No. S15G1903

In the
SUPREME COURT OF GEORGIA

CertainTeed Corporation,

Defendant/Appellant,

v.

Marcella Fletcher,

Plaintiff/Appellee.

AMICI CURIAE BRIEF OF THE COALITION FOR LITIGATION JUSTICE, INC., NATIONAL ASSOCIATION OF MANUFACTURERS, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF APPELLANT

Mark A. Behrens (*pro hac* pending)
Cary Silverman (*pro hac* pending)
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Phone: (202) 783-8400
Fax: (202) 783-4211
mbehrens@shb.com
csilverman@shb.com

Leonard Searcy, II
(Ga. Bar No. 633303)*
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Phone: (816) 474-6550
Fax: (816) 421-5547
lsearcy@shb.com

Attorneys for *Amici Curiae*
* Counsel of Record

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INTEREST OF *AMICI CURIAE*

Amici have significant experience with the adverse impacts caused when courts impose broad, new duties on manufacturers to protect against "take-home" exposures to asbestos or other toxic substances that are part of a workplace environment. If the Court imposes such a novel duty, then businesses that make and sell products in Georgia would be subject to greater and increasingly tenuous liability.

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for asbestos and other toxic tort claims.[1] The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs over 12 million men and women, contributes roughly $2.17 trillion to the

[1] The Coalition includes Century Indemnity Company; Great American Insurance Company; Nationwide Indemnity Company; San Francisco Reinsurance Company; Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

U.S. economy annually, has the largest economic impact of any major sector and accounts for three-quarters of private-sector research and development. Its 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.

The Chamber of Commerce of the United States of America ("U.S. Chamber") is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive agencies. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil

litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The NFIB Small Business Legal Center, 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 approximately 325,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

INTRODUCTION

This Court has already ruled that employers owe no duty of care to third parties who are not exposed to asbestos in the workplace, but who rather come in contact with asbestos carried home on an employee's person and clothing. *See CSX Transp., Inc. v. Williams*, 278 Ga. 888, 608 S.E.2d 208, 209-10 (2005). Here, Plaintiff invites this Court to undermine *Williams* by holding that even though *employers* owe no duty of care to third parties exposed to asbestos through contact with occupationally exposed workers or their clothes, *product manufacturers* nonetheless owe a duty of care to those same individuals, who are further removed from a product manufacturer's orbit of contact. Plaintiff's theory is irreconcilable with settled Georgia law, traditional tort law principles, or the reasoned decisions

of other states. Further, imposition of a duty risks opening the door to a new wave of asbestos litigation in Georgia. This Court should reverse the Court of Appeals and clarify that the rationale of *Williams* applies to product manufacturers.

ARGUMENT AND CITATION OF AUTHORITIES

I. THE EXISTENCE OF A DUTY OF CARE IS DETERMINED BASED ON PUBLIC POLICY, NOT FORESEEABILITY

The rule in *Williams* governs this case: a duty of care to protect individuals from exposure to hazardous substances does not extend "beyond the workplace to all who might come into contact with an employee or an employee's clothing outside the workplace." 608 S.E.2d at 210. The defendant in *Williams* was an employer, but the reasoning underlying the Court's decision—the lack of a relationship between the plaintiff and defendant—applies equally to manufacturers.

Courts have long recognized that there are sound public policy reasons to limit legal duties even when a harm is arguably foreseeable. *See* W. Page Keeton *et al*., *Prosser and Keeton on the Law of Torts* § 53, at 358 (5th ed. 1984) ("'[D]uty' . . . is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection."). That is why many courts do not rely solely on the broad concept of foreseeability to determine the existence of a tort law duty, but rather consider the relationship between the parties. *See* Victor E. Schwartz & Mark A. Behrens, *Asbestos*

Litigation: The "Endless Search for a Solvent Bystander," 23 Widener L.J. 59, 80 (2013).

The *Williams* Court applied these principles in the take-home exposure context. As this Court recognized, public policy "plays an important role" in setting "manageable bounds" of duty and avoiding adoption of a rule that creates "an almost infinite universe of potential plaintiffs." *Id.* at 209 (quoting *Widera v. Ettco Wire & Cable Corp*., 204 A.D.2d 306, 307-08, 611 N.Y.S.2d 569 (N.Y. App. Div. 1994)). The Court rejected an expansive duty based on "mere foreseeability," *id*. at 209-10, the very approach employed by the Court of Appeals here.

