

IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 171494

WESLEY J. QUISENBERRY, Personal
Representative of the Estate of WANDA J. QUISENBERRY,

Plaintiff,

v.

BORGWARNER MORSE TEC, INC., et al.,

Defendants.

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

On Certification from the United States District Court
for the Eastern District of Virginia, Civil Action No. 4:16cv126

Mark A. Behrens (VSB #31493)
SHOOK HARDY & BACON L.L.P.
1155 F Street NW, Suite 200
Washington, DC 20004
(202) 783-8400
(202) 783-4211 (facsimile)
mbehrens@shb.com

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
CERTIFIED QUESTION	1
INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. CREATING A DUTY OF CARE FOR TAKE-HOME ASBESTOS EXPOSURE WOULD BE UNSOUND	5
II. CREATING A TAKE-HOME DUTY WOULD ENCOURAGE THE FILING OF GROUNDLESS ASBESTOS LITIGATION	16
III. PLAINTIFF COMPENSATION AND ASBESTOS TRUSTS	19
CONCLUSION	21
CERTIFICATE OF COMPLIANCE	22
CERTIFICATE OF SERVICE	End

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Adams v. Owens-Illinois, Inc.</i> , 705 A.2d 58 (Md. Ct. Spec. App. 1998)	10
<i>Amchem Prods. Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	13
<i>Balderson v. Robertson</i> , 203 Va. 484, 125 S.E.2d 180 (1962).....	4
<i>Boley v. Goodyear Tire & Rubber Co.</i> , 929 N.E.2d 448 (Ohio 2010).....	10
<i>CSX Transp., Inc. v. Williams</i> , 608 S.E.2d 208 (Ga. 2005).....	9-10
<i>Doe v. Pharmacia & Upjohn Co., Inc.</i> , 879 A.2d 1088 (Md. 2005).....	15
<i>Dreisonstok v. Volkswagenwerk, A.G.</i> , 489 F.2d 1066 (4th Cir. 1974).....	3
<i>Dudley v. Offender Aid & Restoration of Richmond, Inc.</i> , 241 Va. 270, 401 S.E.2d 878 (1991)	3
<i>Georgia Pacific, LLC v. Farrar</i> , 69 A.3d 1028 (Md. 2013).....	6
<i>Gillen v. Boeing Co.</i> , 40 F. Supp. 3d 534 (E.D. Pa. 2014)	12
<i>Hamilton v. Beretta U.S.A. Corp.</i> , 750 N.E.2d 1055 (N.Y. 2001)	7
<i>Holiday Motor Corp. v. Walters</i> , 292 Va. 461, 790 S.E.2d 447 (2016).....	3
<i>In re Asbestos Litig. (Lillian Riedel)</i> , 2007 WL 4571196 (Del. Super. Ct. Dec. 21, 2007), <i>aff'd sub nom. Riedel v. ICI Americas Inc.</i> , 968 A.2d 17 (Del. 2009).....	6, 11
<i>In re Eighth Jud. Dist. Asbestos Litig. (Rindfleisch v. AlliedSignal, Inc.)</i> , 815 N.Y.S.2d 815 (N.Y. Sup. Ct. 2006).....	8
<i>In re Garlock Sealing Techs., LLC</i> , 504 B.R. 71 (W.D.N.C. Bankr. 2014).....	21
<i>In re New York City Asbestos Litig. (Holdampf v. A.C. & S., Inc.)</i> , 840 N.E.2d 115 (N.Y. 2005)	7-8
<i>Jeld-Wen, Inc. v. Gamble by Gamble</i> , 256 Va. 144, 501 S.E.2d 393 (1998).....	3

<i>Kent v. Miller</i> , 167 Va. 422, 189 S.E. 332 (1937)	4
<i>Marshall v. Winston</i> , 239 Va. 315, 389 S.E.2d 902 (1990).....	4
<i>Martin v. General Elec. Co.</i> , 2007 WL 2682064 (E.D. Ky. Sept. 5, 2007), <i>aff'd sub nom. Martin v. Cincinnati Gas & Elec. Co.</i> , 561 F.3d 439 (6th Cir. 2009)	6
<i>Miller v. Ford Motor Co. (In re Certified Question from the 14th Dist. Court of Appeals)</i> , 740 N.W.2d 206 (Mich. 2007).....	8-9
<i>Nelson v. Aurora Equip. Co.</i> , 909 N.E.2d 931 (Ill. App. Ct.), <i>appeal denied</i> , 919 N.E.2d 355 (Ill. 2009)	10
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999)	13
<i>Palmer v. 999 Quebec, Inc.</i> , 874 N.W.2d 303 (N.D. 2016)	10
<i>Price v. E.I. DuPont de Nemours & Co.</i> , 26 A.3d 162 (Del. 2011)	10
<i>Quiroz v. ALCOA, Inc.</i> , 382 P.3d 75 (Ariz. Ct. App. 2016), <i>review granted</i> (Ariz. Feb. 14, 2017)	6, 16
<i>Riedel v. ICI Americas Inc.</i> , 968 A.2d 17 (Del. 2009)	10-11
<i>Ruffing v. Union Carbide Corp.</i> , 766 N.Y.S.2d 439 (N.Y. App. Div. 2003)	16
<i>Stanton v. Battelle Energy Alliance, Inc.</i> , 89 F. Supp. 3d 937 (D. Idaho 2015).....	15
<i>Van Fossen v. MidAmerican Energy Co.</i> , 777 N.W.2d 689 (Iowa 2009)	4, 9
<i>Widera v. Ettco Wire and Cable Corp.</i> , 611 N.Y.S.2d 569 (N.Y. App. Div. 1994), <i>leave denied</i> , 650 N.E.2d 414 (N.Y. 1995).....	10, 15
<i>Williamson v. Old Brogue, Inc.</i> , 232 Va. 350, 350 S.E.2d 621 (1986)	11
<u>STATUTES</u>	
Kan. Stat. Ann. § 60-4905(a)	10
Ohio Rev. Code Ann. § 2307.941(a)(1).....	10

