In The

Court of Appeals of Maryland

No. 102

September Term, 2012

GEORGIA-PACIFIC, LLC,

Petitioner,

v.

JOCELYN A. FARRAR,

Respondent.

On Writ of Certiorari to the Court of Special Appeals of Maryland from a Decision on an Appeal from the Circuit Court for Baltimore City (Hon. Barry Williams, Judge)

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF DEFENDANT-PETITIONER GEORGIA-PACIFIC, LLC

HUGH F. YOUNG, JR. (OF COUNSEL)
hyoung@plac.net
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive, Suite 510
Reston, VA 20191
(703) 264-5300

TERRI S. REISKIN
treiskin@dykema.com
DYKEMA GOSSETT PLLC
1300 I Street, NW
Suite 300 West
Washington, DC 20005
(202) 906-8600

Counsel for Amicus Curiae Product Liability Advisory Council, Inc.

FEBRUARY 28, 2013

COUNSEL PRESS, LLC (202) 783-7288 * (888) 277-3259 246233

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INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 975 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

PLAC is particularly concerned by the issues raised in this case because the decision by the Court of Special Appeals ("CSA") departs from well-established Maryland precedent and imposes on product manufacturers an essentially unlimited duty to warn. Although the product at issue in this case is asbestos, the CSA's decision presents the fundamental question of the extent to which manufacturers of any product have a duty to warn individuals who have never used their products and are remote bystanders to their use. The CSA's decision establishes a legal duty that has an infinite reach: manufacturers will be required to warn every person who potentially could be

injured by a product or its residue at a time and place far removed from the product's use. Manufacturers cannot possibly comply with such a duty, as there is no practical or effective method for communicating a warning to a limitless universe of individuals who could potentially be exposed. In effect, the CSA's holding imposes a duty to warn the world at large, which this Court has previously and repeatedly rejected as an impermissible expansion of traditional tort liability concepts.

Although PLAC also supports Georgia-Pacific's argument that the Respondent failed to prove that the product was a substantial factor in causing her disease, this brief is submitted solely on the issue of duty to warn. For the reasons discussed below, PLAC respectfully requests that the CSA's decision be reversed.

STATEMENT OF THE CASE

PLAC adopts the Statement of the Case set forth in the Petitioner's brief.

STATEMENT OF THE QUESTIONS PRESENTED

PLAC adopts the Questions Presented set forth in the Petitioner's brief.

STATEMENT OF THE FACTS

PLAC adopts the Statement of the Facts set forth in the Petitioner's brief.

ARGUMENT

I. THE CSA'S DECISION DEPARTS FROM WELL-SETTLED PRECEDENT AND CREATES A BROAD AND AMORPHOUS DUTY TO WARN AN INDETERMINATE CLASS THAT WOULD BE IMPOSSIBLE TO COMPLY WITH.

The CSA's decision in this case represents an unwarranted departure from decades of Maryland precedent holding that there is no duty to warn a large and indeterminate class because to do so would "expand traditional tort concepts beyond manageable bounds." *Dehn v. Edgecombe*, 384 Md. 606, 615 (2005). The central flaw in the CSA's reasoning rests on its determination that "the actual harm inflicted on Ms. Farrar fell within a general field of danger which should have been anticipated," and, thus, "Georgia-Pacific owed her a duty to warn." *Georgia-Pacific, LLC v. Farrar*, 207 Md. App. 520, 547 (2012). In essence, the CSA held that it was foreseeable to Georgia-Pacific that a remote third party like Ms. Farrar could be harmed by its product—or, more accurately, the product's residue—and that alone gave rise to a duty to warn.

Not only is the CSA's foreseeability analysis flawed, but its singular focus on that issue ignores a long line of cases recognizing that the determination of whether a legal duty exists cannot be reduced to a single factor or simple formula. *See, e.g., Doe v. Pharmacia & Upjohn Co.*, 388 Md. 407, 415 (2005) ("*Pharmacia*") ("There is no set formula for the determination of whether a duty exists."). As this Court emphasized in *Pharmacia*, "[w]e have stated consistently that foreseeability *alone* is not sufficient to establish duty." *Id.* at 417.

"At its core, the determination of whether a duty exists represents a policy question of whether the specific plaintiff is entitled to protection from the acts of the defendant." *Gourdine v. Crews*, 405 Md. 722, 745 (2008). This requires "weighing the various policy considerations and reaching a conclusion that the plaintiff's interests are, or are not, entitled to legal protection against the conduct of the defendant." *Rosenblatt v. Exxon Co.*, 335 Md. 58, 77 (1994). Among the factors to be considered in making this policy determination are the relationship of the parties, the degree to which the tortfeasor's conduct has a close and direct effect on the injured party, whether the duty would stretch traditional tort concepts beyond manageable bounds to an indeterminate class of plaintiffs, the extent of the burden on the defendant and the consequences to the community of imposing a duty, and whether the injury is foreseeable. *See Pharmacia*, 388 Md. at 416. When these factors are properly weighed in this case, it is evident that the CSA's holding was erroneous, constitutes bad policy, and should be reversed.

