COMMONWEALTH OF KENTUCKY
SUPREME COURT

2023-SC-0436-DG

SCHNEIDER ELECTRIC USA INC., F/K/A SQUARE D COMPANY

APPELLANT

On Review from Court of Appeals
v. Nos. 2022-CA-0184 & 2022-CA-0190
Fayette Circuit Court No. 16-CI-01842

PAUL WILLIAMS, INDIVIDUALLY, ET AL.

APPELLEES

AND

2023-SC-0440-DG

UNION CARBIDE CORPORATION

APPELLANT

On Review from Court of Appeals
v. Nos. 2022-CA-0184 & 2022-CA-0190
Fayette Circuit Court No. 16-CI-01842

SCHNEIDER ELECTRIC USA INC., F/K/A SQUARE D COMPANY

APPELLEES

MOTION OF AMERICAN ASSOCIATION FOR JUSTICE TO FILE BRIEF AS *AMICUS CURIAE*

The Association for Justice ("AAJ") moves pursuant to RAP 34 for leave to file a brief as *Amicus Curiae*. AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in

Kentucky. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

This case is of acute interest to AAJ, as it involves a fundamental principle of common law torts, that is, whether an employer whose workplace exposes workers to a toxic substance owes a duty of due care to their employees' household members. AAJ agrees with Plaintiffs that such a duty falls within the "universal duty of care" recognized by the Commonwealth and extends to harms that were created by the employer and reasonably foreseeable. Based on settled principles of tort law, the majority of state supreme courts to have addressed the issue hold that employers who expose their workers to asbestos fibers in the workplace owe a duty to take reasonable precautions to protect household members from take-home asbestos.

Contrary to Appellants' arguments, baseless fears of an "asbestos litigation crisis" do not warrant denying seriously injured victims justice. Recognizing a duty to protect workers' families from disease and death from take-home asbestos would not create an unlimited pool of potential plaintiffs. Recent data shows that the total number of filings nationwide has declined steadily over the past decade and courts have successfully implemented a variety of docket management strategies to process claims filed by plaintiffs exposed to deadly asbestos efficiently, such as "deferred dockets." Moreover, Appellants' reliance on the "specter of limitless liability" similarly rings hollow. Other courts across the country have had little difficulty tailoring the scope of the general duty of care to include those household family members who are most directly at risk of developing mesothelioma and lung cancer from substantial exposure without opening the courthouse door to a wider circle of persons with limited contact with the employee.

Additionally, public policy strongly supports extending the duty of care to protect workers' households from take-home asbestos. Granting employers total immunity from liability for

negligently inflicting severe harm on their workers' families serves no social good, would remove a strong incentive for employers to invest in workplace safety, and would deprive vulnerable Kentuckians of their right to legal redress for wrongful injury.

For these reasons, and the additional reasons in the accompanying brief, the Association for Justice moves for leave to file the tendered brief as *Amicus Curiae*.

Respectfully submitted,

/s/ Tad Thomas

Tad Thomas (KY 88577)
Attorney of Record
Thomas Law Offices, PLLC
9418 Norton Commons Blvd., Ste. 200
Louisville, KY 40059
(502) 473-6540
tad@thomaslawoffices.com

Counsel for Movants/Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2024, copies of this motion were served via UPS or electronic mail to the following:

Hon. Kimberly Bunnell, Circuit Judge
Fayette County Circuit Court
120 N. Limestone St.
Lexington, KY 40507

Clerk of the Kentucky Court of Appeals
360 Democrat Drive
Frankfort, KY 42501

Palmer G. Vance, II
Matthew R. Parsons
Todd S. Page
Stoll, Keenon Ogden, PLLC
300 West Vine Street, Suite 2100
Lexington, KY 40507
gene.vance@skofirm.com
matt.parsons@skofirm.com
todd.page@skofirm.com

Craig A. Woods
Brett E. Legner
Michael A. Scodro
Mayer Brown, LLP
71 South Wacker Drive
Chicago, IL 60606
cwoods@mayerbrown.com
blegner@mayerbrown.com
mscodro@mayerbrown.com

Scott Masterson
Brantley C. Rowlen
Lewis Brisbois Bisgaard & Smith LLP
600 Peachtree Street, N.E., Suite 4700
Atlanta, GA 30308
scott.masterson@lewisbrisbois.com
brantley.rowlen@lewisbrisbois.com

