the mother's special, doctor-patient relationship with the hospital gave rise to a duty of reasonable care to her son. Here, however, the derivative special relationship is absent (plaintiff's family members were independent contractors). Moreover, the policy considerations in this appeal are entirely different. The situation is *Shepard* is not one that could have resulted in widespread impacts and would spawn countless new claims, worsening a situation that has been described by many as a "crisis" that has bankrupted scores of employers.

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

Finally, the Court's duty analysis must 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.

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.

Plaintiff provides this Court with the findings of one study reporting on the incidence of mesothelioma from household exposure to suggest that concerns about a potential flood of claims are overblown. But creation of a new duty rule presumably would not be limited to such claims; a new duty rule would attract other claims too, including many claims by persons having little or no physical impairment. To date, this Court has not issued an order adopting a statewide inactive asbestos docket,[6] and the Michigan legislature has not enacted minimal medical criteria standards for asbestos cases, as several other states have done. Thus, it is inappropriate and misleading to characterize the potential impact of the proposed new duty rule based solely on data from one study that looked at the smallest segment of overall asbestos filings (i.e., mesothelioma claims). 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 Defendant-Appellant. Landlords and private homeowners also might be liable for secondhand exposures that originate from their premises. In an attempt to reach for homeowners' insurance

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6 *See Proposed Administrative Order Regarding Asbestos-Related Disease Litigation,* ADM File No. 2003-47 (Mich., filed Feb. 23, 2006); *see generally* Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 Rev. Litig. 253 (2005); Mark A. Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech L. Rev. 1 (2001).

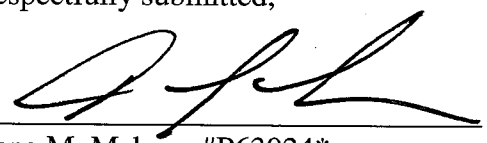
policies, private individuals could be swept into the "dragnet search" for potentially responsible parties in asbestos cases.

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 Michigan courts and premises owners.

CONCLUSION

For these reasons, *amici* ask this Court to answer the question certified to it by the Fourteenth District Court of Appeals in Houston, Texas, by confirming that, under Michigan law, Defendant-Appellant Ford Motor Company did not owe a duty to protect Carolyn Miller from exposure to asbestos fibers allegedly carried home on the clothing of a member of her household who was working on Ford's property as the employee of an independent contractor.

Respectfully submitted,



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Of Counsel

Dated: April 18, 2007

APPENDIX A

State of Tennessee

Fifth Judicial District

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W. Dale Young
Judge

CIRCUIT COURT
Blount County Justice Center
946 East Lamar Alexander Parkway
Maryville, Tennessee 37804

MEMORANDUM

TO:	Mr. Gregory F. Coleman, Esquire	(525-6001)
	Mr. H. Douglas Nichol, Esquire	(588-2883)
	Ms. Mona L. Wallace, Esquire	(704+633-9434)
	Mr. Steve Hurdle, Esquire	(546-0423)
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	Mr. David C. Landin, Esquire	(804+788-8218)
	Mr. Robert G. McDowell, Esquire	(615+726-0464)
FROM:	W. Dale Young	
DATE:	March 22, 2006	
SUBJECT:	**Satterfield vs. Breeding Insulation Co., et al.** **Blount Circuit No. L-14000**	

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

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

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

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

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

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

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

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

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

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

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

APPENDIX B

ASBESTOS DOCKET

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

DOROTHY BORDEAUX,

Plaintiff,

v

ACME INSULATIONS, INC., et al.,

Defendants.

File No. 02-3855-NP-S
HON. KENNETH W. SCHMIDT

ORDER GRANTING DEFENDANT THE DOW CHEMICAL COMPANY'S MOTION FOR SUMMARY DISPOSITION

STATE OF MICHIGAN
COUNTY OF BAY
ATTESTED A TRUE COPY
LINDA L. TOMER
CLERK OF CIRCUIT COURT
BY: Deputy

At a session of said Court held at the Courthouse, County of Bay, Bay City, Michigan, this 28th day of June 2004.

PRESENT: HONORABLE KENNETH W. SCHMIDT
Circuit Court Judge

Defendant The Dow Chemical Company, having moved for motion for summary disposition pursuant to MCR 2.116(C)(10), was heard on June 14, 2004. After full consideration of all admissible evidence, and the separate statement of each party, the authorities submitted by counsel, as well as counsel's oral argument, the Court finds that Defendant The Dow Chemical Company owes no duty to Plaintiff and is entitled to summary disposition for the following reasons:

1. Plaintiff concedes that Plaintiff only claims secondary exposure as a result of fibers brought home through her husband Robert Bordeaux and her father John Willman, who worked for Willman Insulation as insulation contractors from time to time at The Dow Chemical Company premises in Midland and Bay City.

EXHIBIT
Exhibit
B

002097

2. The undisputed facts are that Plaintiff never worked at or was on the premises of Defendant The Dow Chemical Company, nor was she exposed to asbestos-containing materials while on the premises at Dow.

3. The exceptions to the general rule that a premises owner does not have a duty to contractors are not applicable to a plaintiff who was never on the premises.

THEREFORE, IT IS HEREBY ORDERED that The Dow Chemical Company's motion for summary disposition is hereby granted.

Honorable Kenneth W. Schmidt (P25211)
Circuit Court Judge