When this Court decided *Williams* just over a decade ago, it was the first state court of last resort to consider the liability of an employer for off-site, exposure-related injuries to nonemployees. Since that time, several courts have followed this Court's lead in rejecting take-home asbestos exposure claims against premises owners and employers, the defendants most frequently targeted in such cases.[2] In fact, courts that focus on the relationship between the parties (or lack

[2] *See, e.g., In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.),* 840 N.E.2d 115, 119 (N.Y. 2005); *Van Fossen v. MidAmerican Energy Co*., 777 N.W.2d 689, 697 (Iowa 2009); *Georgia Pacific, LLC v. Farrar,* 69 A.3d 1028, 1034 (2013); *In re Certified Question from Fourteenth Dist. Ct. of Appeals of Texas (Miller v. Ford Motor Co.)*, 740 N.W.2d 206, 213-14 (Mich. 2007); *Palmer v. 999 Quebec, Inc.,* 2016 WL 165709, at *3 (N.D. Jan. 14, 2016); *Martin v.*
(Footnote continued on next page)

thereof) uniformly reject a duty in such cases. *See* Schwartz & Behrens, 23 Widener L.J. at 80-81 (citing cases). While a minority of courts have recognized a duty of care in take-home exposure cases, "[i]n nearly every instance . . . the decision turned on the court's conclusion that the foreseeability of risk was the primary (if not only) consideration in the duty analysis." *In re Asbestos Litig.*, 2007 WL 4571196, at *11 (Del. Super. Ct. Dec. 21, 2007) (emphasis in original), *aff'd sub nom. Riedel v. ICI Americas Inc*., 968 A.2d 17 (Del. 2009). This was the very approach that this Court rejected. *See Williams*, 608 S.E.2d at 209-10.

Tort law should not be driven by foreseeability. This Court should, as it did in *Williams*, consider broader public policy, including the possibility that imposition of an expansive new duty on manufacturers to people who never purchased, used, or were in the vicinity of their products would lead to asbestos litigation that involves increasingly tenuous connections between plaintiffs and defendants.

Cincinnati Gas & Elec. Co., 561 F.3d 439, 446 (6th Cir. 2009) (Kentucky law); *Gillen v. Boeing Co*., 40 F. Supp. 3d 534, 542 (E.D. Pa. 2014) (Pennsylvania law).

II. THE PLAINTIFF'S THEORY CREATES AN UNPRINCIPLED DICHOTOMY BETWEEN EMPLOYERS AND PRODUCT MANUFACTURERS

The Plaintiff has failed to articulate a coherent principle for permitting take-home claims against *manufacturers* that can be squared with this Court's rationale in *Williams* rejecting such a duty of care for employers. In *Williams*, this Court recognized that opening the door to "take-home" asbestos claims against employers would "expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs." 608 S.E.2d at 209-10. The same is true here.

Further, imposing a duty on product manufacturers, when employers have no such duty, is particularly counterintuitive since manufacturers are a step further removed from plaintiffs bringing take-home exposure claims. Unlike employers, manufacturers have no relationship with the worker, let alone the worker's family members. Even if the dangers of non-occupational exposure to asbestos dust on workers' clothes was known at the time of the worker's employment, any warnings conveyed *by the manufacturer* would need to be passed on by the employer that purchased the product to its workers and then from the workers to all others that they or their clothing came in contact with.

It is not surprising, then, that courts have treated product manufacturers and employers the same in rejecting a duty in take-home exposure cases. Some courts

have reached this result by holding that a manufacturer has no duty to warn an injured party who "was never exposed to asbestos as a user or [were] present where the product was used." *Carel v. Fibreboard Corp.*, 1996 WL 3917, at *4 (10th Cir. 1996) (unpublished) (applying Oklahoma law and quoting *Rohrbaugh v. Owens-Corning*, 965 F.2d 844, 846 (10th Cir. 1992)). Others have found that it was not foreseeable that secondary exposure to asbestos could cause harm. *See, e.g., Martin v. Cincinnati Gas & Elec. Co*., 561 F.3d 439, 446 (6th Cir. 2009).