OTHER AUTHORITIES

- American Academy of Actuaries’ Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* (Aug. 2007), at https://www.actuary.org/pdf/casualty/asbestos_aug07.pdf..... 14
- William L. Anderson, *The Unwarranted Basis for Today’s Asbestos “Take Home” Cases*, 39 Am. J. of Trial Advoc. 107 (2015)..... 17
- Mark A. Behrens, *A ‘Perfect Storm’ Confronts Asbestos Defendants in Newport News*, 24:11 Legal Opinion Letter (Wash. Legal Found. June 5, 2015), at http://www.wlf.org/upload/legalstudies/legalopinionletter/BehrensLOL_060515.pdf..... 2
- Mark A. Behrens, *Disconnects and Double-Dipping: The Case for Asbestos Bankruptcy Trust Transparency in Virginia* (U.S. Chamber Inst. for Legal Reform Dec. 2016), at <http://www.instituteforlegalreform.com/research/disconnects--double-dipping-the-case-for-asbestos-bankruptcy-trust-transparency-in-virginia>..... 5
- Best’s Special Report: Asbestos Losses Continue to Rise* (Nov. 2017)..... 12
- Jenni Biggs et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* (Towers Watson June 2013), at <https://www.towerswatson.com/DownloadMedia.aspx?media=%7B67C014AD-30A0-43A8-BF7D-987809C35E76%7D>..... 12, 14
- Mathieu Boniol & Mary Heanue, “Chapter 7: Age-Standardisation and Denominators,” in *Cancer Incidence in Five Continents Vol. IX*, IARC Scientific Publication No. 160 (2015), at <http://www.iarc.fr/en/publications/pdfs-online/epi/sp160/> 17
- Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071 (2014) 20
- S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299 (2013) 14, 20
- Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (Rand Corp. 2010), at https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf..... 19

Editorial, <i>Lawyers Torch the Economy</i> , Wall St. J., Apr. 6, 2001	13
Meghan E. Flinn, Note, <i>Continuing War With Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure</i> , 71 Wash. & Lee L. Rev. 707 (2014)	4, 11
Patrick M. Hanlon & Anne Smetak, <i>Asbestos Changes</i> , 62 N.Y.U. Ann. Surv. Am. L. 525 (2007).....	13
James S. Kakalik et al., <i>Costs of Asbestos Litigation</i> (Rand Corp. 1983), at https://www.rand.org/pubs/reports/R3042.html	13
Bethany Krajelis, <i>Lung Cancer Suits are New Trend in Asbestos Litigation; Filings discussed at recent California Asbestos Conference</i> , Madison-St. Clair Record (Mar. 28, 2013), at http://madisonrecord.com/issues/302-asbestos/254325-lung-cancer-suits-are-new-trend-in-asbestos-litigation-filings-discussed-at-recent-california-asbestos-conference	15
Adrienne Bramlett Kvello, <i>The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas</i> , 40 The Advoc. (Tex.) 80 (2007)	20
David C. Landin et al., <i>Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation</i> , 16 Brook. J.L. & Pol’y 589 (2008).....	5
Manville Trust, 2002 Trust Distribution Process (TDP) § B(C)(11) (Revised Jan. 2012), at http://www.claimsres.com/wp-content/uploads/2016/11/2002-TDPJanuary-2012-Revision.pdf	19
‘ <i>Medical Monitoring and Asbestos Litigation</i> ’—A Discussion with Richard Scruggs and Victor Schwartz, 17 Mealey’s Litig. Rep.: Asbestos 19 (Mar. 1, 2002)	14
Suresh Moolgavkar, et al., <i>Pleural and Peritoneal Mesotheliomas in SEER: Age Effects and Temporal Trends</i> , 20 Cancer Causes Control 935 (2009).....	17
Christine Rake et al., <i>Occupational, Domestic and Environmental Mesothelioma Risks in the British Population: A Case-Control Study</i> , 100 Brit. J. Cancer 1175 (2009)	18
Restatement (Second) of Torts § 281(b) (1965)	3, 16