A. There Was No Relationship or Proximity Between The Parties That Would Give Rise To A Legal Duty.

This Court repeatedly has held that the relationship of the parties is an important factor in determining whether a duty exists. Indeed, the "'relationship of the parties is so pervasively important in determining existence and measure of duty that it often goes unmentioned.'" *Pharmacia*, 388 Md. at 415 (quoting 1 Dan B. Dobbs, *The Law of Torts* § 229 (2001)); *see also Dehn*, 384 Md. at 619-20 (holding that duty "is based upon a relationship between the actor and the injured person"). Although a direct or personal relationship is not required, there must be a sufficiently close nexus between the

defendant's conduct and the plaintiff's injury to give rise to a duty to warn. *Gourdine*, 405 Md. at 746 ("Duty requires a close or direct effect of the tortfeasor's conduct on the injured party."). This is particularly important in a case, such as this one, where the plaintiff claims injury as a result of the absence of a warning accompanying a product that the plaintiff never used, saw, or even came near, and which even her grandfather never used and was only briefly exposed to as a bystander.

Gourdine is dispositive on this issue. In *Gourdine*, the plaintiff asserted a failure to warn claim against a drug manufacturer, Eli Lilly, arising out of an automobile accident that killed her husband, Isaac Gourdine. 405 Md. at 726. The accident was caused by Ellen Crews, who passed out while driving and struck Gourdine's vehicle. *Id.* Crews was a Type 1 diabetic who was taking insulin medications manufactured by Lilly, and plaintiff alleged that Lilly had not provided adequate warnings regarding potential adverse reactions to those medications. *Id.* Plaintiff argued that Lilly owed a duty to Gourdine because it was foreseeable that a patient like Crews could suffer an adverse reaction while driving and injure another driver. *Id.*

The trial court and the CSA held that Lilly did not owe Gourdine a duty to warn, and this Court affirmed. The Court held that "[d]uty requires a close or direct effect of the tortfeasor's conduct on the injured party." *Id.* at 746. Such a relationship was absent because "there was no direct connection between Lilly's warnings, or the alleged lack thereof, and Mr. Gourdine's injury. In fact, there was no contact between Lilly and Mr. Gourdine whatsoever." *Id.* at 750.

The same is true in this case. There was no relationship whatsoever between Georgia-Pacific and Ms. Farrar. Georgia-Pacific manufactured a product, Ready-Mix, that was used as a drywall joint compound by unidentified individuals at a building where Ms. Farrar's grandfather worked for 6-7 months in 1968. (E343, 346-47, 616-17, 655-56, 683). Ms. Farrar's grandfather never used the product, but was exposed as a bystander to the dust created when it was sanded and he was working nearby. (E669-70). Ms. Farrar, who lived in her grandfather's home at the time, was never in the vicinity of the product when it was being used and thus could not possibly have seen any warnings that may have appeared on the product. Her only exposure was to dust on her grandfather's clothing when she laundered it, rode in his car or swept or vacuumed. (E725-36, 943-44). As such, her relationship to the product was no different than others with incidental and remote exposure, including those who rode in Mr. Hentgen's car, performed work on or in his home, visited the house for social or other reasons, or were exposed to him at any point between work and home. As in *Gourdine*, there is a complete absence of any connection between the lack of any warnings and Ms. Farrar's injuries, due to the remoteness of her exposure to the byproduct (dust) of the product at issue. This Court has repeatedly held that product manufacturers have no duty to identify and communicate warnings to individuals who never use or even come near their products.

Indeed, this Court has found no legal duty in cases where the connection between the defendant and plaintiff is far closer than that alleged here, and where the identity of the plaintiff was either known or could be readily ascertained by the defendant. For example, in *Pharmacia*, the Court held that an employer owed no legal duty to the spouse

of its employee. In that case, Pharmacia cultivated pathogens, including HIV, for use in diagnostic test strips that it manufactured. *Pharmacia*, 388 Md. at 410. The company periodically tested its employees for HIV. When one of its employees tested positive for a strain of HIV, Pharmacia considered the test a "false positive" and did not "counsel or warn" its employee or his wife that a false positive could indicate infection with another strain of HIV. *Id.* at 411. After the employee's wife became infected, she brought suit against Pharmacia under various negligence theories, including failure to warn. *Id.* at 412-13. The Court held that Pharmacia owed no duty to its employee's wife because she "had no relationship with Pharmacia." *Id.* at 420. Specifically, she was never "an employee of Pharmacia," she had never "been tested for HIV or any other disease by Pharmacia," and she never "had any contact with Pharmacia." *Id.*