Other courts, such as the Maryland Court of Appeals, have found that it would be unsound public policy to impose on manufacturers a duty to warn members of the households of workers because that duty "cannot feasibly be implemented or, even if implemented, would have no practical effect." *Georgia Pacific, LLC v. Farrar*, 69 A.3d 1028, 1039 (Md. 2013). Maryland's high court recognized that, even if it was foreseeable at the time of the exposure that asbestos dust taken home on clothing could injure the family members of workers (a circumstance it found unforeseeable as a matter of law pre-1972), it simply would not have been feasible for manufacturers to disseminate warnings to distributors, contractors, and employers that would have reached not only the workers themselves, but also the workers' households. *See id.* (holding manufacturer had no duty to granddaughter of mechanic who did not himself work with the asbestos-

containing joint compound, but worked in proximity to others who did). *Farrar*'s rationale is entirely consistent with *Williams*.

III. DEPARTING FROM *WILLIAMS* TO IMPOSE A DUTY ON MANUFACTURERS RISKS AN INFLUX OF TENUOUS TAKE-HOME EXPOSURE CASES IN GEORGIA

Take-home exposure claims are an example of how asbestos litigation is sustained by changes in claiming practices by plaintiffs' lawyers and through new theories of liability. Over time, the connection between plaintiffs, defendants, and asbestos-containing products has become increasingly remote, and liability more tenuous. Claims that seek to impose a duty that runs not simply from manufacturers to purchasers of their products but to the workers who used the products and from there to individuals who came in contact with those workers off-site illustrates this problematic trend.

If the Court were to impose a new duty on manufacturers in asbestos cases, its ruling would affect a wide range of businesses. Nationally, approximately 100 companies have been forced into bankruptcy due at least in part to asbestos-related liabilities to date, including virtually all manufacturers of asbestos-containing thermal insulation. *See* S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 301 (2013). Since the surge of bankruptcies that occurred in the early 2000s, asbestos litigation has become an "endless search for a solvent bystander." Schwartz &

Behrens, 23 Widener L.J. at 59 (quoting a former plaintiff attorney). By 2012, more than 10,000 companies, including subsidiaries, had been named as asbestos defendants. *See* Towers Watson, *A Synthesis of Asbestos Disclosures from Form 10-Ks – Updated* 1 (June 2013). "Parties formerly viewed as peripheral defendants are now bearing the majority of the costs of awards relating to decades of asbestos use." Schwartz & Behrens, 23 Widener at 61 (quoting Am. Academy of Actuaries' Mass Torts Subcomm., *Overview of Asbestos Claims Issues and Trends* 1, 3 (Aug. 2007)).

The universe of plaintiffs has expanded in tandem with the pool of defendants. There has been an increase in mesothelioma cases claiming nontraditional exposures in settings outside the workplace. Take-home exposure claims are one example.[3] Take-home exposure lawsuits are not limited to members of the workers' household; they can include extended family, guests, and anyone else the worker or his clothing comes into contact with after the work day. *See Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 699 (Iowa 2009) (explaining that the plaintiff's proposed expansion of duty "would be incompatible with public policy" and "would arguably also justify a rule extending the duty to a

[3] Other cases involve plaintiffs exposed to asbestos through projects such as home remodeling or "shade tree" automotive brake repair.

large universe of other potential plaintiffs who never visited the employers' premises but came into contact with a contractor's employee's asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a laundromat"); *see also* William L. Anderson, *The Unwarranted Basis for Today's Asbestos "Take Home" Cases*, 39 Am. J. of Trial Advoc. 107, 121 (2015) (providing examples involving plaintiffs with tenuous connections to asbestos).

Nor are take-home exposure claims limited to mesothelioma cases. They can include lung and other cancers as well as nonmalignant conditions such as asbestosis. Some jurisdictions have experienced a spike in the number of lawsuits alleging individuals developed lung cancer as a result of asbestos exposure. *See, e.g.*, Heather Isringhausen Gvillo, *Lung Cancer Cases Push Madison County's Asbestos Docket to New Record*, Legal Newsline, Mar. 6, 2014.