Marc C. Scarcella et al., <i>The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010</i> , 27 Mealey’s Litig. Rep.: Asbestos 1 (Nov. 7, 2012)	14
Victor E. Schwartz & Mark A. Behrens, <i>Asbestos Litigation: The “Endless Search for a Solvent Bystander,”</i> 23 Widener L.J. 59 (2013)	6
Dionne Searcy & Rob Barry, <i>Asbestos Claims Rise, So Do Worries About Fraud</i> , Wall St. J., Mar. 11, 2013, at https://www.wsj.com/articles/SB10001424127887323864304578318611662911912	19
William P. Shelley et al., <i>The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008</i> , 23 Widener L.J. 675 (2014).....	19
Mary Elizabeth Stern & Lucy P. Allen, <i>Resolution Values Dropped 35% While Filings and Indemnity Payments Continued at Historical Levels</i> , (NERA Econ. Consulting June 2016), at http://www.nera.com/content/dam/nera/publications/2017/PUB_Asbestos_Litigation_Trends_0217.pdf	12
Mary Jane Teta et al., <i>US Mesothelioma Patterns 1973-2002: Indicators of Change and Insights into Background Rates</i> , 17 Eur. J. Cancer Prevention 525 (2008)	18
Cristian Tomasetti & Bert Vogelstein, <i>Variation in Cancer Risk Among Tissues Can Be Explained by the Number of Stem Cell Divisions</i> , 347 Science 78 (Jan. 2015).....	17
U.S. Gov’t Accountability Office, GAO-11-819, <i>Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts</i> (Sept. 2011), at https://www.gao.gov/assets/590/585380.pdf	19-20
Stanley Venitt, <i>Mechanisms of Spontaneous Human Cancers</i> , 104 Env’tl. Health Persp. 633 (1996), at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1469658/	17-18
Robert Weinberg, <i>One Renegade Cell: How Cancer Begins</i> (1998)	17-18

CERTIFIED QUESTION

Does an employer owe a duty of care to the family member of an employee who alleges exposure to asbestos from the work clothes of the employee, where such exposure takes place off of the employer's premises and the employer has no relationship with the family member?

INTEREST OF AMICI CURIAE

Amici are business and civil justice associations whose members include Virginia employers and their insurers.¹ This case is important to *amici* because imposition of a duty on employers to prevent off-site exposures to asbestos (and presumably other toxic substances) would lead to potentially limitless and indefinite liability. Such a duty would substantially burden the still-solvent but increasingly remote defendants in the asbestos litigation. The litigation has already bankrupted over 100 companies. Recently, even some attenuated asbestos defendants have filed bankruptcy. A duty finding here also could open the door to lawsuits against employers over any number of hazards that workers carry off-site.

INTRODUCTION AND SUMMARY OF ARGUMENT

Now in its fourth decade, asbestos litigation costs employers and insurers billions of dollars a year and is expected to last several more decades. Over 100

¹ No party or counsel for a party authored the proposed brief in whole or in part. No person or entity other than the *amici* made a monetary contribution intended to fund the preparation or submission of the brief.

companies have filed bankruptcy due at least in part to asbestos-related liabilities. Over time, the connection between plaintiffs and asbestos-containing products has become increasingly remote and the liability connection more attenuated. This case is one example.

Employer liability for off-site exposure to asbestos is a novel concept driven by plaintiff lawyers' hunt for non-traditional solvent defendants.² Asbestos litigation traditionally focused on the manufacturers of asbestos-containing products, often called "traditional defendants." Most of those manufacturers have exited the tort system through bankruptcy. As a result, plaintiffs' lawyers began to target "peripheral defendants," including premises owners for alleged harms to those exposed to asbestos on the premises. Plaintiffs' lawyers are now targeting employers for harms to secondarily exposed "peripheral plaintiffs."

² It is telling that the issue of an employer's liability for take-home asbestos exposure is just now before this Court, because Virginia – particularly Newport News – is no stranger to asbestos litigation. See Mark A. Behrens, *A 'Perfect Storm' Confronts Asbestos Defendants in Newport News*, 24:11 Legal Opinion Letter (Wash. Legal Found. June 5, 2015) ("Asbestos plaintiffs in Newport News, Virginia enjoy the nation's highest win rate at trial—85%. Courts in Newport News try numerous asbestos cases in part because it is a major shipbuilding center with thousands of shipyard workers and retired Navy sailors who live there. Large payouts are a big draw too. Newport News had 513 asbestos filings from January 2013 through April 2015—seven of every ten asbestos cases filed in the entire Commonwealth. Multi-million-dollar verdicts are common against the few companies willing to roll the dice in a jurisdiction where defendants rarely win.").

Like this action, these “peripheral defendant-peripheral plaintiff” cases involve non-occupational, off-site exposure to asbestos through contact with an occupationally exposed worker or that person’s clothing. The cases are not limited to mesothelioma, but can include lung and other cancers, as well as non-malignant conditions such as asbestosis. Also, while the cases often involve members of a worker’s household, they can include extended family and many others who came into contact with the worker.

This Court should reject Plaintiff’s invitation to greatly expand the universe of people to whom employers owe a duty of care. Plaintiff’s position is founded on their perspective of foreseeable harm, but that is not the test in Virginia. *See Holiday Motor Corp. v. Walters*, 292 Va. 461, 478, 790 S.E.2d 447, 455 (2016) (“Foreseeability [of harm], it has been many times repeated, is not to be equated with duty.”) (quoting *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1070 (4th Cir. 1974)).³

Virginia follows the traditional, relational view of duty expressed in the Restatement (Second) of Torts § 281(b) (1965). *See Dudley v. Offender Aid & Restoration of Richmond, Inc.*, 241 Va. 270, 279, 401 S.E.2d 878, 883 (1991) (“In

³ *See also id.* (“[T]he purpose of making the finding of a legal duty as a prerequisite to a finding of negligence . . . is to avoid the extension of liability for every conceivably foreseeable accident, *without regard to common sense or good policy.*”) (quoting *Jeld-Wen, Inc. v. Gamble by Gamble*, 256 Va. 144, 149, 501 S.E.2d 393, 397 (1998)).

every case, it is for the court to determine, as a question of law, from all the circumstances, if it is controverted, whether the plaintiff falls within the class of those to whom the defendant owes a duty.”⁴

Courts that use Virginia’s approach have found no duty to exist in the situation presented here. *See Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 697 (Iowa 2009) (“Most of the courts which have been asked to recognize a duty to warn household members of employees of the risks associated with exposure to asbestos conclude that no such duty exists.”). “[T]he courts are...wary of the consequences of extending employers’ liability too far, especially when asbestos litigation has already rendered [over] one hundred corporations bankrupt.” Meghan E. Flinn, Note, *Continuing War With Asbestos: The Stalemate Among State Courts on Liability for Take-Home Asbestos Exposure* 71 Wash. & Lee L. Rev. 707, 710 (2014).

