Case No. **A139597**

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION THREE

ROSE-MARIE GRIGG and MARTIN GRIGG,
Plaintiffs, Respondents and Cross-Appellants,

vs.

OWENS-ILLINOIS, INC.,
Defendant, Appellant and Cross-Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF ALAMEDA COUNTY,
HON. IOANA PETROU AND JO-LYNNE Q. LEE, CASE NO. RG12629580.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT, APPELLANT AND CROSS-RESPONDENT

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INTRODUCTION: IMPORTANCE OF ISSUES AND INTEREST OF AMICUS

The Civil Justice Association of California ("CJAC" or "amicus")[1] welcomes the opportunity to address two fundamental issues this case presents:

(1) Should the manufacturer of an asbestos containing insulation product ("Kaylo") be held liable to the spouse of an employee for various independent contractors who, after cutting and shaping Kaylo in the 1950s to insulate pipes and boilers in commercial buildings, took home residual asbestos dust on his clothes and exposed his spouse to it?; and, if so,

(2) Is the relaxed *Rutherford* cause-in-fact standard for asbestos cases, which does not require any showing that the defendant's product actually caused the plaintiff's injury, a constitutionally sufficient ground to assess punitive damages, and was the punitive damage award, made under that standard, excessive?[2]

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[1] By separate application, CJAC requests this brief be accepted for filing.

[2] Mrs. Grigg died at 82 years of age on June 17, 2014, and this court, pursuant to Code of Civ. Proc. § 377.10 *et. seq.*, substituted in her place Martin Grigg as successor in interest on this appeal.

The trial court answered "yes" to those questions, approving a stipulated amount of $42,500 for plaintiff's economic loss and the jury's award of $27 million ($12 million for her pain and suffering, $4 million for her second husband's loss of consortium,[3] and $11 million in punitive damages). The jury's determination of liability for compensatory and punitive damage awards, however, was the result of erroneous court rulings and instructions on substantive and procedural law, rulings that essentially made the defendant manufacturer absolutely liable for the plaintiff's mesothelioma.

Amicus deems these issues *fundamental* because they go to the heart of what distinguishes *products* liability from *absolute* liability. Liability for products that occasion harm to consumers can be premised on *negligence* or *strict liability*, but never can that liability be *absolute*. "From its inception, . . . strict liability has never been, and is not now, *absolute* liability . . .." *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 994–995 (*Anderson*); emphasis added. "It was never the intention of the [architects] of the [strict liability] doctrine to make the manufacturer or distributor the insurer of the safety of their products." *Id.* at 1003. "The problem with strict liability of products has been one of limitation. No one [save perhaps plaintiff's counsel here] wants absolute liability where *all* the article has to do is to *cause* injury." David G. Owen, *Design Defects* (2008) 73 *MO. L. REV.* 291, 299, fn 35, quoting *Phillips v. Kimwood Machine Co.* (Or. 1974) 525 P.2d 1033, 1035; emphasis added.

Yet in considering the claim in this case for products liability sounding in negligence, the trial court declined to decide the threshold issue of *duty*, but instead

[3] Her first husband, Mr. Brown, worked with asbestos and took its dust home on his work clothes; he died many years earlier from a heart attack.

mistakenly delegated the duty question to the jury, and even then, asked the jury not to decide whether the *risk of harm* was foreseeable, but only whether the risk of any exposure to asbestos dust was foreseeable. On top of the extremely large compensatory award, the court ratified the jury's (and given the purpose of the compensatory award for plaintiff's emotional distress, *redundant and excessive*) punitive damage award absent substantial evidence of "malice, oppression or fraud." Something looks wrong.