The Court reached the same conclusion in *Dehn*. In that case, the plaintiff alleged that her husband's doctor—who was not the surgeon—failed to provide proper post-operative care and testing following her husband's vasectomy. *Dehn*, 384 Md. at 611-12. Plaintiff became pregnant and sued the doctor for negligence, but the Court held that the doctor owed no duty to her. Even though the doctor knew that his patient was married—and presumably could have identified and communicated with his patient's spouse without great difficulty—the Court held that "[a] duty of care does not accrue purely by virtue of the marital status of the patient alone; some greater relational nexus between doctor and patient's spouse must be established, if it can be established at all." *Id.* at 627.

The CSA also previously has found no tort duty where there was an absence of any relationship between the parties. *Adams v. Owens-Illinois, Inc.*, 119 Md. App. 395

(1998), like this case, was a "take-home" asbestos case, although the plaintiff there was a bystander, rather than a remote bystander of a bystander. The plaintiff's husband was an asbestos worker and she allegedly contracted asbestosis from washing her husband's clothes. *Id.* at 407. In analyzing whether any duty existed, the CSA first made clear that the plaintiff had to show that the defendant owed a duty to her personally, and not to her husband. *Id.* at 411 ("The plaintiff sues in her own right for a wrong personal to herself, and not as the vicarious beneficiary of a breach of duty to another.") (quoting *Palsgraf v. Long Island R.R. Co.,* 162 N.E. 99, 100 (1928)). The court concluded that the defendant "owed no duty to strangers" and thus owed no duty to its employee's wife. *Id.*

In none of these cases did the Court premise its ruling on the *type* of relationship involved (doctor-patient, employer-employee, product manufacturer-user). Instead, in each case, the Court examined the proximity and connection between the conduct and the injury. "Duty requires a close or direct effect of the tortfeasor's conduct on the injured party." *Gourdine*, 405 Md. at 746. Here, as in *Gourdine*, *Pharmacia*, *Dehn*, and *Adams*, there was no relational or proximal nexus whatsoever between Ms. Farrar and Georgia-Pacific. The absence of any relationship between the parties or any direct connection between the failure to warn and the alleged injury should have led the CSA, under this Court's long-established precedent, to find that no duty exists in this case.

B. The Duty Created By The CSA Extends To An Indeterminate Class.

By holding that Georgia-Pacific owed a duty to Ms. Farrar, the CSA effectively held that Georgia-Pacific—and by extension, all product manufacturers—have a duty to warn an unlimited universe of potential plaintiffs. This represents a sharp and unwarranted departure from well-established precedent. In *Gourdine*, the Court held:

> To impose the requested duty from Lilly to Mr. Gourdine would expand traditional tort concepts beyond manageable bounds, because such duty could apply to all individuals who could have been affected by M[s]. Crews after her ingestion of the drugs. Essentially, Lilly would owe a duty to the world, an indeterminate class of people for which we have "resisted the establishment of duties of care."

405 Md. at 750 (quoting *Pharmacia*, 388 Md. at 407); *see also Dehn*, 384 Md. at 627 (holding that extending duty from doctor to patient's spouse would "expand traditional tort concepts beyond manageable bounds"); *Valentine v. On Target, Inc.*, 353 Md. 544, 553 (1999) ("One cannot be expected to owe a duty to the world at large to protect it against the actions of third parties. . . . The class of persons to whom a duty would be owed . . . would encompass an indeterminate class of people, known and unknown."); *Adams*, 119 Md. App. at 411 ("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, and co-workers.").

The Court has refused to extend a duty even where the universe of potential plaintiffs is relatively limited compared to this case. In *Dehn*, the Court held that if it were to recognize a duty to the patient's spouse "[t]he rationale for extending the duty

would apply to all potential sexual partners and expand the universe of potential plaintiffs." 384 Md. at 627. Similarly, in *Pharmacia*, the Court held that "[t]he rationale for imposing a duty of care to [the employee's spouse] could apply to all sexual partners of employees." 388 Md. at 421.

