

IN THE SUPREME COURT

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

GLEN MILLER, ESTATE OF CAROLYN
MILLER, SHAWN DEAN, JOHN ROLAND,
and ALMA ROLAND,

Supreme Court No.: 131517
Court of Appeals No. 14-05-00026-CV
Lower Court Case No.: 15077*JG01

Appellees,

vs

FORD MOTOR COMPANY,

Appellant.

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF FORD MOTOR COMPANY**

LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.
C. THOMAS LUDDEN (P45481)
Attorneys for Amicus Curiae
Pacific Legal Foundation
3910 Telegraph Road, Suite 200
Bloomfield Hills, Michigan 48302
(248) 593-5000

PACIFIC LEGAL FOUNDATION
DEBORAH J. LA FETRA
TIMOTHY SANDEFUR
Attorneys for Amicus Curiae
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
(916) 419-7111

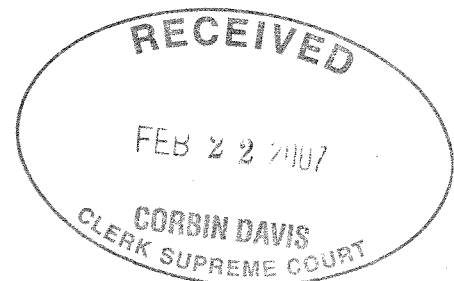


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INTRODUCTION

In the most famous negligence case of all time, *Palsgraf v Long Island R Co*, 248 NY 339; 162 NE 99 (CA NY 1928), Judge Benjamin Cardozo held that defendants owe a duty of reasonable care only to those persons who are within a class of foreseeable victims of negligence. Tort duty can only be based on the foreseeability of harm to the person in fact injured, and not on an abstract duty to the entire world, as dissenting Judge Andrews contended. *Id.* at 103 (Andrews, J., dissenting). In that case, a railroad passenger being helped onto a train dropped a package of explosives; they went off, producing vibrations which caused a scale to fall on Mrs. Palsgraf, injuring her. Judge Cardozo found that because the railroad employees could not have anticipated injury to Mrs. Palsgraf, they owed her no duty, and therefore could not be liable to her for negligence. *Palsgraf*, 162 NE at 100. While every act of every person conceivably can be traced to positive or negative effects on others, imposing legal liability for such attenuated results would have serious negative effects on worthwhile economic enterprises.

Although the merits of both Cardozo's and Andrews' approaches have been extensively debated through the years, one conclusion is clear: in tort law, the concept of duty is one in which considerations of public policy should be primary. "In short, the *Palsgraf* case balanced the 'justice' of Mrs. Palsgraf's position as an innocent passenger injured by the carelessness of a solvent enterprise against the threats to the future financial solvency of that enterprise posed by too extensive an ambit of tort liability." White, *Tort Law In America: An Intellectual History* (1985) p 99.

Like *Palsgraf*, this case presents a question of the extent of a defendant's duty toward parties who are so distant from the alleged injury that imposing liability on the defendant could have seriously harmful consequences for a valuable, socially productive industry. Liability costs are a

serious burden on business, and imposing unnecessary liability runs the risk of over-detering economic activity. Over-deterrence imposes significant costs on consumers, resulting in fewer goods and services being made available to the public, and stifling investment, economic growth, and job creation. Allowing negligence liability to attach here simply because the decedent washed the clothes of her step-father, who worked at Ford's plant intermittently as an independent contractor over the course of eleven years (1954-1965), expands the duty of care much too far, with potentially dangerous consequences for the economy of Michigan.

Courts have long understood that the line of potential liability must be drawn somewhere. See, e.g., *Shinholster v Annapolis Hosp*, 471 Mich 540, 603; 685 NW2d 275, 307 (2004) ("Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.") (citation omitted). In drawing that line, they have relied on the concepts of foreseeability and proximate cause. But, in each case, public policy considerations are paramount. This Court should employ these classic legal principles and hold that the Defendant cannot be held liable.