CJAC, whose members are businesses, professional associations and local governments, is vitally interested in these issues because they go to the heart of our purpose – to educate the public about ways to make laws for determining who gets how much, and from whom, when the actions of some are alleged to occasion harm to others, more "fair, efficient and economical." What happened here is by no stretch of the imagination "fair"; indeed, it is just the opposite. By refusing to rule on the threshold issue of *duty* and relegating the issue to the jury (and even then, not as a question of foreseeability of the risk of harm, but only foreseeability of exposure), the court cinched defendant's liability, a determination effectively indistinguishable from imposing absolute liability upon manufacturers of asbestos containing products. "[W]hile public policy supports holding manufacturers strictly liable, absolute liability would simply be *unfair*." Clinton H. Scott, *Defective Condition or Unreasonably Dangerous under the Tennessee Products Liability Act: Just What Does it Mean?* (2003) 33 *U. MEM. L. REV.* 945, 984; emphasis added. "[A]bsolute liability is unfair and unduly limits individual freedom by imposing liability on people for harms they can only prevent by refraining from acting altogether." Bernard W. Bell, *The Wide World of Torts: Reviewing Franklin & Rabin's Tort Law and Alternatives* (2001) 25 *SEATTLE U. L. REV.* 1, 8.

This jurisprudential morphing from a regime of negligence and strict liability to one of absolute liability for manufacturers of asbestos products has taken place fitfully, subtly and incrementally over the past half-century, as befits the growth of the common law. See Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 25 (1921). Significantly, it has occurred with increased awareness over time about the serious dangers posed by a product of indisputable utility.

> Asbestos, naturally occurring fibrous minerals that "have extraordinary tensile strength, conduct heat poorly, and are relatively resistant to chemical attack," flew under the radar until fairly recently. Heralded as a miracle product since the turn of the twentieth century for its fire retardant characteristics, asbestos had various beneficial uses. The widespread use of asbestos, for example, contributed to the lowest fire death rate in U.S. history, 3.3 fire deaths per 100,000 people in 1970. Moreover, asbestos was considered a "strategic and critical mineral essential to the war effort during World War II." Even today, many products continue to utilize asbestos, including materials used in heat and acoustic insulation, fire proofing, roofing, and flooring.

Christopher J. O'Malley (Note), *Breaking Asbestos Litigation's Chokehold on the American Judiciary*, 2008 *U. ILL. L. REV.* 1101-1102 (footnotes omitted).

Ongoing research studies eventually confirmed the linkage of asbestos exposure to a number of debilitating diseases, such as mesothelioma, asbestosis, pleural changes, lung and other cancers. "Asbestos-related diseases have a long latency period, lasting anywhere from ten to forty years." Andrew Malzahn (Comment), *For Every Wrong, a Remedy: a Narrow Interpretation of the Locomotive Inspection Act's Preemptive Scope in Asbestos Cases* (2014) 37 *HAMLINE L. REV.* 349, 355 (footnotes omitted).

Asbestos-related litigation grew along with increased knowledge of the harm associated with it, producing profound consequences on our civil justice system.

> Asbestos not only affects those with one of its associated health problems, but also all citizens, because society must bear the substantial costs of litigating the claims of those injured by asbestos. The cost of asbestos litigation has caused an amount of medical and economic suffering never experienced under American tort law. Asbestos litigation has left plaintiffs without compensation, corporations without assets, courts with crowded dockets, and litigators with hearty bank accounts.

Brittan Jackson Bush, *Crafting an Asbestos Scheduled Compensation Solution for Louisiana and the Nation* (2012) 72 *LA. L. REV.* 757.

One study predicted that by the year 2015 there will be as many as 265,000 pending asbestos-injury cases.[4] Asbestos litigation will eventually cost nearly $265 billion,[5] which surpasses the litigation costs for tobacco and Agent Orange. Michelle J. White, *Asbestos and the Future of Mass Torts* (2004) 18 *J. Econ. Persp.* 192 (noting the total costs of Agent Orange litigation ($180 million) and tobacco litigation ($246 billion)). Of the $70 billion spent on asbestos litigation up to a decade ago, plaintiffs recovered $29 billion compared to legal counsels' $41 billion benefit.[6] When compared to the $13 billion collected by litigators in tobacco's $246 billion litigation, the disparity between asbestos litigation costs and other mass torts is startling.