In fact, courts in states, like Virginia, that do not focus on foreseeability in their analysis of whether the defendant owed a duty to the plaintiff have *uniformly* rejected take-home asbestos exposure claims against employers. These courts have

⁴ *See also Balderson v. Robertson*, 203 Va. 484, 488, 125 S.E.2d 180, 183 (1962) (“An action for negligence only lies where there has been a failure to perform some legal duty which the defendant owes to the party injured.”); *Marshall v. Winston*, 239 Va. 315, 319, 389 S.E.2d 902, 905 (1990) (“[T]here is no such thing as negligence in the abstract, or in general.... Negligence must be in relation to some person.”) (quoting *Kent v. Miller*, 167 Va. 422, 425-26, 189 S.E. 332, 334 (1937)).

“recognized that tort law must draw a line between the competing policy considerations of providing a remedy to everyone who is injured and of extending tort liability almost without limit.” David C. Landin et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Public Policy in Asbestos Litigation*, 16 Brook. J.L. & Pol’y 589, 626 (2008).

In addition, as explained below, the science regarding the prevalence of serious injury, such as mesothelioma, from take-home asbestos exposure suggests that many of today’s take-home exposure cases involve spontaneous cancers.

Finally, there is no need to stretch Virginia tort law to provide compensation to persons injured through off-site exposures to asbestos. A separate multi-billion dollar compensation system exists to compensate persons exposed to asbestos products from the scores of companies that have exited the tort system through bankruptcy. See Mark A. Behrens, *Disconnects and Double-Dipping: The Case for Asbestos Bankruptcy Trust Transparency in Virginia* (U.S. Chamber Inst. for Legal Reform Dec. 2016).

For these reasons, the Court should answer *no* to the certified question.

ARGUMENT

I. CREATING A DUTY OF CARE FOR TAKE-HOME ASBESTOS EXPOSURE WOULD BE UNSOUND

Decisions regarding employer liability for take-home asbestos exposure generally fit into two categories: (1) those focusing on the foreseeability of the

harm to the plaintiff (and typically finding no duty for pre-1972 exposures),⁵ and (2) those that focus on the lack of a relationship between the employer and non-employees and concerns about nearly limitless liability.

Courts in states like Virginia that do not base their recognition of a duty on foreseeability have uniformly held that employers owe no duty of care in take-home asbestos exposure cases.⁶ For this Court to find that a duty was owed to the plaintiff, the Court would need to become the first court in the country to impose a duty on an employer for take-home asbestos exposure based on considerations unrelated to foreseeability. *See Quiroz v. ALCOA, Inc.*, 382 P.3d 75, 82 (Ariz. Ct. App. 2016) (“Those courts that do not focus on foreseeability have declined to find

⁵ In June 1972, “OSHA adopted regulations dealing specifically with the problem of tracking asbestos dust on clothing into the home.” *Georgia Pacific, LLC v. Farrar*, 69 A.3d 1028, 1037 (Md. 2013); *see also Martin v. General Elec. Co.*, 2007 WL 2682064, at *5 (E.D. Ky. Sept. 5, 2007) (“Although the general danger of prolonged occupational asbestos exposure to asbestos manufacturing workers was known by at least the mid-1930’s, the extension of that harm was not widely known until at least 1972, when OSHA regulations recognized a causal connection.”), *aff’d sub nom. Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439 (6th Cir. 2009).

⁶ *See In re Asbestos Litig. (Lillian Riedel)*, 2007 WL 4571196, at *8 (Del. Super. Ct. Dec. 21, 2007), *aff’d sub nom. Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009) (“In jurisdictions . . . where the duty analysis focuses on the relationship between the plaintiff and the defendant, and not simply the foreseeability of injury, the courts uniformly hold that an employer/premises owner owes no duty to a member of a household injured by take home exposure to asbestos.”); *see also* Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The “Endless Search for a Solvent Bystander,”* 23 *Widener L.J.* 59 (2013).

a duty of care in take-home exposure cases.”), *review granted* (Ariz. Feb. 14, 2017).

Courts have recognized the practically limitless liability that would result if employers owe a duty of care to anyone in contact with (or even close to) an occupationally exposed worker or that person’s clothing. Plaintiffs might include household members, extended family, dating partners, renters, houseguests, babysitters, house cleaners, carpool members, bus drivers, friends and co-workers of exposed workers, people in diners and other commercial enterprises visited by exposed workers, and local laundry workers, among others.

For example, New York’s highest court in *In re New York City Asbestos Litigation (Holdampf v. A.C. & S., Inc.)*, 840 N.E.2d 115 (N.Y. 2005), applied a relational view of duty⁷ – the test used in Virginia – to hold that an employer owed no duty of care to a former employee’s wife for asbestos exposure introduced into the home from her husband’s work clothes. *Id.* at 122.

The court held that no duty was owed because an employer’s duties run to its employees, not to others. *See id.* at 120. Further, the duty would be expansive.