Here, the duty established by the CSA knows no bounds. Courts in a number of other jurisdictions have rejected "take-home" asbestos claims categorically for precisely this reason. As one court explained, "there is no principled basis in the law upon which to distinguish the claim of a spouse or other household member . . . 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." *In re Asbestos Litig.*, No. 04C-07-099-ASB, 2007 WL 4571196, at *12 (Del. Super. Ct. Dec. 21, 2007), *aff'd sub nom. Riedel v. ICI Ams. Inc.*, No. 156,2008, 2009 WL 536540 (Del. Mar. 4, 2009); *see also Campbell v. Ford Motor Co.*, 141 Cal. Rptr. 3d 390, 403 (Cal. App. 2d Dist. 2012) ("[W]here the claim is that the laundering of the worker's clothing is the primary source of asbestos exposure, the class of secondarily exposed potential plaintiffs is far greater, including fellow commuters, those performing laundry services and more."); *CSX Transp., Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005) (extending duty would "create an almost infinite universe of potential plaintiffs"); *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 699 (Iowa 2009) (declining to establish duty because "the universe of potential persons to whom the duty might be

owed is unlimited"); *In re New York City Asbestos Litig.*, 840 N.E.2d 115, 122 (N.Y. 2005) (finding no duty in "take-home" asbestos case because duty could be extended too far, such as to a "babysitter" or "an employee of a neighborhood laundry").

Moreover, the exceedingly broad duty established by the CSA will have ramifications well beyond the asbestos context. *See In re Certified Question From The 14th Dist. Ct. App. of Tex.*, 740 N.W.2d 206, 217 n.17 (Mich. 2007) ("*In re Certified Question*") (rejecting contention that ruling could somehow be contained to the specific case before the court because "this is not how a court of law properly determines the existence, or nonexistence, of a legal duty, for such a determination will apply not only in the instant case but in the next 500 cases as well"). Plaintiffs in future product liability cases will argue that all product manufacturers and sellers have a duty to warn anyone and everyone – not even limited to those who come into contact with the product, but including those who are bystanders to its use, or are exposed to debris from use of the product indirectly through proximity to others.

Indeed, the "take-home" theory has already been used by plaintiffs in other jurisdictions in cases involving other products. *See, e.g., Oddone v. Superior Ct.*, 101 Cal. Rptr.3d 867, 874 (Cal. App. 2d Dist. 2009) (holding that defendant owed no duty to wife of employee for exposures to various film processing chemicals that employee brought home on clothes); *Widera v. Ettco Wire & Cable Corp.*, 204 A.D.2d 306, 307 (N.Y. App. Div. 1994) (holding that defendant had no duty to wife and child of its employee for injuries from lead dust that employee carried home on clothes). The CSA's ruling opens the door to similar such bystander, or bystander-to-a-bystander, exposure

cases involving an array of products from benzene to pesticides to formaldehyde, to name a few. Quite simply, under the CSA's rationale, manufacturers have a duty to warn the world at large, which is in direct conflict with this Court's well-reasoned and longstanding precedent rejecting liability to an indeterminate, amorphous class. *See, e.g., Vill. of Cross Keys, Inc. v. U.S. Gypsum Co.*, 315 Md. 741, 744-45 (1989).

C. The CSA's Decision Imposes An Impossible Burden On Georgia-Pacific And Other Manufacturers.

In determining whether a legal duty exists, this Court has long recognized that consideration should be given to "the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability." *Ashburn v. Anne Arundel Cnty.*, 306 Md. 617, 627 (1986). The CSA did not even consider this factor, but courts in other "take-home" asbestos cases have refused to recognize a duty because the burden on defendants is too severe.

For example, in *Campbell*, the plaintiff alleged that her mesothelioma was caused by washing the clothes of her father and brother, both of whom worked as installers of asbestos insulation at a Ford Motor Company plant. The California Court of Appeal held that Ford owed no duty to her because the burden of complying with such a duty would be too onerous:

> The gist of the matter is that imposing a duty toward nonemployee persons saddles the defendant employer with a burden of uncertain but potentially very large scope. One of the consequences to the community of such an extension is the cost of insuring against liability of unknown but potentially massive dimension. Ultimately, such costs are borne by the consumer. In short, the burden on the defendant

> is substantial and the costs to the community may be considerable.

141 Cal. Rptr. 3d at 403 (citation omitted); *see also In re Asbestos Litig.*, 2007 WL 4571196, at *12 ("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 Certified Question*, 740 N.W.2d at 217 ("[P]rotecting every person with whom a business's employees and the employees of its independent contractors come into contact, or even with whom their clothes come into contact, would impose an extraordinarily onerous and unworkable burden.").

The burden on product manufacturers of complying with the duty established by the CSA raises similar concerns, but on an even larger scale. Manufacturers reasonably may be expected to supply necessary warnings for their products on the products themselves, or in the product's packaging, or, in materials accompanying products, such as user's guides or owner's manuals. *See Moran v. Faberge, Inc.*, 273 Md. 538, 543 (1975) (noting that providing a sufficient warning on a product "amount[s] only to the expense of adding some more printing to a label"). But, if the CSA's ruling stands, none of this would be sufficient. Rather, manufacturers would be expected to identify all individuals who may come into contact with the product, or any byproduct of the product (dust, residue, fumes) at any time or place no matter how far removed from the product's original use—and from its labeling, packaging or user guides.