Mike Abate
Burt (Chuck) Stinson
Kaplan Johnson Abate & Bird LLP
710 W. Main St.
Louisville, KY 40202
mabate@kaplanjohnsonlaw.com
cstinson@kaplanjohnsonlaw.com

Joseph D. Satterley
Paul J. Kelley
Paul J. Ivie
Satterley & Kelley, PLLC
8700 Westport Rd., Ste. 202
Louisville, KY 40242
jsatterley@satterleylaw.com
pkelley@satterleylaw.com
pivie@satterleylaw.com

Kevin C. Burke
Jamie K. Neal
BURKE NEAL, PLLC
2200 Dundee Rd., Ste. C
Louisville, KY 40205
kevin@burkeneal.com
jamie@burkeneal.com

/s/ Tad Thomas
Counsel for Movants/Amicus Curiae
American Association for Justice

COMMONWEALTH OF KENTUCKY
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APPELLEES

BRIEF ON BEHALF OF *AMICUS CURIAE* AMERICAN ASSOCIATION FOR JUSTICE

Respectfully Submitted by:

Jeffrey R. White
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street NW, #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Tad Thomas (KY 88577)
Attorney of Record
Thomas Law Offices, PLLC
9418 Norton Commons Blvd., Ste. 200
Louisville, KY 40059
(502) 473-6540
tad@thomaslawoffices.com

CERTIFICATE OF SERVICE

I certify that on August 1, 2024, copies of this brief were sent via UPS or electronic mail to: Hon. Kimberly Bunnell, Fayette Circuit Court, 120 N. Limestone, Lexington, KY 40507; Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 42501; Joseph Satterley, Paul Kelley, & Paul Ivie, Satterley & Kelley PLLC, 8700 Westport Rd., Ste. 202, Louisville, KY 40242; Kevin Burke, Burke Neal, 2200 Dundee Rd., Louisville, KY 40205; Palmer Vance II, Matthew Parson, & Todd Page, Stoll, Keenon Ogden, PLLC, 300 West Vine St., Ste. 2100, Lexington, KY 40507; Scott Masterson & Brantley Rowlen, Lewis Brisbois Bisgaard & Smith, 1180 Peachtree St. NE, Ste. 2900, Atlanta, GA 30309; Craig Woods, Brett Legner, & Michael Scodro, Mayer Brown, LLP, 71 South Wacker Dr., Chicago, IL 60606; and Michael Abate & Burt Stinson, Kaplan Johnson Abate & Bird, 710 W. Main St., Louisville, KY 40202.

/s/ Tad Thomas
Counsel for Amicus Curiae

STATEMENT OF POINTS AND AUTHORITIES

PURPOSE AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in Kentucky. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

This case presents the Court with a question that touches upon a fundamental principle of this Commonwealth's common law of torts: Whether an employer whose workplace exposes workers to deadly asbestos owes a duty of due care to family or household members who are foreseeably endangered by asbestos fibers carried home by those employees.

AAJ agrees with Plaintiffs that such a duty falls within the "universal duty of care" recognized by the common law of the Commonwealth and by most other jurisdictions. The duty extends to those risks that were created by a defendant and were foreseeable at that time, as they were in this case. Unwarranted fears of an "asbestos litigation crisis" do not warrant denying seriously injured victims their redress. The "wave" of asbestos claims thirty years ago for non-symptomatic harms caused by the industry's own wrongdoing resulted in docket management plans that addressed the number of filings at the time. Nor does the duty to protect household members most directly endangered create an unlimited pool of potential plaintiffs.

The immunity sought by Defendants in this case would serve no social purpose, would remove a strong incentive for employers to invest in workplace safety, and would deprive Kentuckians of their right to legal redress for wrongful injury. This Court should therefore affirm.

ARGUMENT

I. The better-reasoned, majority rule recognizes that an employer who exposes workers to asbestos owes a duty to protect their workers' families from asbestos fibers carried home from the workplace.

AAJ addresses this Court with regard to the central issue presented in this appeal: Whether an employer who controls a workplace where workers are exposed to asbestos owes a duty of due care to family or household members who would be foreseeably endangered by asbestos fibers carried home by those employees.

A. The lower court's recognition of a duty on the part of an employer to exercise due care to protect workers' family members from take-home asbestos accords with the well-reasoned majority view.