ARGUMENT

I

COURTS MUST LIMIT NEGLIGENCE LIABILITY IN ACCORDANCE WITH GOOD PUBLIC POLICY

Negligence law seeks to make whole those who have been injured by people who fail to live up to their social and personal responsibilities. See *McAuley v General Motors Corp*, 457 Mich 513, 520; 578 NW2d 282, 285 (1998). However, there is always a risk that negligence law could impose responsibilities on parties who should not have to bear them. Imposing a tort duty essentially

requires a specific party to pay the cost of socially desirable activities—which is a perfectly reasonable enterprise when the burdened party has caused the injury to begin with. For example, it is reasonable to require that a defendant who operates a motor vehicle must do so with reasonable care and be prepared to pay the cost of any damages he may incur by driving negligently. See, e.g., *Holloway v General Motors Corp Chevrolet Div*, 403 Mich 614, 626-27; 271 NW2d 777, 783 (1978). Tort law usually imposes liability so as to deter conduct that creates an unreasonable risk of injury to others. See *Mann v Shusteric Enters, Inc*, 470 Mich 320, 338; 683 NW2d 573, 582 (2004) (citation omitted) (premises liability action); *Lowe v. Estate Motors Ltd*, 428 Mich 439, 472; 410 NW2d 706, 720 (1987) (product liability action).

But, there is a point at which imposing liability will have negative consequences—at which there is a serious risk of discouraging worthwhile conduct. As Justice Breyer explained, courts must take care to strike an effective balance, because “[s]maller damages would not sufficiently discourage firms from engaging in the harmful conduct, while larger damages would ‘over-deter’ by leading potential defendants to spend more to prevent the activity that causes the economic harm . . . than the cost of the harm itself.” *BMW of North America, Inc v Gore*, 517 US 559, 593; 116 S Ct 1589, 1607-08; 134 L Ed 2d 809 (1996).

Overdeterrence is a serious concern. Economically speaking, if a business faces too high a potential tort liability, it will invest too many resources in avoiding that liability, rather than into productive enterprises. See Note, *Market Share Liability New York Style: Negligence in the Air? Hymowitz v Eli Lilly and Co*, 55 Mo L Rev 1047, 1067 (1990) (“The consequences of over-deterrence include disincentives for safety to unsafe manufacturers, and a reluctance by ‘leading edge’ companies to introduce new products for fear of potential liability.”). This diverts businesses

away from satisfying the needs of consumers and wastes the energy of entrepreneurs which ought to be focused on producing goods and services at low prices. Worse, businesses might be deterred completely from operating in a significant branch of industry. See LaFetra, *Freedom, Responsibility and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind L Rev 645, 645 (2003) (“[M]any vitally important businesses have simply chosen not to operate in the United States out of fear of litigation.”). Modern industrial society is full of potential hazards, and imposing severe costs on parties with only tenuous connections to the harm runs the risk of stifling important economic activity:

The threat of such enormous [damages] awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages.

Browning-Ferris Indus of Vt Inc v Kelco Disposal, Inc, 492 US 257, 282; 109 S Ct 2909, 2924; 106 L Ed 2d 219 (1989) (O’Connor and Stevens, JJ., concurring and dissenting) (citations omitted). See further LaFetra, *supra*, at 649-50 (“According to the American Medical Association, ‘[i]nnovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance.’” (quoting Alan R. Nelson, Am Med Ass’n, *Impact of Product Liability on the Development of New Medical Technologies* 1 (1988))). Limitations on tort liability, therefore, serve an important economic purpose. As Professors Cass Sunstein, et al., explain:

If [damages] awards are unpredictable . . . resources are likely to be wasted on that calculation, and as a practical matter, a risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies. Hence

unpredictable awards create both unfairness and (on reasonable assumptions) inefficiency, in a way that may overdeter desirable activity.

Sunstein, et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 Yale LJ 2071, 2077 (1998).

The principle that a business should pay for the harms it causes is not, therefore, a sufficient principle for the creation of tort law. Every act has a potentially infinite number of consequences, so that if a defendant were required to pay for every potential wrong resulting from an action, economic enterprise simply could not go on. “At some point,” therefore, “it is generally agreed that the defendant’s act cannot fairly be singled out from the multitude of other events that combine to cause loss.” Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U Chi L Rev 61, 70 (1982).