⁷ Under this approach, the court explained, “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.” *Id.* at 119 (quoting *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1060 (N.Y. 2001)). In contrast, if duty is defined solely by the foreseeability of the harm, “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*, 750 N.E.2d at 1060).

Plaintiffs might include anyone who might come into contact with a dusty employee or that person's clothing, such as a "babysitter (or maybe an employee of a neighborhood laundry) [who] launders the family members' clothes." *Id.* at 122. The court dismissed the suggestion that the number of claims would be rather low, stating that "experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality." *Id.*⁸

Holdampf also rejected the plaintiff's attempt to find support for a duty in cases imposing a duty of care to the surrounding community, such as when mining practices carried out on a landowner's property cause the negligent release of toxins into the ambient air. The court said that off-site exposure to asbestos through an occupationally exposed worker is "far different from" those situations. *Id.* at 121. The *Holdampf* plaintiff's exposure came from handling her husband's work clothes, not from the release of "asbestos into the community generally." *Id.*

The Michigan Supreme Court in *Miller v. Ford Motor Co. (In re Certified Question from the 14th District Court of Appeals)*, 740 N.W.2d 206 (Mich. 2007), held that Ford Motor Company did not owe a duty to protect a plaintiff from asbestos fibers carried home on the clothing of a family member who worked at a Ford plant. The court said that imposing such a duty "would create a potentially limitless pool of plaintiffs." *Id.* at 220. The court held that "expand[ing]

⁸ See also *In re Eighth Jud. Dist. Asbestos Litig. (Rindfleisch v. AlliedSignal, Inc.)*, 815 N.Y.S.2d 815, 820-21 (N.Y. Sup. Ct. 2006).

traditional tort concepts beyond manageable bounds and creat[ing] an almost infinite universe of potential plaintiffs” imposed a social cost that did not outweigh any alleged social benefit. *Id.* at 213 (quoting *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 209 (Ga. 2005)).

Concerns about open-ended liability also led the Iowa Supreme Court to reject a duty of care requiring an employer to warn the wife of an independent contractor’s employee of the hazards of asbestos. In *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689 (Iowa 2009), the court said such a duty arguably would extend “to a large universe of other potential plaintiffs who never visited the employers’ premises but came into contact with a contractor’s employee’s asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a laundromat.” *Id.* at 699. The court “conclude[d] such a dramatic expansion of liability would be incompatible with public policy.” *Id.*

The Georgia Supreme Court in *CSX Transportation, Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005), also “decline[d] to extend on the basis of foreseeability the employer’s duty beyond the workplace to encompass all who might come into contact with an employee or an employee’s clothing outside the workplace.” *Id.* at 210. The court realized that such a duty would “create an almost infinite universe

of potential plaintiffs.” *Id.* at 209 (quoting *Widera v. Ettco Wire & Cable Corp.*, 611 N.Y.S.2d 569, 571 (N.Y. App. Div. 1994)).

Other courts have rejected the duty sought here for similar reasons. *See Adams v. Owens-Illinois, Inc.*, 705 A.2d 58, 66 (Md. Ct. Spec. App. 1998) (“If liability for exposure to asbestos could be premised on Mary Wild’s handling of her husband’s clothing, presumably Bethlehem would owe a duty to others who came in close contact with Edwin Wild, including other family members, automobile passengers, passengers, and co-workers. Bethlehem owed no duty to strangers based upon providing a safe workplace for employees.”).⁹ And two states have made a legislative policy decision to bar take-home asbestos exposures claims against employers. *See* Ohio Rev. Code Ann. § 2307.941(a)(1); Kan. Stat. Ann. § 60-4905(a); *see also Boley v. Goodyear Tire & Rubber Co.*, 929 N.E.2d 448 (Ohio 2010) (applying the statute to bar claim for asbestos exposure not occurring at employer’s property).

Further, alternative approaches to cabin the scope of liability, such as limiting any duty to household family members of an occupationally exposed work, may be unworkable and would require the type of line-drawing that is

⁹ *Cf. Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162 (Del. 2011); *Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009); *Palmer v. 999 Quebec, Inc.*, 874 N.W.2d 303 (N.D. 2016); *Nelson v. Aurora Equip. Co.*, 909 N.E.2d 931 (Ill. App.), *appeal denied*, 919 N.E.2d 355 (Ill. 2009).

typically the role of legislators. *See* Flinn, 71 Wash. & Lee L. Rev. at 746 (“the problem of take-home asbestos exposure is best suited for the legislature”). As one court explained:

[T]here is no principled basis in the law upon which to distinguish the claim of a spouse or other household member who has been exposed to asbestos while laundering a family member’s clothing, from the claim of a house keeper or laundry mat operator who is exposed while laundering the clothing, or a co-worker/car pool passenger who is exposed during rides home from work, or the bus driver or passenger who is exposed during the daily commute home, or the neighbor who is exposed while visiting with the employee before he changes out of his work clothing at the end of the day. All have been exposed to asbestos from the employee’s clothing; all arguably have intersected with the asbestos-covered employee in a foreseeable manner; and all would have viable claims of negligence . . . if the take home exposure cause of action is permitted. . . . The burden upon the defendant to undertake to warn or otherwise protect every potentially foreseeable victim of off-premises exposure to asbestos is simply too great; the exposure to potential liability would be practically limitless.

In re Asbestos Litig. (Lillian Riedel), 2007 WL 4571196, at *12 (Del. Super. Ct. Dec. 21, 2007), *aff’d sub nom. Riedel v. ICI Americas Inc.*, 968 A.2d 17 (Del. 2009).