Imposing a duty on manufacturers in take-home exposure cases is particularly problematic given the highly permissive standard for asbestos causation applied by some Georgia courts. For example, in *Scapa Dryer Fabrics, Inc. v. Knight*, 332 Ga. App. 82, 770 S.E.2d 334 (2015), *cert. granted* (Ga. Sept. 8, 2015), the Court of Appeals upheld a $4 million verdict where no plaintiff expert showed how much exposure the plaintiff received at the defendant's facility and whether the exposure at this facility was sufficient to cause mesothelioma. Earlier,

however, in *Butler v. Union Carbide Corp.*, 310 Ga. App. 21, 712 S.E.2d 537 (2011), the Court of Appeals recognized that so-called "any exposure" testimony (that is, that any amount of asbestos exposure is sufficient to cause disease) is unscientific; plaintiffs' experts were required to show a causative dose. Moreover, a significant number of take-home exposure cases today arise out of minimal workplace exposures by the worker and from persons at the worker's home who were exposed to far less asbestos than that worker was exposed to. *See* Anderson, 39 Am. J. of Advoc. at 109 (citing illustrative cases). Furthermore, many take-home claims, medical literature suggests, may not result from asbestos exposure, but merely reflect the background rate of the cancer. *See id.* at 115-25.

Asbestos litigation shows no signs of abating, making it especially important that this Court recognize that its sound no-duty rule in take-home exposure cases adopted in *Williams* applies with equal force regardless of whether the defendant is a manufacturer or is an employer or premises owner. Asbestos litigation, the nation's longest running mass tort, still costs businesses and insurers billions of dollars a year and is expected to last for another 50 years. Towers Watson, *supra*, at 5. The number of asbestos claims filed each year has remained stable since 2007, even though epidemiologists predicted drops in the number of asbestos-related diseases. *See* Mary Elizabeth C. Stern & Lucy P. Allen, *Snapshot of Recent Trends in Asbestos Litigation, 2015 Update* 4 (NERA Econ. Consulting June 4,

2015); *see also* Towers Watson, *supra*, at 1 (finding mesothelioma claim filings have "remained near peak levels since 2000"). Departing from *Williams* to impose a duty on manufacturers risks an influx of tenuous take-home exposure litigation in Georgia.

CONCLUSION

For these reasons, the Court should reverse the Court of Appeals and find that *Williams*' no-duty rule applies equally to manufacturers and employers.

Respectfully submitted,

/s/Leonard Searcy, II
Leonard Searcy, II
(Ga. Bar No. 633303)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Phone: (816) 474-6550
Fax: (816) 421-5547
lsearcy@shb.com

Mark A. Behrens (*pro hac* pending)
Cary Silverman (*pro hac* pending)
SHOOK, HARDY & BACON L.L.P.
1155 F Street NW, Suite 200
Washington, DC 20004
Phone: (202) 783-8400
Fax: (202) 783-4211
mbehrens@shb.com
csilverman@shb.com

Attorneys for *Amici Curiae*

Dated: March 14, 2016

CERTIFICATE OF SERVICE

This is to certify that on March 14, 2016, I served a true and correct copy of the foregoing via First Class Mail and electronic delivery to the following:

Leah Ward Sears
SCHIFF HARDIN LLP
One Atlantic Center
1201 West Peachtree Street
Suite 2300
Atlanta, GA 30309
lsears@schiffhardin.com

David C. Marshall
E. Elaine Shofner
HAWKINS, PARNELL,
THACKSTON & YOUNG LLP
4000 SunTrust Plaza
303 Peachtree Street, NE
Atlanta, GA 30308-3243
dmarshall@hptylaw.com
eshofner@hptylaw.com

Robert C. Buck
Juliana Y. Sleeper
BUCK LAW FIRM
1050 Crown Pointe Parkway
Suite 940
Atlanta, GA 30338
rbuck@buckfirm.com
jsleeper@buckfirm.com

Michael Crist
DEMAHY LABRADOR DRAKE
VICTOR & CABEZA
150 Alhambra Circle
Coral Gables, FL 33134
mcrist@dldlawyers.com

/s/Leonard Searcy, II
Leonard Searcy, II (Ga. Bar No. 633303)
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, MO 64108
Phone: (816) 474-6550
Fax: (908) 848-6310