The common law traditionally dealt with this problem in two ways: the principles of foreseeability (usually in the analysis of whether a duty exists) and of proximate causation. In the realm of foreseeability, courts often have found that defendants have no duty to take burdensome precautions against potential harms that are not reasonably foreseeable, or are simply too unlikely. See *Brown v Brown*, 270 Mich App 689, 701; 716 NW2d 626, 633 (2006) (Whether an act is foreseeable cannot depend on either the plaintiff’s or defendant’s ability to “predict the future.”). This was the basis of the *Palsgraf* case, holding that a defendant had no duty to an unforeseeable plaintiff. As Prosser and Keeton conclude in their analysis of *Palsgraf*, “[t]he real problem, and the one to which attention should be directed, would seem to be one of social policy.” Keeton, *Prosser and Keeton on the Law of Torts* (5th ed. 1984) p 287; *Ross v Glaser*, 220 Mich App 183, 193; 559 NW2d 331, 337 (1996) (holding that proximate cause foreseeability analysis “involves a

determination that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable”); *Swartz v Huffmaster Alarms Sys Inc*, 145 Mich App 431, 434-45; 377 NW2d 393, 395 (1985) (owner of business premises has no duty to intoxicated patron who leaves premises and then is struck by a car, distinguishing *Langen v Rushton*, 138 Mich App 672, 678; 360 NW2d 270, 273 (1984), which “stretched the duty concept to its outer limit” by holding a shopping mall negligently designed its landscaping where a car exiting the lot had line of vision impaired by trees). *Swartz, supra*, at 437.

But policy considerations counsel against finding liability in a case like this. As Nobel Laureate Friedrich Hayek noted, liability rules “will normally raise the cost of production, or, what amounts to the same thing, reduce over-all productivity.” Hayek, *The Constitution of Liberty* (1960) p 224. A presumption against imposing liability is justified because the “over-all cost is almost always underestimated.” *Id.* at 225. This underestimation is due to the fact that tort law has the potential of stifling entrepreneurial activity, driving away investors, and depriving society of jobs, as well as goods and services, that might otherwise have existed. Since these jobs, goods, and services never come into existence once a legal cost is imposed on all businesses, it is easy to overlook their cost to society. See generally Bastiat, *That Which Is Seen, and That Which Is Not Seen* (1850), available at <http://bastiat.org/en/twisatwins.html> (last accessed Feb 9, 2007). This concern is especially acute in a case like this, where the connection between the alleged wrong and the injury suffered is so distant. In *CSX Transp, Inc v Williams*, 278 Ga 888, 889; 608 SE2d 208, 209 (2005), the Georgia Supreme Court held that a business was not liable where a wife was alleged

to have contracted asbestos-related disease from the dust on her husband's clothing; it did so in terms of foreseeability. It found that

in fixing the bounds of duty, not only logic and science, but policy play an important role [T]here is a responsibility to consider the larger social consequences of the notion of duty and to correspondingly tailor that notion so that the illegal consequences of wrongs are limited to a controllable degree. 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.

Id. at 890; 608 SE2d at 209 (citations omitted).

Courts have also tried to put boundaries on tort liability through the concept of “proximate causation.” This principle is better described “as a problem of the scope of the legal obligation to protect the plaintiff against an intervening cause.” Keeton, *supra*, at 313. As is true of the principles of duty, the concept of proximate cause stems from policy considerations that serve to place manageable limits upon the liability that flows from negligent conduct. *Wilkinson v Lee*, 463 Mich 388, 397 n 6; 617 NW2d 305, 310 n 6 (2000) (“Certainly considerations of public policy do enter into limitations on proximate cause”); see also *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496-97; 668 NW2d 402, 410 (2003) (“[T]he connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable, and depends in part on foreseeability.”).

The causal connection in this case is extraordinarily weak, given that the Plaintiff's step-father worked at the Ford plant only intermittently—during the same general time he worked at many other facilities—for some fraction of his total eleven years working on blast furnaces from 1954-1965; and there was no specific intent to harm. Although Mrs. Miller certainly became ill, that illness is as indirect as possible from the actions of Ford—a third-party claim of a person exposed

to the clothing of a person who spent some small fraction of his career working in one of many environments containing asbestos.