The large size of the class to whom this expansive new duty would be owed, in itself, has been recognized as an important factor against imposing such a duty. *See, e.g.*, *Gourdine*, 405 Md. at 752 ("We have not, however, historically embraced the belief that duty should be defined mainly with regard to foreseeability, without regard to the size of the group to which the duty would be owed…."). But the impracticability of warning an amorphous and indeterminate class bears equal consideration. "The concern with recognizing a duty that would encompass an indeterminate class of people is that a person ordinarily cannot foresee liability to a boundless category of people." *Pharmacia*, 388 Md. at 421. The CSA does not explain how such a warning would have been delivered in 1968, or even today. The impossibility of complying with the duty established by the CSA is inconsistent with longstanding Maryland precedent because it exposes product manufacturers to "the specter of liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Vill. of Cross Keys,* 315 Md. at 744-45 (citation omitted). In failing to consider this essential factor, which should have been dispositive to a finding of no duty, the CSA erred.

D. The CSA's Decision Stretches The Concept Of Foreseeability Beyond Any Reasonable Limits.

The CSA erroneously limited its analysis to foreseeability, holding that "Ms. Farrar fell within a general field of danger which should have been anticipated." *Georgia-Pacific*, 207 Md. App. at 547. The CSA's foreseeability approach is flawed in two respects. First, the CSA expanded the concept of foreseeability beyond any reasonable limits to capture even the most remote possible harms. Second, the CSA

incorrectly equated foreseeability with duty and ignored the other factors that require a finding of no duty even if the alleged harm is foreseeable.

1. Foreseeability Does Not Extend To Remote Or Merely Possible Harms.

Since *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928), "foreseeability" has been a fundamental principle of tort law. Indeed, Maryland has long "embrace[d] Judge Cardozo's iteration of the social policy to narrow 'the concept of duty to embrace only those persons or classes of persons to whom harm of some type might reasonably have been foreseen as a result of the particular tortious conduct.'" *Rhaney v. Univ. of Md. E. Shore*, 388 Md. 585, 597 (2005) (citation omitted). Foreseeability is "based upon the recognition that duty must be limited to avoid liability for unreasonably remote consequences." *Rosenblatt*, 335 Md. at 77. Foreseeability does not encompass all theoretical or possible harms that could occur, but instead extends only to those outcomes that are probable. *See Rhaney*, 388 Md. at 600 n.10 ("Our view of foreseeability is not nearly wide enough to include a *possible* result, but deals more with the *probability* of that result."). Foreseeability thus is intended to limit, not expand, the duty of care.

The CSA's decision does precisely the opposite, by re-defining foreseeability in such a way as to capture even the most remote possibilities. The CSA erroneously relied on three cases: *Moran*; *Eagle-Picher Indus., Inc. v. Balbos*, 326 Md. 179 (1992); and *Anchor Packing Co. v. Grimshaw*, 115 Md. App. 134 (1997), *vac'd on other grounds sub nom.*, *Porter Hayden Co. v. Bullinger*, 350 Md. 452 (1998). None of these cases, however, provides support for imposing a legal duty to a bystander of a bystander.

In *Moran*, two teenage girls were playing with a lit candle when one decided to spray cologne on the flame, while her friend stood nearby. 273 Md. at 541. The cologne caused the candle to flare, which resulted in her friend being burned on her face and chest. *Id.* The manufacturer of the cologne allegedly knew that the product was flammable, but did not provide any warning on the bottle. *Id.* at 541-42. The Court held that the manufacturer had a duty to warn because it "could reasonably foresee that in the environment of its use, such as the home . . . this cologne might come close enough to a flame to cause an explosion of sufficient intensity to burn property or injure bystanders, such as [plaintiff]." *Id.* at 554. Moreover, the Court explained that the burden of providing a warning was minimal, as it "amount[ed] only to the expense of adding some more printing to a label." *Id.* at 543.