The Delaware Supreme Court said “the General Assembly decides these matters of social policy, not the courts.” *Riedel*, 968 A.2d at 21. Virginia cases are in accord. *See Williamson v. Old Brogue, Inc.*, 232 Va. 350, 354, 350 S.E.2d 621, 624 (1986) (“Where, as here, the issue involves many competing economic, societal, and policy considerations, legislative procedures and safeguards are

particularly appropriate to the task of fashioning an appropriate change, if any, to the settled rule.”).

Moreover, the “specter of limitless liability,” *Gillen v. Boeing Co.*, 40 F. Supp. 3d 534, 542 (E.D. Pa. 2014), would stretch decades into the future because the volume of asbestos claims shows no signs of abating. A 2016 review of asbestos-related liabilities reported to the U.S. Securities and Exchange Commission by more than 150 publicly traded companies found that “[f]ilings remained flat at the levels observed since 2007....” Mary Elizabeth Stern & Lucy P. Allen, *Resolution Values Dropped 35% While Filings and Indemnity Payments Continued at Historical Levels*, at 1 (NERA Econ. Consulting June 2016); *see also* Jenni Biggs et al., *A Synthesis of Asbestos Disclosures from Form 10-Ks — Updated* 1 (Towers Watson June 2013) (mesothelioma claim filings have “remained near peak levels since 2000.”). “Typical projections based on epidemiology studies assume that mesothelioma claims arising from occupational exposure to asbestos will continue for the next 35 to 50 years.” Biggs et al., *supra*, at 5; *see also Best’s Special Report: Asbestos Losses Continue to Rise* (Nov. 2017) (asbestos losses show no sign of subsiding). As of 2013, analysts predicted that some 28,000 mesothelioma claims will be filed. *See* Biggs et al., *supra*, at 1.

Another reason to reject the duty the plaintiff seeks here is the substantial burden that would be imposed on the remaining solvent, but increasingly remote, defendants in asbestos cases today.

In earlier years, asbestos litigation typically pitted a “dusty trade” worker “against the asbestos miners, manufacturers, suppliers, and processors who supplied the asbestos or asbestos products that were used or were present at the claimant’s work site or other exposure location.” James S. Kakalik et al., *Costs of Asbestos Litigation* 3 (Rand Corp. 1983).

By the late 1990s, the asbestos litigation had reached such proportions that the Supreme Court of the United States described the “elephantine mass” (*Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)), as a “crisis.” *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Mass filings led virtually all of the primary historical defendants to file bankruptcy.

After the most culpable asbestos defendants exited the tort system through bankruptcy, the litigation “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 A14.¹⁰ The focus of plaintiff attorneys

¹⁰ See also Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 556 (2007) (“The surge of bankruptcies in 2000-2002...triggered higher settlement demands on other established defendants, including those attempting to ward off bankruptcy, as well as a search for new

shifted “away from the traditional thermal insulation defendants and towards peripheral and new defendants....” Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts And Changes in Exposure Allegations From 1991-2010*, 27 Mealey’s Litig. Rep.: Asbestos 1, 1 (Nov. 7, 2012). One plaintiffs’ attorney described the asbestos litigation as an “endless search for a solvent bystander.” *‘Medical Monitoring and Asbestos Litigation’—A Discussion with Richard Scruggs and Victor Schwartz*, 17 Mealey’s Litig. Rep.: Asbestos 19 (Mar. 1, 2002) (quoting Mr. Scruggs).

The expanded range of defendants has produced exponential growth in the dimensions of the litigation. The Towers Watson consulting firm has identified “more than 10,000 companies, including subsidiaries, named in asbestos litigation.” Biggs et al., *supra*, at 1. Companies that used to be peripheral defendants are “now bearing the majority of the costs of awards relating to decades of asbestos use.” American Academy of Actuaries’ Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 3 (Aug. 2007).

Recently, even some attenuated asbestos defendants have filed bankruptcy. See S. Todd Brown, *Bankruptcy Trusts, Transparency and the Future of Asbestos Compensation*, 23 Widener L.J. 299, 306 (2013) (“Defendants who were once

recruits to fill the gap in the ranks of defendants through joint and several liability.”).

viewed as tertiary have increasingly become lead defendants in the tort system, and many of these defendants have also entered bankruptcy in recent years.”).

This Court should avoid creating a novel and limitless duty on the part of employers to those they do not employ given that asbestos litigation is increasingly focused on companies with an attenuated connection to asbestos and has already rendered over 100 corporations bankrupt.

Lastly, any duty finding here could spark lawsuits by plaintiffs with numerous other asbestos-related diseases,¹¹ including non-malignant conditions. A duty finding also could open the door to lawsuits against employers over any number of hazards that workers carry off-site. *See Stanton v. Battelle Energy Alliance, Inc.*, 89 F. Supp. 3d 937, 946 (D. Idaho 2015) (policy factors weighed against duty on nuclear operator for wife of employee exposed to radioactive chemical elements); *Doe v. Pharmacia & Upjohn Co., Inc.*, 879 A.2d 1088, 1096-97 (Md. 2005) (employer owed no duty to wife of employee who became infected with HIV through unprotected sex with her spouse, a lab technician at employer’s viral production facility, because imposition of a duty of care “would create an indeterminate class of potential plaintiffs.”); *Widera*, 611 N.Y.S.2d at 571

¹¹ There is a new wave of asbestos lung cancer cases appearing on some asbestos dockets, reflecting an attempt to expand the litigation well beyond mesotheliomas. *See* Bethany Krajelis, *Lung Cancer Suits are New Trend in Asbestos Litigation; Filings Discussed at Recent California Asbestos Conference*, Madison-St. Clair Record (Mar. 28, 2013).