Should liability be found in this case, therefore, the chances of keeping such attenuated claims within judicially manageable limits is very small. In this case, a laborer's step-daughter, who never set foot on Appellant's premises, seeks to establish liability on a *premises liability theory* because she was exposed to asbestos which clung to her step-father's clothing when she laundered his clothes at home. If the Court were to find liability in such a case, it is difficult to imagine where such liability would stop.

- Employers that permit employees to smoke in a designated smoking area could be liable when nonsmokers are exposed to the particles of smoke infiltrating the clothing of their smoking colleagues; see *Bell v Elmhurst Chicago Stone Co*, 919 F Supp 308, 310 (ND Ill 1996).
- Hospitals could be liable to relatives of patients who bring home illnesses they catch from other patients; see *Gammill v United States*, 727 F2d 950, 954 (CA 10 1984) (noting in dicta that physician may be liable for failure to warn those exposed to patient of patient's infectious illness but not liable to unforeseeable baby-sitter).
- Friends of gas station or airport employees, or other workers who deal with hazardous chemicals, could sue for second- and third-hand exposure. See, e.g., *Ruffing ex rel Calton v Union Carbide Corp*, 193 Misc 2d 350, 351; 746 NYS2d 798, 801 (2002) (plaintiff children sued petroleum company where father worked because his clothing carried particles of toxic chemicals home and children were born with deformities); *Kennedy v S Cal Edison Co*, 268 F3d 763, 766 (CA 9 2001), *cert denied*, 535 US 1079; 122 S Ct 1964 (Mem); 152

L Ed 2d 1024 (2002) (recovery denied to wife of nuclear power plant employee who developed cancer and sued on grounds that husband brought home minute particles of radioactive material).

Allowing liability in this case would offer no limiting principle. See also *In re New York City Asbestos Litigation*, 5 NY3d 486, 498; 840 NE2d 115, 122 (NY 2005) (refusing to find liability in case where wife was injured by laundering husband's asbestos-covered clothing because "the 'specter of limitless liability' is banished only when 'the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship'" and there was no relationship between the employer and the wife). As a result, a ruling for plaintiffs would increase the potential costs of doing business in Michigan, which would harm the economy and the state's citizens.

Many courts have rejected such attenuated causes of action. In *Bosch v St Louis Healthcare Network*, 41 SW3d 462, 463 (Mo 2001), for example, a husband sued the hospital where his wife worked, after she contracted hepatitis C by pricking herself on an infected needle. He alleged that he suffered the mental distress of worrying that he might contract hepatitis from her. The court rejected the claims, noting that the husband was not within the "zone of danger," and that "to so extend a claim for the negligent infliction of emotional distress" would inappropriately expand the reach of tort law. *Id.* at 465. In *Kennedy*, 268 F3d 763, the Ninth Circuit Court of Appeals rejected a lawsuit by the wife of a nuclear power plant employee who brought home particles of radioactive material on his clothing and who later developed cancer. The court noted that the chances were overwhelming that she developed the cancer for other reasons than from her brief exposure to minute particles of radioactivity, and that "no reasonable juror" could have found that such exposure was "more than an 'infinitesimal' or 'theoretical' part in bringing about Mrs. Kennedy's [cancer]."

Kennedy, 268 F3d at 770. In *Hughes v Johns-Manville Corp*, No 88(23), 1982 WL 290330 (Pa CP Phila 1982), the Philadelphia County Court of Common Pleas rejected a claim for emotional distress by a wife who feared that she might develop cancer due to the asbestos that her husband brought home on his clothing. The wife had experienced no physical impact from asbestos, the court held, and thus could not claim emotional distress damages. And in *Rohrbaugh v Owens-Corning Fiberglas Corp*, 965 F2d 844, 847 (CA 10 1992), the court found that a wife could not bring suit based on the injuries sustained from asbestos clinging to her husband's clothing. To find that any person coming in contact with the clothing worn by the users of a product "would be an overextension of Oklahoma manufacturer's products liability law," the court concluded. *Id.* One scholar sums up the policy implications of causation problems this way:

To expect the judge and jury to produce optimal analyses of the health risks presented by various chemicals, and the corresponding benefits and burdens of a particular protective level, is unrealistic. Where a plaintiff may recover even with weak proof of causation, litigation will be brought, not based on whether the causative inference is likely to be true, but based on the potential for recovery. The incentive to pursue those cases in which the harm alleged is most likely due to the defendant's conduct will evaporate. Under an eroded causation standard, the plaintiff is incentivized in the weakest possible manner to pursue damages only against those who caused his injury. Potential defendants cannot effectively regulate their conduct where the scope of their liability is so unclear.