The differences between *Moran* and this case are readily apparent. In *Moran*, the cologne was being used in the home (where one would expect cologne to be used) and the plaintiff was a direct bystander who was injured when the cologne combined with the flame to produce the flare. In addition, the only warning that the Court contemplated was a warning directly on the bottle of cologne—a minimal burden—in order to alert users or those nearby to potential dangers. By contrast, Ms. Farrar was not a direct bystander to the use of Georgia-Pacific's product. Indeed, she was in Maryland when Ready-Mix was being used in the District of Columbia, she was never exposed to the product directly, and she never even saw the product or its packaging. Thus, even if Georgia-Pacific had provided the type of warning contemplated by the Court in *Moran*—a label on the Ready-

Mix container—it would have made no difference. Unlike in *Moran*, the degrees of separation in this case are simply too great to impose a duty to warn.[1]

Balbos is also distinguishable. That case did not address how far a duty to warn reaches. Rather, the issue was whether the defendants knew or should have known that asbestos caused lung disease based on the scientific evidence available at the time of sale. *Balbos*, 326 Md. at 197, 204. The plaintiffs in that case were shipyard workers who were direct bystanders to the use of asbestos. *Id.* at 210. The Court never discussed the issue of whether defendants would owe a duty to members of the plaintiffs' households or other people in the public at large, and thus provides no support for the CSA's expansion of the duty of care in this case.

Finally, the CSA relied heavily on its earlier decision in *Grimshaw*, considering it "especially on point." *Georgia-Pacific*, 207 Md. App. at 538. In *Grimshaw*, the plaintiff's stepfather "worked with the asbestos-containing insulation product manufactured by" the defendant, and the plaintiff alleged that she contracted mesothelioma from washing her stepfather's clothes. 115 Md. App. at 193-94. The CSA held "that the dangers [plaintiff] suffered as a result of her exposure to [defendant's] product were not unforeseeable as a matter of law" and concluded that "[w]hether it was foreseeable to [defendant] that asbestos workers would bring home asbestos-covered clothes and expose their households to harm is an issue to be determined by the jury." *Id.* at 191.

[1] It should also be noted that *Moran* was decided in 1975 and thus predates this Court's adoption of the multi-part test for determining duty that was first articulated a decade later in *Ashburn v. Anne Arundel Cnty.*, 306 Md. 617, 627 (1986).

Grimshaw is not persuasive for several reasons. First, the CSA improperly equated foreseeability with duty. *See Ashburn*, 306 Md. at 628 ("'[F]oreseeability' must not be confused with 'duty.' The fact that a result may be foreseeable does not itself impose a duty in negligence terms."). Second, the CSA held that the issue should be submitted to the jury, contrary to this Court's directive that "[t]he existence of a legal duty is a question of law, to be decided by the court." *Gourdine*, 405 Md. at 732. Third, *Grimshaw* conflicts with the CSA's later decision in *Adams*, where the court held that there was no duty to warn household members of the alleged dangers of "take-home" asbestos. *See Adams*, 119 Md. App. at 411. Fourth, *Gourdine*, *Pharmacia*, and *Dehn* have since rejected the sort of expansive duty recognized by the CSA in *Grimshaw*. Finally, even *Grimshaw* did not go as far as the CSA did in this case. In *Grimshaw*, the plaintiff's stepfather was a direct user of asbestos and thus plaintiff was a bystander, rather than a bystander of a bystander like Ms. Farrar. Thus, the already tenuous connection between the defendant and plaintiff that was recognized in *Grimshaw* is further attenuated in this case.

In sum, the CSA's definition of foreseeability is based on a misreading of this Court's precedent and a misplaced reliance on its own flawed and outdated precedent. The CSA's decision sweeps far too broadly and encompasses even the most remote possible harms to an indeterminate class of people. *See Pharmacia*, 388 Md. at 421 ("The concern with recognizing a duty that would encompass an indeterminate class of people is that a person ordinarily cannot foresee liability to a boundless category of

people."). Accordingly, the CSA's foreseeability analysis in this case was flawed and requires reversal.

2. Foreseeability Alone Is Not Dispositive And Is Outweighed In This Case By The Other Factors.

Repeating its error from *Grimshaw*, the CSA in this case focused almost exclusively on the issue of foreseeability even though this Court has "stated consistently that foreseeability *alone* is not sufficient to establish duty." *Pharmacia*, 388 Md. at 417. In addition, "'[t]he fact that a result may be foreseeable does not itself impose a duty in negligence terms.'" *Barclay v. Briscoe*, 427 Md. 270, 294 (2012) (quoting *Ashburn*, 306 Md. at 628). Compounding the error, the CSA sanctioned the trial court's derogation of its responsibility to determine whether a duty existed as a matter of law by entrusting the foreseeability issue to the jury to decide. *See 100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co.*, -- Md. --, 2013 WL 322663, at *4 (Md. Jan. 29, 2013) ("Whether a legal duty exists between parties is a question of law to be decided by the court.").