AAJ agrees with Plaintiffs that such a duty falls within the "universal duty of care" recognized by the common law of the Commonwealth of Kentucky. *See Grand Aerie Fraternal Ord. of Eagles v. Carneyhan*, 169 S.W.3d 840, 848–49 (Ky. 2005); *see also Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439, 444 (6th Cir. 2009). The court below was correct in so holding.

Kentucky's universal duty of care also comports with generally accepted principles of tort law. *See* Restatement (Second) of Torts § 302 cmt. a (Am. L. Inst. 1965) ("[A]nyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act."); Restatement (Third) of Torts: Phys. & Emot. Harm § 7(a) (Am. L. Inst. 2010) ("An actor

ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.").

This duty, as is widely recognized, is not unlimited. It encompasses only the dangers created by the defendant's own conduct, as distinguished from any obligation to rescue a plaintiff from a danger created by another. *See* Restatement (Second) of Torts § 314 cmt. c, d. And it extends only to harms that were reasonably foreseeable when defendant created those dangers. *See* Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 Wake Forest L. Rev. 1247, 1258 n.47 (2009) (citing the highest state courts of 45 states for the proposition that foreseeability represents an essential component in the determination of duty).

The Commonwealth has long recognized that liability of a manufacturer or supplier extends to bystanders who are harmed by an unreasonably dangerous product. *Embs v. Pepsi-Cola Bottling Co. of Lexington*, 528 S.W.2d 703, 705 (Ky. 1975). On that basis, the Sixth Circuit has indicated that family member injured by take-home asbestos may be liable, provided that the danger was foreseeable. *Martin*, 561 F.3d at 446–47. *See also Lunsford v. Saberhagen Holdings, Inc.*, 208 P.3d 1092, 1103 (Wash. 2009); *Fuller-Austin Insulation Co. v. Bilder*, 960 S.W.2d 914, 918 (Tex. App. 1998).

Based on these settled principles of tort law, the majority of state supreme courts to have addressed the issue hold that employers who expose their workers to asbestos fibers in the workplace owe a duty to take reasonable precautions to protect household members from "take-home asbestos." *See Kesner v. Superior Ct.*, 384 P.3d 283, 290 (Cal. 2016) (nephew developed mesothelioma from exposure to uncle's work clothes at uncle's home); *Ramsey v. Ga. S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255, 1277 (Del. 2018) (worker's

spouse developed lung cancer from inhalation of asbestos while washing her husband's work clothes); *Simpkins v. CSX Transp., Inc.*, 965 N.E.2d 1092, 1094 (Ill. 2012) (spouse of railroad worker developed mesothelioma caused by exposure to work clothes); *Olivo v. Owens-Illinois, Inc.*, 895 A.2d 1143, 1146 (N.J. 2006) (spouse developed mesothelioma due to exposure to work clothes); *Satterfield v. Breeding Insulation Co.*, 266 S.W.3d 347, 355 (Tenn. 2008) (daughter developed mesothelioma due to exposure to father's work clothes); *Boynton v. Kennecott Utah Copper, LLC*, 500 P.3d 847, 858 (Utah 2021) (spouse of worker developed mesothelioma due to exposure to work clothes); *Quisenberry v. Huntington Ingalls Inc.*, 818 S.E.2d 805, 809–10 (Va. 2018) (daughter developed mesothelioma due to exposure to father's work clothes). *See also Bobo v. Tenn. Valley Auth*., 855 F.3d 1294, 1307 (11th Cir. 2017), *aff'g* 138 F. Supp. 3d 1285 (N.D. Ala. 2015) (employee's spouse developed mesothelioma due to exposure to asbestos on work clothes).

B. <u>The danger that household members could develop severe disease due to exposure to asbestos fibers carried home from the workplace has long been foreseeable.</u>

The Sixth Circuit as well has recognized that an employer might similarly be held accountable pursuant to Kentucky's universal duty, but concluded that the plaintiff in that case had provided insufficient proof that harm to household members from take-home asbestos was foreseeable prior to 1963. *Martin*, 561 F.3d at 445.

In this case, by contrast, Vickie Williams was exposed to asbestos fibers brought into the home by her adoptive father from 1967, when she was six years old, until she moved away in the mid-1980s. *Williams v. Schneider Elec. USA, Inc.*, No. 2022-CA-0184-MR, 2023 WL 4374514, at *1 (Ky. Ct. App. July 7, 2023). By that time, it was well known in the industry and to the public that asbestos fibers carried home on workers' clothing posed a deadly risk to their loved ones.