(employer not liable to infant exposed in utero to toxic chemicals emitted at work because recognition of a duty would “expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs.”).¹² As an Arizona appellate court recently explained:

[Plaintiffs] offer no way to limit the duty they seek either to employees’ family members or to asbestos exposure. Absent these constraints, any company that made or used a potentially hazardous substance could be liable to anyone who ever came into contact with an employee who arguably could have carried said hazardous substance offsite. Such a dramatic expansion of liability would not be compatible with public policy.

Quiroz, 382 P.3d at 81.

II. CREATING A TAKE-HOME DUTY WOULD ENCOURAGE THE FILING OF GROUNDLESS ASBESTOS LITIGATION

Duty rules by their very nature may exclude claims by potential plaintiffs who, while injured, lack a sufficient connection to the defendant. The rules are imposed to create reasonable boundaries around liability. *See* Restatement (Second) of Torts § 281(b) (1965). Here, the Court should not be overly concerned that by rejecting a duty of care it would be cutting off a large class of meritorious mesothelioma claims. The science behind mesothelioma suggests that today’s take-home litigants are frequently suing over spontaneously generated cancers that

¹² *See also Ruffing v. Union Carbide Corp.*, 766 N.Y.S.2d 439, 441 (N.Y. App. Div. 2003) (worker whose pregnant wife was exposed to toxic substances carried home by worker, resulting in daughter’s birth defects, failed to state cause of action against employer).

have nothing to do with asbestos exposures. Preserving Virginia’s sensible limitations on who is owed a duty of care will not deprive deserving plaintiffs, because it would only impact those with the most attenuated and questionable claims. See 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).

Mesotheliomas, like all cancers, are increasingly a function of age – the older the population becomes, the more cancers we have. See Stanley Venitt, *Mechanisms of Spontaneous Human Cancers*, 104 *Envtl. Health Persp.* 633, 633, 635 (1996).¹³ Most cancers are produced by our own bodies generating errors in our genes during the billions of replications of our DNA that occur in our cells on a daily basis. See *id.* at 637; Robert Weinberg, *One Renegade Cell: How Cancer Begins* at 89-90 (1998). These types of cancers are called “spontaneous” cancers because they are self-generating, the result of a series of two or more spontaneous cell mutations in a given cell sufficient to turn that cell cancerous. See Cristian Tomasetti & Bert Vogelstein, *Variation in Cancer Risk Among Tissues Can Be*

¹³ See also Suresh Moolgavkar, et al., *Pleural and Peritoneal Mesotheliomas in SEER: Age Effects and Temporal Trends*, 20 *Cancer Causes Control* 935, 943 (2009); Mathieu Boniol & Mary Heanue, “Chapter 7: Age-Standardisation and Denominators,” in *Cancer Incidence in Five Continents Vol. IX*, IARC Scientific Publication No. 160, at 9 (2015).

Explained by the Number of Stem Cell Divisions, 347 *Science* 78 (Jan. 2015); see also Venitt, *supra*, at 633, 635; Weinberg, *supra*, at 89-90.

Spontaneous cancers produce as much as two-thirds of the cancers in today's population, and they are increasingly accounting for mesotheliomas. See *id.*; Mary Jane Teta et al., *US Mesothelioma Patterns 1973-2002: Indicators of Change and Insights into Background Rates*, 17 *Eur. J. Cancer Prevention* 525, 526 (2008) (“[S]cientific evidence suggests that a portion of cases occurred with no apparent history of asbestos exposure. . . . It is generally well accepted, therefore, that there is a background rate of mesothelioma, unrelated to asbestos exposure.”).¹⁴

In short, today's population of persons with mesothelioma are decreasingly individuals who had sufficient asbestos exposure to cause their disease and increasingly made up of people who have instead incurred spontaneous mesotheliomas, sometimes in conjunction with inconsequential asbestos exposures.

By rejecting a take-home asbestos exposure duty rule in Virginia, this Court will prevent further unwarranted expansion of an already massive area of litigation.

¹⁴ See also Christine Rake et al., *Occupational, Domestic and Environmental Mesothelioma Risks in the British Population: A Case-Control Study*, 100 *Brit. J. Cancer* 1175, 1175 (2009) (14% of male and 62% of female cases of mesothelioma “not attributable to occupational or domestic asbestos exposure”).

III. PLAINTIFF COMPENSATION AND ASBESTOS TRUSTS

A duty finding is not required to assure that an injured party has some form of remedy. Recoveries are available outside of litigation for persons exposed to asbestos from the former major asbestos producers.¹⁵

Today, billions of dollars in assets are available in asbestos trusts to “answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades.” William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 *Widener L.J.* 675 (2014). There are presently over sixty trusts in operation. *See* U.S. Gov’t Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* (Sept. 2011). These trusts operate independent from the civil tort system. *See* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (Rand Corp. 2010).

Asbestos trusts are designed to settle claims quickly. *See* Dionne Searcy & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, *Wall St. J.*, Mar. 11, 2013, at A1 (“Unlike court, where plaintiffs can be cross-examined and

¹⁵ *See, e.g.*, Manville Trust, 2002 Trust Distribution Process (TDP) § B(C)(11) (Revised Jan. 2012).

evidence scrutinized by a judge, trusts generally require victims or their attorneys to supply basic medical records, work histories and sign forms declaring their truthfulness. The payout is far quicker than a court proceeding and the process is less expensive for attorneys.”).