This Court has made clear that even where foreseeability has been firmly established, other factors can outweigh any finding of a duty. For example, in *Pharmacia*, the Court held that the harm to plaintiff was foreseeable. 388 Md. at 416-17. Yet the Court held that there was no duty because of the absence of any relationship between the parties and because imposing a duty "would create an expansive new duty to an indeterminate class of people." *Id.* at 420. The Court reached a similar conclusion in both *Gourdine* and *Dehn*. *See Gourdine*, 405 Md. at 755 (noting the absence of any connection between the parties and further holding that "[w]e have not . . . historically

embraced the belief that duty should be defined mainly with regard to foreseeability, without regard to the size of the group to which the duty would be owed"); *Dehn*, 384 Md. at 627 (discussing absence of any relationship between parties and holding that to recognize duty would "expand traditional tort concepts beyond manageable bounds").

Similarly, in this case, even if the Court finds that the harm to Ms. Farrar was foreseeable, the other factors far outweigh any finding of foreseeability. As discussed above, there is a complete absence of any relational nexus between Georgia-Pacific or its product and Ms. Farrar; the duty established by the CSA would extend to an indeterminate class and would stretch traditional tort concepts beyond any manageable bounds; and, the burden of identifying and communicating warnings to the world at large would be impossible for Georgia-Pacific and other product manufacturers to meet.[2]

II. THE CSA'S CATEGORICAL DISTINCTION FOR PRODUCT LIABILITY CASES SHOULD BE REJECTED.

The CSA refused to follow this Court's precedent in *Pharmacia* and *Dehn*, and its own earlier opinion in *Adams*, on the singular basis that those cases did not involve

[2] In *Gourdine*, the Court held that "although there may be circumstances where foreseeability alone may give rise to liability to a third party because of policy reasons, this is not the case." 405 Md. at 754. This is certainly not the case either. Ms. Farrar's grandfather worked directly with the most toxic forms of asbestos for fifty years, and she was exposed to debris from that asbestos over several years. By contrast, for six or seven months, Ms. Farrar's grandfather was exposed to construction dust and debris from the Forrestal Building, which may have included dust from Georgia-Pacific's far less toxic Ready-Mix product. On a weekly basis during those few months, Ms. Farrar split laundry chores with her sister and possibly her aunt, mother, and grandmother. When it was her turn to do the laundry, she would shake the dust out of her grandfather's clothes for less than a minute. Even Ms. Farrar's experts agreed that she was exposed to an extremely low dose of asbestos from Georgia-Pacific's product. In short, if there ever were a case where foreseeability alone could create a legal duty, this is not the one.

product liability claims. Specifically, the CSA held that *Adams* and *Pharmacia* were distinguishable because those cases involved an employer-employee relationship, and that *Dehn* was not controlling because it involved a doctor-patient relationship. *Georgia-Pacific*, 207 Md. App. at 541-543. In so doing, the CSA effectively singled out product manufacturers and sellers for a heightened duty to warn that applies to no one else. Such a bright-line, categorical distinction has never been recognized in Maryland, or, indeed, any other jurisdiction, to PLAC's knowledge. Moreover, in *Gourdine*, this Court implicitly rejected such an approach and there is no principled basis for distinguishing that case from this one.

Like this case, *Gourdine* was a products liability case and the defendant was a product manufacturer. Moreover, like this case, *Gourdine* involved a failure to warn claim. In discussing the duty issue in *Gourdine*, this Court extensively relied on *Pharmacia*, *Dehn*, and other cases that did not involve product liability claims. The Court never indicated that product manufacturers are subject to a heightened tort duty, or that any of the factors discussed in its prior cases did not apply simply because the defendant was a manufacturer.

The CSA nevertheless distinguished *Gourdine* on the basis that "Georgia-Pacific's asbestos-containing product, Ready-Mix compound, was directly involved in causing Ms. Farrar's injury." *Georgia-Pacific*, 207 Md. App. at 546. In the CSA's view, that made this case like *Valk Mfg. Co. v. Rangaswamy*, 74 Md. App. 304 (1988), *rev'd on other grounds sub nom., Montgomery Cnty. v. Valk Mfg. Co.*, 317 Md. 185 (1989). In *Valk Manufacturing*, the plaintiffs' decedent was killed by a dump truck that had a defectively

designed snowplow hitch. The CSA held that the manufacturer owed a duty to the plaintiffs' decedent and, thus, plaintiffs could recover. *Id.* at 322.