In 1964, the New York Academy of Sciences convened a landmark conference at which Dr. Irving Selikoff and other medical researchers presented their findings documenting the adverse health consequences of asbestos exposure. *See generally Conference on Biological Effects of Asbestos*, 132(1) Annals of the N.Y. Acad. of Scis. 5 (1965), http://onlinelibrary.wiley.com/doi/10.1111/nyas.1965.132.issue-1/issuetoc. At that conference, researchers Muriel Newhouse and Hilda Thompson presented their epidemiological research, which concluded that there was "little doubt that the risk of mesothelioma may arise from both occupational and domestic exposure to asbestos," including among women who washed their spouses' asbestos-laden work clothes. *Id.* at 587;[1] *see* Rebecca Leah Levine, *Clearing the Air: Ordinary Negligence in Take-Home Asbestos Exposure Litigation*, 86 Wash. L. Rev. 359, 364–65 (2011).

The evidence Plaintiffs presented in this case shows that the danger posed by take-home asbestos was reasonably foreseeable long before the New York conference. It had been known "since the 1930s that inhaling dust containing asbestos fibers could lead to disabling and even fatal lung disease." 2023 WL 4374514, at *4. Whether that inhalation occurs in the workplace or in a laundry room at home makes little difference to the lungs of the inhaler. *Ramsey*, 189 A.3d at 1279–80. The threat to the spouse shaking out the asbestos dust from work clothes "requires no leap of imagination," *Olivo*, 895 A.2d at 1149, but only "common experience and knowledge." *Kesner*, 384 P.3d at 292. Indeed, industrial hygiene textbooks from as early as 1913 recommended that workers change out

[1] Their paper was subsequently published in Muriel L. Newhouse & Hilda Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, 22 Brit. J. Indus. Med. 261 (1965), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1069377/pdf/brjindmed00128-0015.pdf.

of their work clothes before leaving factories to ensure that poisonous substances were not carried into their homes. 2023 WL 4374514, at *4. *See also Boynton*, 500 P.3d at 859 (summarizing the expert testimony of Dr. Richard Lemen regarding "numerous medical and government sources from the early twentieth century describing the dangers of workers transmitting various poisons on work clothes").

Responding to the mounting medical evidence, in 1972 the federal Occupational Safety and Health Administration (OSHA) published its first permanent regulations for employers using asbestos. Standard for Exposure to Asbestos Dust, 37 Fed. Reg. 11318, 11320 (June 7, 1972) (to be codified at 29 C.F.R. § 1910 *et seq.*).[2]

As courts have found significant support for a duty of care in OSHA's detailed requirements for employers regarding the provision of uniforms restricted to the workplace, the safe laundering of asbestos-contaminated clothing, segregation of work clothing from street clothes, and other measures designed to prevent employees from bringing asbestos fibers from the workplace into their homes. *See, e.g.*, *Ramsey*, 189 A.3d at 1280; *Kesner*, 384 P.3d at 292; *Satterfield*, 266 S.W.3d at 353. *See also* Levine, *supra*, at 365–66.

The decision by the court of appeals below is in agreement with these soundly reasoned decisions from around the country and is based on Schneider Electric's conduct that foreseeably endangered the members of their workers' households. This Court should affirm.

II. Unwarranted fears of an asbestos litigation "crisis" do not support immunity for employers who have caused severe harm to workers and their families.

Defendant Schneider Electric sought this Court's review and reversal on the ground

[2] The current regulation is located at 29 CFR § 1910.93a(d)(4) (2016).

that recognizing a duty to protect workers' families from disease and death from take-home asbestos would "exacerbate the current 'asbestos-litigation crisis.'" Def.'s Mot. for Discretionary Review 8 (quoting Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for "Take Home" Exposure Claims*, 21 Mealey's Litig. Rep.: Asbestos 1, 4 (2006), https://www.shb.com/-/media/files/professionals/b/behrensmark/apotentialnewfrontier_2006.pdf). Ignoring the foreseeability of the harm caused by its own conduct, defendant conjures up the specter of numerous employers hauled into court by a "potentially limitless pool" of persons who may have had momentary contact with someone wearing dirty work clothes. *Id.*

Neither of these speculations is true, and neither justifies the broad immunity defendant seeks from this Court.

A. The asserted "asbestos litigation crisis" is not 'current," has been addressed, and is wholly unrelated to the plaintiff's claim that defendant caused severe actual harm.