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[4] See 60 *AM. JUR. TRIALS* § 4, note 35, citing Stephen Labaton, *Judges' Panel, Seeing Court Crisis, Combines 26,000 Asbestos Cases*, *N.Y. TIMES*, July 30, 1991, p. A1.

[5] Stephen J. Carroll, *ASBESTOS LITIGATION COSTS & COMPENSATION*, p. vii (2004).

[6] *Id.* at 195 (outlining the distribution of asbestos litigation costs among plaintiffs ($29 billion), their attorneys ($20 billion), and defense counsel ($21 billion)).

The sensible way for courts to assure reason and fairness in decisions compensating those injured from asbestos exposure is to make clear that while both *negligence* and *strict product liability* law are available to assist in redress, *absolute* liability is not. The jurisprudential line separating the viable tort claims from absolute liability is a legal one that judges should make using the doctrines of duty and legal causation to limit liability within reasonable and fair limits. This case provides the court that opportunity.

STATEMENT OF FACTS

Amicus adopts Appellant's Statement of Facts.

SUMMARY OF ARGUMENT

There should be no liability running from product manufacturers (like defendant here, who made and distributed in the 1940s and 1950s an insulation product Kaylo, which contained 15-20% asbestos) to the category of persons exposed to product residue brought home on the clothing of industrial workers. Plaintiff, the spouse of an employee for independent contractors who installed insulation on boilers and pipes in commercial buildings, was exposed during the 1950s to second-hand residual dust from Kaylo that her husband brought home on his work clothes. More than 40 years later, she contracted mesothelioma, assertedly because of this secondary exposure. Defendant did not know in the 1950s of any dangers to plaintiff from such exposure; in fact, there were no scientific or medical studies about dangers to persons like the plaintiff resulting from take home exposure to residual asbestos dust until years after defendant sold its Kaylo business in 1958 to another company.

Having no knowledge of dangers to third parties (like plaintiff) from exposure to the residue from its product, defendant owed no tort duty to plaintiff under negligence law, and hence had no liability to her. The trial court should have found no duty; its refusal to do so is reversible error. Neither is defendant liable to plaintiff under strict liability for "failure to warn" or the "consumer expectations" test. As in negligence law, both strict liability claims also require that defendant's product (if found defective) be the *legal cause* of plaintiff's injury. "Legal cause" is different from cause-in-fact and allows the court to determine the limits of liability – *i.e.*, whether it was reasonably foreseeable to defendant (as a matter of law) that its product at that time would harm someone in plaintiff's position. The court here refused to make that finding, instead delegating it to the jury for a cause-in-fact ("substantial factor") determination.

These errors were prejudicial and warrant reversal of the compensatory damage award. Without compensatory damages there can be no punitive damages. Assuming *arguendo* that the stipulated judgment for plaintiff's nominal special (medical expense) damages of $42,500 is a sufficient predicate to award punitive damages, however, the punitive award here should be reversed or remanded for remittitur. It violates due process because it is duplicative and excessive, awarding almost equally large amounts for *emotional distress* and *punitive* damages; punishes the defendant for creating an increased risk that she may suffer injury instead of for actual injury to her; and does not take into consideration the billions of dollars of compensatory damages paid by the defendant to resolve its asbestos claims for its manufacture and distribution of Kaylo that ended more than a half-century ago.

ANALYSIS

I. THE TRIAL COURT'S DECISION TO ALLOW THE JURY IN THE NEGLIGENCE CLAIM TO EFFECTIVELY DETERMINE WHETHER A DEFENDANT OWES A DUTY BY ASKING IF A RISK OF EXPOSURE (RATHER THAN A RISK OF HARM) WAS FORESEEABLE, REQUIRES REVERSAL.