Mosher, *A Pound of Cause for a Penny of Proof: The Failed Economy of an Eroded Causation Standard in Toxic Tort Cases*, 11 NYU Env'tl LJ 531, 616 (2003).

Finally, there is little to be gained by finding liability against defendants that have such attenuated connections to a plaintiff's injury. As Carroll, et al., Rand Institute for Civil Justice, *Asbestos Litigation Costs and Compensation: An Interim Report* (2002) p vii, points out, "[i]f

business leaders believe that tort outcomes have little to do with their own behavior, then there is no reason for them to shape their behavior so as to minimize tort exposure.” Carroll, *supra*, at 87.

The tort system is supposed to create an incentive mechanism that allows businesses to predict, on the basis of anticipated costs and benefits, what sort of risks and practices are legitimate in their pursuit of customer satisfaction. See generally Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 Cal L Rev 677, 678 *et seq* (1984) (describing cost-benefit analysis expectations and limitations). But that mechanism is disrupted when a damages verdict is irrationally large or is not based on some clear principle of fault. In those cases, businesses will disregard the confusing signals that tort liability sends them, and will simply consider the cost of tort liability as a general cost of doing business. “When [tort] awards are arbitrary, it becomes impossible to discern any relevant incentives from the pattern of damage awards, leaving businesses only to guess at what business practices will not instigate damage claims.” Gray, *Damage Control*, Wall St J, Dec. 11, 2002, at A18. Whatever deterrent benefit is to be gained by finding liability in this case is minor compared to the litigation flood that the Court would be inviting by allowing such attenuated claims to proceed.

The Court should find that, while an employer may owe a duty to an employee, it does not owe a duty to ensure that the employee personally attends to his laundry, so as to protect the employee’s friends and family from possible exposure to asbestos.

II

THIS COURT SHOULD NOT ENCOURAGE A FURTHER EXPANSION OF ALREADY WIDE-RANGING ASBESTOS LITIGATION

Asbestos exposure has become one of the primary targets for abusive and exploitative mass tort litigation. Such litigation harms citizens of Michigan by deterring economic investment and job creation and by curbing the availability of goods and services on the market—thus increasing the cost of living. Worse, asbestos litigation has created serious injustices in our tort system, by changing the rules and extending liability beyond the traditional limits of tort law. It is important to consider the ramifications of the expansion of liability sought by plaintiffs in this case in the context and history of asbestos litigation as a whole.

A. Asbestos Litigation Is Imposing Serious Economic Harms on the Nation

Asbestos litigation is now widely recognized as the epicenter of a massive breakdown in American tort law. See, e.g., *Amchem Products, Inc v Windsor*, 521 US 591, 597-98; 117 S Ct 2231, 2237; 138 L Ed 2d 689 (1997). According to a 2002 report by the Rand Corporation, \$54 billion has already been spent on litigation over asbestos-related injuries, more than half of which has gone to “transaction costs,” such as attorneys’ fees. After thirty years, this litigation “has spread far beyond the asbestos and building products industries. The list of defendants now ranges across 75 out of 83 different types of industries . . . [and] almost every type of economic activity in the U.S.” Carroll, *supra*, at vii. Now, after three decades of asbestos litigation, virtually every manufacturer of products containing asbestos are bankrupt, and the plaintiffs’ bar has begun searching out other defendants with peripheral connections to the asbestos industry.

These “peripheral defendants” have only an attenuated connection to asbestos, but are now named in asbestos litigation because of their “deep pockets”; “the net has spread . . . to companies far removed from the scene of any putative wrongdoing.” There were 300 asbestos defendants in 1982; now there are more than 8,500. Asbestos litigation now touches firms in industries engaged in almost every form of economic activity that takes place in the economy. Senior U.S. District Court Judge Jack Weinstein has said “it is not impossible that every company with even a remote connection to asbestos may be driven into bankruptcy.”