Asbestos litigation can hardly be said to be in a current state of crisis. The piece quoted in Defendant's motion for discretionary review is not a scholarly work, but a five-page advocacy essay. It presents no "asbestos litigation crisis" data, but only a bare reference to the U.S. Supreme Court's use of that phrase in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997), which referred to the 1991 report by the Judicial Conference Ad Hoc Committee on Asbestos Litigation. *Id.* at 597–98. Surely, Defendant's call to shut the doors of Kentucky courthouses to workers' families should rest on a more solid basis than a general observation concerning crowded docket conditions in some parts of the country more than thirty years ago.

Moreover, the *Amchem* Court did not place the responsibility for the rising caseload of asbestos claims on American workers and their families. Importantly, the Court

emphasized the deadliness of asbestos was "known in the 1930s" by the asbestos industry, which nevertheless inflicted asbestos exposure "upon millions of Americans in the 1940s and 1950s." 521 U.S. at 598. When scientific studies "found that asbestos was a carcinogen, this information was suppressed. The ensuing cover-up, effected through industry associations and research compacts, resulted in thousands of deaths." *In re Joint E. & S. Dist. Asbestos Lit*., 129 B.R. 710, 739 (E.D.N.Y. 1991) (quoting David E. Lilienfeld, *The Silence: The Asbestos Industry and Early Occupational Cancer Research*, 81 Am. J. Pub. Health 791 (1991)). And when sick and dying workers were finally able to come to court to seek accountability and compensation, industry defendants routinely moved to dismiss their cases as barred by the statute of limitations. *See* David Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-up and Litigation*, 99 Harv. L. Rev. 1693, 1693 (1986).

Consequently, workers, who with the aid of their unions and plaintiff trial lawyers were able to document their on-the-job exposure, filed lawsuits to ensure their claims did not become time-barred. Twenty years ago, it was estimated that 90% of the numerous asbestos suits then being filed were by exposed-but-unimpaired workers fearing "that state statutes of limitations will bar their claims if they do not file soon after the first markers of exposure become detectable." Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331, 342–43 (2002). Professor Lester Brickman noted that "the 'asbestos litigation crisis' would never have arisen and would not exist today" but for the large number of such "exposure-only" claims. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Env't. L. & Pol'y Rev.

243, 273 (2001). Meanwhile, the claims of seriously ill and dying victims of asbestos were delayed and at risk of depletion of defendants' assets. Behrens, *supra*, at 344.

In short, asbestos litigation did not require courts to render less justice. Their challenge instead was to devise and implement more strategic docket management.

Behrens and others proposed the use of "deferred dockets" or "pleural registries," which would place non-symptomatic claimants on inactive dockets, giving priority to the claims of currently sick and dying plaintiffs, but tolling otherwise applicable statutes of limitations for the unimpaired until such time as they might develop disease. *Id*. at 346–49.[3] Courts around the country adopted these proposals. *See* Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 Rev. Litig. 253, 284–85 (2005). *See also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 564–67 (2007) (reviewing the enactment of similar medical criteria legislation).

Subsequently, Behrens was able to report that "the asbestos litigation tide finally may be turning." Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning,* 12 Conn. Ins. L. J. 477, 478 (2006). Specifically, he credited the adoption of docket management plans and other forms of plaintiff triage, designed to prioritize the claims of currently ill plaintiffs while preserving the claims of those who may develop serious illness in the future. *Id*. at 489–95. In some jurisdictions, those and other reforms were credited with reducing asbestos caseloads by 50 to 90%. *Id.* at 503. A management consulting firm that tracks asbestos personal injury lawsuits nationwide

[3] Such docket reforms had been discussed for over a decade. *See, e.g.*, Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541 (1992).

reports that the total number of filings continued to decline steadily from 2014 to 2023, resulting in a 30% decrease over those ten years. KCIC, Asbestos Litigation: 2023 Year in Review (2024), https://www.kcic.com/asbestos.

Simply put, there is no current "crisis." The docket's so-called "overcrowding" caused by the industry's own wrongdoing has been addressed.

Moreover, denying legal redress for serious injury and wrongful death due to asbestos exposure runs counter to those very efforts. The aim of inactive dockets and other reforms was not simply to trim caseloads; it was to allow victims suffering from the most severe forms of asbestos disease, "who need help right now," to move ahead in the line. Behrens & López, *supra*, at 255.