However, the decision in *Valk Manufacturing* is inapposite, as this Court itself has recognized, because that case involved a design defect claim in which the decedent was directly injured by the product. *See Gourdine*, 405 Md. at 751 ("In *Valk Manufacturing*, however, the defective product was directly involved in the accident and caused the decedent's injury."). By contrast, this case is based on a failure to warn theory. Thus, as in *Gourdine*, the key issue is the absence of any "direct connection between [defendant's] warnings, or the alleged lack thereof, and [plaintiff's] injury." *Id.* at 750. Moreover, as in *Gourdine*, if Georgia-Pacific or any other manufacturer owed a duty to warn to everyone who might in some way come into contact with its products or their byproducts, the manufacturer "would owe a duty to the world." *Id.* In short, the CSA's categorical distinction is unsupported by law or logic, and should be rejected.

If the CSA decision is not reversed, Maryland would stand alone as the only jurisdiction in the United States to extend duty to warn liability to the bystander of a bystander to the residue of a product. And that liability would be imposed solely on product manufacturers, whereas employers or others with much greater practical ability to identify and communicate with those who might be exposed to danger would have no such responsibility. Maryland has repeatedly rejected the notion that a manufacturer is an insurer of its product, *see, e.g., Phipps v. General Motors Corp.*, 278 Md. 337, 351-52 (1976), yet the inevitable effect of the CSA's ruling would be exactly that. As this Court has stated, "[s]ome boundary must be set to liability for the consequences of any act,

upon the basis of some social idea of justice or policy." *Dehn*, 384 Md. at 626. There is no justice or sound policy involved in singling out product manufacturers for boundless liability to an indeterminate class. This Court has consistently refused to impose such "unpredictable and unlimited" liability,[3] and should do so once again in this case. The decision of the CSA should be reversed.

CONCLUSION

Under this Court's precedent, the determination of whether to establish a legal duty is a policy decision that requires carefully weighing a number of factors. The CSA failed to undertake such an analysis, instead stretching the concept of foreseeability beyond well-established principles and relying on a categorical distinction for product manufacturers that has no support in law or logic. The CSA's decision establishes a draconian duty on product manufacturers to provide warnings to anyone who may come into contact with their products at a time and place far removed from the manufacture, sale, or use of the product. No manufacturer can possibly communicate warnings to such an indeterminate and limitless class. For these reasons, the CSA's decision should be reversed.

[3] *100 Inv. Ltd. P'ship*, 2013 WL 322663, at *9.

Respectfully submitted,

Terri S. Reiskin
Dykema Gossett PLLC
1300 I St., N.W.
Suite 300 West
Washington, DC 20005
(202) 906-8600
(202) 906-8669 (facsimile)
treiskin@dykema.com

Attorneys for *Amicus*
Product Liability Advisory Council, Inc.

OF COUNSEL:

Hugh F. Young, Jr.
Product Liability Advisory Council, Inc.
1850 Centennial Park Drive
Reston, Virginia 20191
(703) 264-5300
(703) 264-5301 (facsimile)
hyoung@plac.net
[Admitted in DC and VA]

Eric C. Tew
Dykema Gossett PLLC
1300 I Street, N.W.
Suite 300 West
Washington, DC 20005
(202) 906-8600
(202) 906-8600 (facsimile)
etew@dykema.com
[Admitted in DC and VA]

STATEMENT OF TYPE STYLE AND POINT SIZE

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APPENDIX

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Corporate Members of the Product Liability Advisory Council

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CERTIFICATE OF SERVICE

Court of Appeals of Maryland
No. 102, September Term 2012
----------)
Georgia-Pacific, LLC,
Petitioner,
vs.
Jocelyn A. Farrar,
Respondent.
----------)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by DYKEMA GOSSETT PLLC, Counsel for *Amicus Curiae* Product Liability Advisory Counsel, Inc., to print this document. I am an employee of Counsel Press.

On the **28th Day of February, 2013**, I served the within **Brief of Amicus Curiae Product Liability Advisory Council, Inc. in Support of Petitioner Georgia-Pacific, LLC** upon:

James L. Shea
Mitchell Y. Mirviss
David S. Gray
Venable LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21201

Counsel for Petitioner
Georgia-Pacific, LLC

F. Ford Loker, Jr.
Robin Silver
Miles & Stockbridge, P.C.
10 Light Street
Baltimore, Maryland 21202

Counsel for Petitioner
Georgia-Pacific, LLC

Edward J. Lilly
Thomas J. Kelly
William G. Minkin
Jennifer L. Lilly
Law Office of Peter Angelos
One Charles Center
100 North Charles Street
Baltimore, Maryland 21201

Counsel for Respondent
Jocelyn Farrar

Mark A. Behrens
Christopher E. Appel
Shook, Hardy & Bacon, L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004

Counsel for Amici Curiae

William L. Anderson
Rebecca C. Baden
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Of Counsel for Amicus Curiae The Coalition for Litigation Justice, Inc.

Kate Comerford Todd
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062

Of Counsel for Amicus Curiae The Chamber of Commerce of the United States of America

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