Of all common law defenses to negligence claims, absence of duty is the best known and most frequently asserted. Indeed, "duty" is an essential element in every negligence action, and plaintiffs have the burden of demonstrating its existence. For negligence claims, a plaintiff must show a defendant's legal duty to a plaintiff to conform to a standard of care, a breach of that duty (negligence), and damages *caused* (both factually and legally) by the breach. *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477. Some of these issues – *i.e.*, breach, factual foreseeability (cause-in-fact) and damages – are the exclusive province of the jury; others – duty and legal causation – are the responsibility of the court.

"The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion." *Paz v. State of California* (2000) 22 Cal.4th 550, 559. Whether this prerequisite to a negligence cause of action has been satisfied in this case is a question of law to be resolved by the court, *not* the jury. As the Court stated in *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 933: "To say that someone owes another a duty of care 'is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . .. Duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' " [Citation.] "[L]egal duties are not discoverable facts

of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done."

Under *Rowland*,[7] foreseeability of the "risk of harm" is one factor the court considers in determining whether a defendant owes the plaintiff a tort duty (while whether, for defendants owing a duty, a particular harm in a particular case was foreseeable is a fact question for the jury). "[F]oreseeability, when analyzed to determine the evidence or scope of duty, is a question of law to be decided by the court." *Ericson v. Federal Express Corp.* (2008) 162 Cal.App.4th 1291, 1300. Here the trial court took for its own determination of duty the jury's determination on the verdict form that plaintiff's exposure to asbestos was *foreseeable* because the defendant knew or should have known "that household members would be exposed to asbestos due to the normal and intended use, application or handling of Kaylo."[8]

Thus, the court abdicated *its* responsibility to decide the duty issue. It allowed the jury to decide the question of foreseeability of exposure instead of the foreseeability of harm as an issue of breach or factual causation, and thereby implicitly ruled that defendant owed a duty to plaintiff. That was backwards. The trial court first had to make the duty determination, and if it found a duty existed, then ask the jury to decide if the duty had been breached. Plaintiff contends, by denying defendant's motions for

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[7] The criteria for determining duty are commonly referred to as the "*Rowland* factors," a shorthand name taken from the first opinion establishing them, *Rowland v. Christian* (1968) 69 Cal.2d 108. See discussion *post* at 11.

[8] Opening Brief of Appellant Owens-Illinois, Inc., p. 18.

nonsuit on the negligence claim, the trial court ruled *sub silentio* that defendant owed a duty to plaintiff.[9] Under any of these scenarios, the court got it wrong.

That duty should not be determined even by foreseeability of the risk of harm alone is underscored by *Thing v. LaChusa* (1989) 48 Cal.3d 644, which cautioned when tightening the test for recovery by third parties for their negligently inflicted emotional distress that "there are clear judicial days on which a court can foresee forever and thus determine liability, but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury." *Id.* at 668. This same concern was reiterated in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370: "Policy considerations may dictate a cause of action should not be sanctioned *no matter how foreseeable* the risk . . . for the sound reason that the consequences of a negligent act must be limited in order to avoid an intolerable burden on society." *Id.* at 399, quoting *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274; emphasis added.

A "sound reason" for courts to eschew the equation of cause-in-fact *foreseeability* as the primary or sole factor to determine *duty* under negligence law is that

> The duty issue, being one of law, is broad in its implications; the negligence issue is confined to the particular case and has no implications for other cases. There are many factors other than foreseeability that may condition a judge's imposing or not imposing a duty in a particular case, but the only factors for the jury to consider in determining the negligence issue are expressed in the foreseeability formula. If the foreseeability formula were the only basis of determining both duty and its violation, such activities as some types of athletics, medical services, construction enterprises, manufacture and use of chemicals and explosives,

[9] Combined Respondents' and Cross-Appellants' Opening Brief, p. 47.

> serving of intoxicating liquors, operation of automobiles and airplanes, and many others would be greatly restricted. Duties would be so extended that many cases now disposed of on the duty issue would reach a jury on the fact issue of negligence.