For that reason, as the Tennessee Supreme Court has stated, any plea for immunity to avoid exacerbating the so-called crisis "rings hollow with regard to a claimant . . . who has died of mesothelioma." *Satterfield*, 266 S.W.3d at 370. "Victims of mesothelioma are regularly identified as *precisely the type of claimants whose claims should be protected*." *Id.* (emphasis added).

B. <u>The duty to take reasonable steps to protect household members who are at risk of frequent and substantial exposure to take-home asbestos is limited and manageable.</u>

Schneider Electric also urged this Court to deny any duty in this case because a "potentially limitless pool of plaintiffs" might file lawsuits, imposing on employers "limitless liability to an indeterminate class of persons" Def.'s Mot. for Discretionary Review 8, 12.

Some state courts have adopted a similar fundamentally unjust position, holding that, regardless of how genuine and foreseeable the harms inflicted by take-home asbestos on employees' household members, duty must be denied, lest the law be haunted by the

"specter of limitless liability." *In re New York City Asbestos Litig*., 840 N.E.2d 115, 122 (N.Y. 2005). *See also CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 209 (2005) (holding that such a duty would "create an almost infinite universe of potential plaintiffs"); *In re Certified Question from Fourteenth Dist. Ct. of Appeals of Texas*, 740 N.W.2d 206, 220 (Mich. 2007) (similar); *Quiroz v. ALCOA Inc.*, 416 P.3d 824, 841 (Ariz. 2018) (similar).

Aside from the callousness of finding the carelessly inflicted suffering of family members outweighed by risk to corporate profits,[4] the argument is based on a wholly false dichotomy. This Court is not required to legislate for all manner of potential and imagined plaintiffs; it must decide the case before it, setting a clearly defined precedent for similar disputes. The Delaware Supreme Court explained, "a fair and efficient accountability system can be established by limiting the duty of asbestos product manufacturers and employers in take-home asbestos exposure cases . . . to those with whom they have the most proximate relationship," *Ramsey*, 189 A.3d at 1277, which would extend to "a household member who regularly launders an employee's asbestos-covered clothing." *Id.* at 1262.

Other courts have had little difficulty in tailoring the scope of the general duty of due care to include the workers' household family members, who are most directly at risk of developing mesothelioma and lung cancer from the substantial exposure. They have been able to do so without opening the door to claims by a wider circle of persons who may have had incidental or momentary contact with the employee. For example, the Tennessee Supreme Court held that the employer owed a duty to those "who regularly and

[4] See Justice Michael Cavanagh's moving dissent in *In re Certified Question*, 740 N.W.2d at 229 (Cavanagh, J., dissenting).

for extended periods of time came into close contact with the asbestos-contaminated work clothes of its employees." *Satterfield*, 266 S.W.3d at 352. *See also Olivo*, 895 A.2d at 1149 (holding that the owner of premises where contractor employees were exposed to asbestos "owed a duty to spouses handling the workers' unprotected work clothing"); *Bobo*, 855 F.3d at 1306 ("The duty we recognize extends only to people whose harm is foreseeable, such as an employee's family members or others in the employee's household."); *Boynton*, 500 P.3d at 862 (holding that the duty to prevent take-home asbestos exposure addresses liability "only for a relatively narrow class of people," and excludes more incidental exposures).

As the California Supreme Court similarly held:

> [A]n employer's or property owner's duty to prevent take-home exposure extends only to . . . persons who live with the worker and are thus foreseeably in close and sustained contact with the worker over a significant period of time. . . . By drawing the line at members of a household, we limit potential plaintiffs to an identifiable category of persons who, as a class, are most likely to have suffered a legitimate, compensable harm.

Kesner, 384 P.3d at 298.

In response to fears of "unlimited liability," the Delaware Supreme Court observed,

> If . . . claims from plaintiffs with more momentary exposure to and tenuous relationship to an exposed employee are filed in the future, the answer is to address those cases then in a reasoned way . . . [T]he answer is not to ignore the equity due to the plaintiff before us.

Ramsey, 189 A.3d at 1287.

That these courts have succeeded in manageably defining the scope of duty is borne out by the fact that in none of those jurisdictions have defendants pointed to any evidence of a surge in claims against employers by persons incidentally or momentarily exposed to workers.

III. Public policy strongly supports the duty to protect workers' households from take-home asbestos.

In Kentucky, as in other states, the scope of the universal duty of care "is not boundless." *Grand Aerie*, 169 S.W.3d at 849. In addition to foreseeability, "consideration must be given to public policy." *Id*. (quoting *Fryman v. Harrison*, 896 S.W.2d 908, 909 (Ky. 1995)). In the cause before this Court, public policy strongly supports recognition of a duty on the part of the employer.