Hantler, et al., *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 Loy LA L Rev 1121, 1151-52 (2005) (citations omitted). Of course, many of these cases are justified on the merits. There is no doubt that industrial exposure to dangerous chemicals is properly the subject of tort law. The problem is that damages awards have become so vast, and courts have become so willing to bend the rules of tort law in favor of plaintiffs and against “deep pockets” defendants, that asbestos litigation has created an entire industry within the legal profession. See Stengel, *The Asbestos End-Game*, 62 NYU Ann Surv Am L 223, 233 (2006) (Identifying two “fundamental phenomena” that combine to create the asbestos litigation crisis: “claimant elasticity,” defined as “the essentially inexhaustible supply of claimants,” and “defendant elasticity,” defined as “the correspondingly unbounded source of defendants,” that both stem “the inability of the asbestos litigation system to discriminate both between those with real asbestos-related injuries and those without, and between defendants who are in fact culpable and those more appropriately viewed as ‘solvent bystanders.’”) (footnotes and citations omitted).

This industry is economically wasteful, in that it puts resources into unproductive litigation, drives businesses that do produce social benefits into bankruptcy, and overdeters legitimate enterprises. James Stengel identified 32 bankruptcies related to asbestos litigation just from 2000-2005. Stengel, *supra*, at 265 (listing each bankrupt company and the year it filed for bankruptcy).

Moreover, the financial windfalls produced by verdicts in these cases often fail to effect any reparation or justice. “Plaintiffs’ attorneys collect an estimated \$30 billion annually in legal fees—money that could otherwise help prevent or compensate injuries [I]n mass tort litigation involving asbestos, two-thirds of insurance expenditures have gone to lawyers and experts.” Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 Duke LJ 447, 464 (2004).

There appears to be no end in sight. The Rand Corporation survey predicts that the number of claimants in asbestos cases will increase to a total of 1 million plaintiffs, and a total cost of over \$200 billion. Carroll, *supra*, at 77. Of these claimants, the vast majority will not be ill in any way. Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp L Rev 33, 59-62 (2003). How many businesses will be driven into bankruptcy, and how much time will be spent by lawyers and courts investigating and prosecuting these claims, is unclear. And the amount of entrepreneurial activity, industrial innovation, and increased productivity that will be stifled in the process is impossible to calculate.

B. Asbestos Litigation Suffers from System-Wide Injustice

Asbestos litigation creates genuine injustices in the name of placing the burden of risk onto those parties that are wealthiest rather than parties that genuinely deserve the blame. So many businesses are at risk for such potentially devastating damages awards with regard to asbestos that some defense lawyers warn their clients that

[t]he turbulent waters of asbestos litigation have seeped into virtually every type of economic activity in our country. Defense attorneys are striving to protect their

clients from the perils attendant to the most enduring mass tort litigation recorded in the annals of American jurisprudence—a marathon that has yet to reach full stride.

Meyer, et al., *Emerging Trends in Asbestos Premises Liability Claims*, 72 Def Couns J 241, 241 (2005). Changing the rules of tort liability, or easing the burden on plaintiffs to prove causation and foreseeability so as to allow plaintiffs to recover, is to transform the system from one of justice to one which redistributes wealth on the basis of a jury's subjective feelings of compassion. It is unjust for the courts to treat litigants differently simply, or to presume their guilt, on the basis of their relative wealth. Further, it is unjust to find defendants liable where their connection to the plaintiff's injury is weak. As Carroll, et al., point out, "[r]equiring companies that played a relatively small role in exposing workers to asbestos to bear substantial costs of compensating for asbestos injuries . . . raises fundamental questions of fairness." *Supra*, at 87.