Leon Green, *Foreseeability in Negligence Law* (1961) 61 *COLUMB. L. REV.* 1401, 1417-18. That, unfortunately, is what happened here.

Numerous factors go into determining "duty," of which foreseeability of the potential harm to the plaintiff is but one: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." See, *e.g.*, *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 774-784 [rejecting claimed exception to duty of care for stopping alongside a freeway]; *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472–478 [recognizing exception to duty of care for normal operation of garbage truck near bridle path]. Most of these factors weigh in favor of defendant and a conclusion of no duty here.

As *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243 explains, "To avoid redundancy with the other *Rowland* factors, the moral blame that attends ordinary negligence is generally not sufficient to tip the balance of the *Rowland* factors in favor of liability." *Id.* at 270. That leaves us with the other governing *Rowland* factors.

A. It Was Not Reasonably Foreseeable In The 1950s That Residual Dust From Asbestos-Containing Products Left On A Worker's Clothes Created A Risk Of Harm To Household Members Exposed To That Dust.

The evidence relating to the controlling "duty" factors weighs against finding that defendant owed a duty to the plaintiff. To begin with, the forseeability of harm that must be considered here is "whether the *category* of negligent conduct at issue is sufficiently likely to result in the *kind of harm experienced* that liability may appropriately be imposed on the negligent party." *Ballard v. Uribe* (1986) 41 Cal.3d 564, 573, fn. 6; emphasis added. In other words, was it *reasonably foreseeable* to defendant in the 1950s that if dust from its Kaylo insulation used by employees of independent contractors when insulating pipes and boilers in commercial buildings were taken home on their work clothes, that this dust presented a risk of harm to their household members exposed to it?

Answering this question requires the court to consider what was known or should have been known in the scientific community about the dangers of take-home asbestos dust in the 1950s. To paraphrase a former federal official, what in the 1950s were the "known knowns" and "known unknowns" about the dangers of asbestos?[10]

Plaintiff's own experts testified that it was *not* scientifically known in the 1950s that take-home asbestos dust on someone's clothes posed any health hazard to household members.[11] Plaintiffs counter that it was enough that defendant knew that

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[10] Donald Rumsfield, Department of Defense News Briefing, Feb. 12, 2002 (http://www.defense link.mil/Transcripts.aspx?TranscriptID=2636).

[11] Combined Reply Brief of Owens-Illinois and Response to Plaintiffs' Cross Appeal, p. 12-13.

asbestos dust from its product, when breathed by those who consistently worked with it on the job, posed health risks to them. From there, they argue, it is but a short step in logic to *foresee* that others who inhale the dust workers carry home on their clothes would also be injured.[12] But this is sheer speculation unaccompanied by any scientific or medical studies in existence at the time, a resort to *fanciful* but not *reasonable* foreseeability. "*[R]easonable foreseeability* does not turn on whether the particular defendant as an individual would have in actuality foreseen the exact accident and loss; it contemplates that courts, on a case-to-case basis, analyzing all the circumstances, will decide what the ordinary man under such circumstances should reasonably have foreseen. The courts thus mark out the areas of liability, excluding the *remote* and *unexpected*." *Dillon v. Legg* (1968) 68 Cal.2d 728, 741; emphasis added (reversed on unrelated grounds). Carried to the limits of its logic, plaintiffs' contention is in reality an argument for absolute liability: the mere use of asbestos makes the defendant liable for any causally traceable harm, regardless of whether a particular risk of harm was known or knowable at the time of exposure. It is illogical and unfair to impose (in hindsight) on defendant a duty to know something that the scientific community did not know at that time and only discovered long after defendant ceased manufacturing Kaylo and sold its division to another company.[13]

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[12] Combined Respondents' Brief and Cross-Appellants Opening Brief, p. 57.