A. Total immunity from liability for negligently inflicting severe harm on workers' families serves no social good.

Mesothelioma is an aggressive, excruciatingly painful, and inevitably fatal disease. It is almost always caused by inhalation of asbestos fibers, whether in an asbestos mine, at a workplace where workers handled asbestos, or at home where workers carried fibers on their clothing. *See* Occupational Exposure to Asbestos, Tremolite, Anthophyllite, and Actinolite, 51 Fed. Reg. 22612, 22615 (June 20, 1996) (to be codified at 29 C.F.R. 1910, 1926) [hereinafter Final Rule]. These dangers were not only foreseeable, but they were established facts that employers in defendant's position knew or should have known since at least 1965. Indeed, from 1972 onward, they were obliged by OSHA regulations to take steps to prevent asbestos from traveling out of the workplace on the clothing of their workers.

Nevertheless, a few courts—notably those of New York, Georgia, and Michigan—have taken the view that, regardless of the foreseeability of severe harm to household members, "any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh its costs. *In re New York City Asbestos Litig.*, 840 N.E.2d at 119 (internal quotation omitted); *In re Certified Question,* 740 N.W.2d at 218 (same); *CSX Transp., Inc. v. Williams,* 608 S.E.2d at 209 (same). And the costs to

employers of compensating the victims of their negligent handling of workplace asbestos, these courts have concluded, are simply too great.

Such callous calculations serve only to bubble-wrap corporate bottom lines to shield them from accountability. They serve no public good for the people of Kentucky. Employers like Schneider Electric profited from the use of asbestos in the workplace. It is true that those companies provided jobs for Kentuckians and economic activity for their communities. But exposing workers' families to asbestos fibers carried out of the workplace was not an "unavoidable part of [Schneider Electric's] manufacturing operations." *Satterfield*, 266 S.W.3d at 368. Nor was compliance with OSHA requirements economically infeasible. *Kesner*, 384 P.3d at 297.

To the extent that appropriate precautions required expenditures, employers who decided against such measures essentially awarded themselves a competitive advantage over more safety-minded companies—paid for, ultimately, by the wholly foreseeable victims.

The immunity Schneider Electric seeks is not remotely analogous to more familiar provisions that "are generally designed to protect individuals from civil liability for any negligent acts or omissions committed while" engaging in an activity that is otherwise socially valuable. Dany R. Veilleux, Annotation*, Construction and Application of "Good Samaritan" Statutes*, 68 A.L.R.4th 294 § 2 (originally published in 1989). *See, e.g.*, Ky. Rev. Stat. Ann. § 411.148 (providing immunity from civil liability to medical professionals "administering emergency care or treatment at the scene of an emergency").

There is little social value in promoting the use of asbestos in manufacturing. In fact, as OSHA has noted, there exists "no instance in which exposure to a toxic substance

has more clearly demonstrated detrimental health effects on humans than has asbestos exposure." Final Rule, *supra*, 51 Fed. Reg. at 22612. And there is no social benefit at all to support rewarding the handling of asbestos without appropriate precautions.

To argue that the costs of paying compensation for injuries that employers like the defendant have actually caused would be so great that the court should find no duty to prevent those injuries stands public policy on its head. "One of the first duties of government is to afford every individual [legal recourse] whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Those who have wrongfully caused injury cannot complain that courts may render "too much justice" to those they have harmed. *Davis v. Bostick*, 580 P.2d 544, 546 (Or. 1978).

Instead, proper "duty analysis is forward-looking, and the most relevant burden is the cost to the defendants of upholding, not violating, the duty of ordinary care." *Kesner*, 384 P.3d at 296.

B. Forward-looking public policy favors recognition of an employer duty to take reasonable precautions to protect household members from harm caused by toxic substances that may be carried into the home.

1. Imposing duty upon employers promotes accident prevention by incentivizing the party best suited to prevent accidental injury to employees and their families.

It is well established that "the policy of the law [in negligence cases] is to encourage individuals [and companies] to take measures that might prevent further injuries to other persons. *Ford Motor Co. v. Fulkerson*, 812 S.W.2d 119, 125 (Ky. 1991) (citing *Cox v. City of Louisville*, 439 S.W.2d 51 (Ky. 1969) and *Fisher v. Hardesty*, 252 S.W.2d 877 (Ky. 1952)).