Further, “it is much easier to collect against a bankruptcy trust than a solvent defendant.” Adrienne Bramlett Kvello, *The Best of Times and the Worst of Times: How Borg-Warner and Bankruptcy Trusts Are Changing Asbestos Settlements in Texas*, 40 *The Advoc. (Tex.)* 80, 80 (2007)). “[B]ankruptcy trusts have emerged to give asbestos firms an almost automatic guarantee of settlements for their clients.” *Id.* at 82. If a claimant meets a trust’s criteria, the claimant will receive a payment. *See* U.S. GAO, *supra*, at 21. “Thus, it is possible that some claims may be approved even if the evidence supporting exposure may not survive early dispositive motions in the relevant state court.” Brown, 23 *Widener L.J.* at 317.

It is common for a claimant to receive multiple trust payments since each trust operates independently and workers were often exposed to the asbestos-containing products of various former defendants. *See* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 *Tul. L. Rev.* 1071, 1078-79 (2014).

For instance, in a recent bankruptcy case involving gasket and packing manufacturer Garlock Sealing Technologies, a typical mesothelioma plaintiff’s total recovery was estimated to be \$1-1.5 million, “including an average of

\$560,000 in tort recoveries and about \$600,000 from 22 trusts.” *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014).

CONCLUSION

For these reasons, the Court should answer *no* to the certified question and hold that an employer does not owe a duty of care to the family member of an employee who alleges exposure to asbestos from the work clothes of the employee, where such exposure takes place off of the employer’s premises and the employer has no relationship with the family member.

Respectfully submitted,



Mark A. Behrens (VSB #31493)
SHOOK, HARDY & BACON, L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
(202) 639-5621
(202) 783-4211 (facsimile)
mbehrens@shb.com

Dated: February 23, 2018

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the Virginia Supreme Court Rules that pertain to the filing of briefs, including but not limited to Rules 5:6 (Forms of Briefs; paper size, line spacing, 14-point Times New Roman font; binding and cover), 5:26 (General Requirements for All Briefs; length not exceeding the longer of 50 pages or 8,750 words; copies for filing; signature and certificate), 5:30 (Briefs *Amicus Curiae*), and 5:31 (Gray Cover for Brief *Amicus Curiae*).



Mark A. Behrens (VSB #31493)

Dated: February 23, 2018

CERTIFICATE OF SERVICE

I certify that on February 23, 2018, three copies of the foregoing were hand-filed with the Clerk of the Court and an electronic copy was filed via VACES. On this same day, an electronic copy of the Brief was served via email upon:

Peter A. Kraus
Jonathan A. George
Charles S. Siegel
WATERS KRAUS & PAUL
3141 Hood Street, Suite 700
Dallas, TX 75291
kraus@waterskraus.com
jgeorge@waterskraus.com
siegel@waterskraus.com
Counsel for Plaintiff

Alexandra Brisky Cunningham
Merideth Bryant Snow Daly
HUNTON & WILLIAMS, LLP
Riverfront Plaza, East Tower
951 East Byrd St.
Richmond, VA 23219
acunningham@hunton.com
mdaly@hunton.com
Counsel for Defendant

Leslie Kendrick
Vice Dean and Professor of Law
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Rd.
Charlottesville, VA 22903
Kendrick@law.virginia.edu
Counsel for Plaintiff

Wendy Cohen McGraw
HUNTON & WILLIAMS, LLP
500 E. Main Street, Suite 1000
Norfolk, VA 23510
wmcgraw@hunton.com
Counsel for Defendant

E. Kyle McNew
J. Gregory Webb
MICHIEHAMLETT PLLC
P.O. Box 298
500 Court Square, Suite 2000
Charlottesville, VA 22902
kmcnew@michiehamlett.com
gwebb@michiehamlett.com
Counsel for Amicus VTLA

Stuart A. Raphael
HUNTON & WILLIAMS, LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
sraphael@hunton.com
Counsel for Defendant

William W.C. Harty
Robert R. Hatten
Hugh B. McCormick, III
Erin E. Jewell
Jeanette Dodson-O'Connell
Spencer Reiss
PATTEN, WORNOM, HATTEN &
DIAMONSTEIN, L.C.
12350 Jefferson Ave., Suite 300
Newport News, VA 23602
pleadings@pwhd.com
WHarty@pwhd.com
Counsel for Amici
Asbestos Lawyers

Richard S. Glasser
William H. Monroe, Jr.
Marc C. Greco
Kip A. Harbison
GLASSER & GLASSER, P.L.C.
Crown Centre Building, #600
580 East Main Street
Norfolk, VA 23510
richardg@glasserlaw.com
bill@glasserlaw.com
marcg@glasserlaw.com
kip@glasserlaw.com
Counsel for Amici
Asbestos Lawyers

Johan Daniel Flynn
Richard Thomas Radcliffe, Jr.
DEHAY & ELLISTON, LLP
36 S. Charles Street, Suite 1400
Baltimore, MD 21201
jflynn@dehay.com
rtr@dehay.com
Counsel for Defendant

Kevin P. Bilms
Thomas Burris, III
LAW OFFICE OF PETER T. NICHOLL
355 Crawford Street
Portsmouth, VA 23704
kbilms@nicholllaw.com
tburris@nicholllaw.com
Counsel for Amici
Asbestos Lawyers



Mark A. Behrens (VSB #31493)