SUPREME COURT OF NEW JERSEY

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

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STATEMENT OF INTEREST

The Coalition for Litigation Justice, Inc. ("Coalition") was formed by insurers as a nonprofit association to address and improve the toxic tort litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future toxic tort litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1] The Coalition files amicus curiae briefs in important cases before state courts of last resort and the United States Supreme Court that may have a significant impact on the toxic tort litigation environment.

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

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

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

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $520 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all 50 states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In

addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the U.S. property and casualty insurance industry. In 2003, PCI members accounted for 49.5% of the homeowners' insurance premiums in New Jersey, 61.8% of the personal automobile insurance policies issued in New Jersey and wrote $7,272,667,000 of direct written premiums in New Jersey. Thirty-four PCI members are domiciled in New Jersey. In light of its involvement in New Jersey, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed amicus curiae briefs in cases before federal and state courts that have addressed important liability issues.

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

Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 1000 amicus curiae briefs in state and federal court.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

STATEMENT OF FACTS

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

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

INTRODUCTION AND SUMMARY OF THE ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

Transportation, Inc. v. Williams, 608 S.E.2d 208, 210 (Ga. 2005), that "Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace." Decided within the year, these cases represent the proper judicial response to the issue.

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

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

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

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

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

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

ARGUMENT

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

A. The Current Asbestos Litigation Crisis: An Overview

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

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

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

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

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

Mass screenings conducted by plaintiffs' lawyers and their agents have "driven the flow of new asbestos claims by healthy plaintiffs." Hon. Griffin B. Bell, Asbestos & The Sleeping Constitution, 31 Pepp. L. Rev. 1, 5 (2003); see also Owens Corning v. Credit Suisse First Boston, 322 B.R. 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms.").[8]

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

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

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

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

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

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

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

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

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

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

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

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

3. Peripheral Defendants Are Being Dragged into the Litigation

As a result of these bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, Lawyers Torch the Economy, Wall St. J., Apr. 6, 2001, at A14; see also The Congress of the United States, Congressional Budget Office, The Economics of U.S. Tort Liability: A Primer 8 (Oct. 2003) (stating that asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities."); Steven B. Hantler et al., Is the Crisis in the Civil Justice System Real or Imagined?, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to "peripheral defendants"). One well-known plaintiffs' attorney has remarked that the litigation has turned into the "endless search for a solvent bystander." 'Medical Monitoring and Asbestos Litigation' — A Discussion with Richard Scruggs and Victor Schwartz, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002). The defendant in this appeal is an example.

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

129 B.R. 710, 747-48 (E.D.N.Y. & S.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992). Many of these defendants are familiar household names. See Susan Warren, Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps, Wall St. J., Apr. 12, 2000, at B1. Other defendants are small businesses facing potentially devastating liability. See Susan Warren, Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material, Wall St. J., Jan. 27, 2003, at B1. Nontraditional defendants now account for more than half of asbestos expenditures. See RAND Rep., supra, at 94.

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

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

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

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

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

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

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

plaintiff invites this Court to adopt here. See also Adams v. Owens-Illinois, Inc., 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) ("If liability for exposure to asbestos could be premised on [decedent's] handling of her husband's clothing, presumably Bethlehem [the premises owner] would owe a duty to others who came into close contact with [decedent's husband], including other family members, automobile passengers, and co-workers. Bethlehem owed no duty to strangers based upon providing a safe workplace for employees."). This Court should follow the sound reasoning of these courts.

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

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

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

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

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

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

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

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

1977); D'Amico v. Christie, 518 N.E.2d 896 (N.Y. 1987) (defendant employer and third party tortfeasor ex-employee). Nor did the appeal involve a relationship between the plaintiff and defendant that would require the defendant to protect the plaintiff from the conduct of others. "Specifically," the court said, there was "no relationship between the Port Authority and Elizabeth Holdampf - much less that of master and servant (employer and employee), parent and child or common carrier and passenger," examples where liability has been imposed in other cases. See Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y. 2001) (citing cases).

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

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