Understandably troubled by the genuinely traumatic illness and suffering that many plaintiffs have experienced, courts have loosened the traditional rules of tort law so as to do "substantial justice." Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 Cardozo L Rev 1819, 1821 (1992). In the process, courts have "adjust[ed] the rules of evidence . . . creating a result-driven evidentiary regime." *Id.* at 1844. In fact, in one case, *Dunn v Owens-Corning Fiberglass*, 774 F Supp 929 (DVI 1991), a court awarded \$1 million in compensatory damages and \$25 million in punitive damages against an industry defendant even though the plaintiff had presented no evidence of actually being ill and had based his claim simply on his subjective fear that he might get cancer. *Id.* at 938. It was, the court said, "undisputed that plaintiff presently works full time and that he continues to lead a somewhat active life." *Id.*; see also Amundson, *How a Congressional Answer to Asbestos Litigation Would Help Litigants, Courts, and*

the American Economy, 44 S Tex L Rev 925, 929 (2003) (“According to a report released in 2002 by the RAND Institute for Civil Justice, between two-thirds and ninety percent of all current claimants are functionally unimpaired, meaning that their asbestos exposure has not so far affected their ‘ability to perform the activities of daily life.’” (quoting Carroll, *supra*, at 20)). In fact, for most plaintiffs in asbestos liability cases “there is no scientific basis for denominating . . . [them] as injured and no legal basis for valuing such claims since no injury has occurred.” Brickman, *Theory Class*, *supra*, at 60. As Brickman concludes, the result of cases like this is to create an “asbestos lottery” mentality in the legal profession. Brickman, *Crisis*, *supra*, at 1857.

The injustice in asbestos law does not stop at the courts’ willingness to indulge plaintiffs’ weak cases. Courts are increasingly willing to permit consolidation of vast numbers of class action cases, which increases the likelihood that defendants will simply pay to settle a case, even where they may not be guilty. See Carroll, *supra*, at 35 (“In asbestos litigation, experience suggests that consolidation tilts the playing field against defendants, rather than against plaintiffs.”). And although large punitive damages awards often are reduced on remittitur, they continue to make a difference when industry defendants consider settlements, and thereby increase the cost of litigation even for those firms that do not defend themselves. *Id.* at 59. Perhaps most disturbing is the prediction voiced by one expert that

while other mass torts are unlikely to replicate the size and scope of asbestos litigation, the legal techniques and precedents that lawyers developed for asbestos litigation are likely to be applied to other mass torts in the future. As a result, mass torts in the future will be more common and more expensive.

White, *Asbestos and the Future of Mass Torts*, J Econ Perspectives, Mar 22, 2004, at 202.

A recent American Law Institute-American Bar Association conference specifically pinpointed the “take-home liability” issue as the latest salvo from the plaintiffs’ bar to enlarge the circle of both plaintiffs and defendants in asbestos cases.

If the law becomes clear that premises-owners or employers owe a duty to the family members of their employees, the stage will be set for a major expansion in premises liability. The workers’ compensation bar does not apply to the spouses or children of employees, and so allowing those family members to maintain an action against the employer would greatly increase the number of potential claimants. Moreover, people who claim to be injured from take-home exposure, especially children, have very appealing facts and tend to be much younger than other claimants. These factors all flow together in support of high values for these claims

Hanlon, *Asbestos Litigation in the 21st Century: Developments in Premises Liability Law*, SL041 ALI-ABA 665, 694 (2005). The decision below has the potential of subjecting any industrial enterprise to liability from the countless numbers of people who might come into contact with employees—much less the employees of subcontractors—who carry trace amounts of dangerous chemicals on their persons beyond the premises of their employment. To prevent such an outcome, the Court should apply the traditional tort principles of duty and causation to find that while the employer has a duty to the employee, those who come into contact with the employee’s clothing are not liable for illnesses incurred thereby.

CONCLUSION AND RELIEF REQUESTED

The legal rules of duty and foreseeability have evolved over the centuries of the common law for important policy reasons, most notably because extending tort liability indefinitely has serious social and economic costs. Society ultimately suffers when it over-deters economically productive

business and punishes people disproportionately, or punishes people who have done nothing wrong.

This Court should answer the certified question in the negative.

Respectfully submitted,

LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

By 

C. THOMAS LUDDEN (P45481)

Attorney for Amicus Curiae

Pacific Legal Foundation

3910 Telegraph Road, Suite 200

Bloomfield Hills, Michigan 48302

(248) 593-5000

PACIFIC LEGAL FOUNDATION

By 

DEBORAH J. LA FETRA

TIMOTHY SANDEFUR

Attorneys for Amicus Curiae

Pacific Legal Foundation

3900 Lennane Drive, Suite 200

Sacramento, California 95834

(916) 419-7111

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