Duty furthers that public policy in that, as described in economic terms, "the threat of civil liability has a regulatory effect by promoting optimal deterrence—the taking of

precautions and selection of activities that minimize the sum of accident costs and accident avoidance costs." Kenneth S. Abraham, *The Insurance Effects of Regulation by Litigation*, *in* Regulation Through Litigation 212, 232 (W. Kip Viscusi ed. 2002).

Viewed through this prism, the question of duty "reduces to a search for the cheapest cost avoider . . . [that is,] which of the parties to the accident is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision." Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055, 1060 (1972). Tort liability simply ensures that the employer's analysis includes the accident costs borne by the victim, as well as its own avoidance costs.

To the extent that preventing injury is cheaper than compensating the injured, then, tort liability becomes a powerful incentive to invest in safety. *See* Guido Calabresi, The Costs of Accidents 68–129 (1970). The duty of due care is, therefore, "broadly consistent with an optimum investment in accident prevention by the enterprises subject to the standard." Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 30 (1972).

Courts have recognized the very obvious conclusion: Employers control the workplace and the activities of their employees. Decisions to implement safety precautions—even the decision whether to use asbestos in their workplaces at all—are theirs. They are best able to protect workers and workers' families; they should have the strongest incentives to invest in and implement reasonable safety measures. *See, e.g.*, *Boynton*, 500 P.3d at 861 (premises operators "can institute policies that reduce the likelihood of take-home exposure to asbestos" and can even "choose not to introduce asbestos in the first place"); *Ramsey*, 189 A.3d at 1261 ("It is neither fair nor efficient to

immunize employers who . . . are positioned to prevent dangerous at-home laundering altogether."); *Kesner*, 384 P.3d at 297 ("Employers and premises owners are generally better positioned than their employees or members of their employees' households . . . to take reasonable precautions to avoid injuries that may result from on-site and take-home exposure.").

2. *Public policy demands that employers whose workers are exposed to toxic substances know that they will be accountable for ignoring reasonable precautions to prevent the contamination of their workers' homes.*

If duty is informed by public policy, then, this Court's view must be on the safety and welfare of Kentuckians moving forward.

Asbestos continues to be with us. While the use of raw asbestos by U.S. companies has dwindled to 150 tons last year, "an unknown quantity of asbestos is imported annually within manufactured products." U.S. Geological Surv., U.S. Dep't of the Interior, Mineral Commodity Summaries 2024 (Jan. 2024), https://pubs.usgs.gov/periodicals/mcs2024/mcs2024.pdf.

But even if companies immediately stopped using asbestos or asbestos-containing components in their products, workers will continue to be exposed to asbestos fibers, perhaps indefinitely. Renovation, retrofitting, and demolition of commercial and residential buildings will continue to bring workers into proximity to friable asbestos, as will work in industrial facilities and shipyards.

Nor can we comfortably trust that this will be the last instance of single-minded corporate exploitation of a useful natural mineral or man-made chemical, with little regard for the devastating impact of exposure on their own workers, their workers' families and communities.

It would do a great disservice to present and future workers for this Court to hold that employers who expose their workers to minerals and chemicals have no duty to take even modest precautions to prevent foreseeable harm when they are allowed to escape.

As Justice Cavanagh declared in his sharp dissent from the Michigan Supreme Court's denial of duty:

> By focusing solely on the losses suffered by businesses, the majority fails to account for the social benefits that would ensue from ensuring that people who are exposed to detrimental substances and who, consequently, suffer ruined health, life-altering and life-ending diseases, and the loss of family members, are compensated. When workers are protected from deadly substances, society benefits. When corporations are held accountable for the consequences their processes have on those who toil to make the corporations viable, society benefits. When our justice system fairly places the burden of responsibility for dangerous products on the offending party, rather than the one who suffers, society benefits.

In re Certified Question, 40 N.W.2d at 229.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm.

Respectfully submitted,

/s/ Tad Thomas

Tad Thomas (KY 88577)
Attorney of Record
Thomas Law Offices, PLLC
9418 Norton Commons Blvd., Ste. 200
Louisville, KY 40059
(502) 473-6540
tad@thomaslawoffices.com

Counsel for Amicus Curiae

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/s/ Tad Thomas
Counsel for Amicus Curiae
American Association for Justice

Commonwealth of Kentucky
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