[13] See, e.g., *Martin v. Cincinnati Gas & Elec. Co.* (6th Cir. 2009) 561 F.3d 439, 445 (reviewing an expert report to determine that the asbestos industry did not know of the dangers to bystander asbestos exposure at the time of plaintiff's exposure from 1951 to 1963); *Hoyt v. Lockheed Martin Corp.* (9th Cir. 2013) 540 Fed.Appx. 590 (unpublished opinion), ("[N]o reasonable factfinder could conclude that harm from take-home exposure to asbestos should have been foreseeable to Lockheed by 1958."); *Hudson v. Bethlehem Steel Corp.*, No 1991-C-2078, (continued...)

It is primarily for the aforementioned reasons that

> Most of the courts which have been asked to recognize a duty to warn household members of employees of the risks associated with exposure to asbestos conclude that no such duty exists. In jurisdictions where the duty analysis focuses on the relationship between the parties, "the courts *uniformly* hold that an employer/premises owner owes *no* duty to a member of a household injured by take home exposure to asbestos." These courts include the Supreme Courts of Delaware, Georgia, Iowa, Maryland, Michigan, and New York; appellate courts in California and Illinois; and federal and state courts interpreting Pennsylvania law.

Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: the "Endless Search for a Solvent Bystander"* (2013) 23 *WIDENER L.J.* 59, 80-81 (footnotes and citations omitted).

The California appellate opinion referenced in the above article is *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15 (*Campbell*), which holds the defendant owed *no duty* to a woman who, after exposure in the 1940s to asbestos dust brought home by her father and brothers on their clothes from their work as independent contractors installing asbestos insulation at defendant's factory, contracted mesothelioma in 2004. In reaching the conclusion of "no duty," *Campbell* explained that "[e]ven if it was foreseeable to Ford that workers on its premises could be exposed to asbestos dust as a result of the work they performed there, the "closeness of the connection" between

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[13](...continued)
1995 WL 17778064, at *4 (Pa. Ct. C.P. Dec. 12, 1995) (finding "nothing in the record which would have put Bethlehem Steel on notice, prior to 1960, that Mrs. Hudson was in a position to contract mesothelioma"). Amicus does not cite unpublished opinions as authority, but as sensible examples where courts have properly decided the issues of duty and legal cause for take home asbestos exposure.

Ford's conduct in having the work performed and the injury suffered *by a worker's family member* off of the premises is . . . attenuated." *Id.* at 31.

Other California courts that have considered whether employers owe a duty to nonemployees secondarily exposed to toxins taken off premises on their persons, clothing tools or vehicles agree with *Campbell.* See, e.g., *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 822-823 (*Oddone*), holding on public policy grounds that an employer was not liable for take-home asbestos exposures ("imposing a duty toward nonemployee persons saddles the defendant employer with a burden of uncertain but potentially very large scope"); *Haver v. BNSF Railway Co.* (June 3, 2014, B246527) ___ Cal.App.4th ___ 2014 WL 2466570, at pp. *3-*4; review granted August 20, 2014 (S219919)], holding, in a divided opinion, that *"Campbell's* conclusion [finding no duty] is consistent with the majority view on the issue of premises liability to third parties based on off-site exposure to asbestos," adding, "We conclude that BNSF owed no duty of care to [the spouse of defendant's employee];" and *Elsheref v. Applied Materials, Inc.* (2014) 223 Cal.App.4th 451, 453-454 (*Elsheref*), following *Campbell* to find a lack of duty with respect to take-home exposures where a minor asserted a claim against his father's former employer for negligence, after the minor was born with birth defects alleged to have been caused by in utero exposures through his father's contact with his mother; but the court held the minor could assert a product liability claim because the court mistakenly believed "duty" is not a concept that has any bearing in product cases. But see this court's recent opinion, vacated by a grant of review on August 20, 2014 (S219534) in *Kesner v. Superior Court* (2014) 226 Cal.App.4th 251, holding employers owe

a duty in take-home asbestos cases that extends to anyone who had "recurring and non-incidental contact with the employer's employee."

B. The Connection Between The Defendant's Conduct And The Injury Suffered By Plaintiff Is Attenuated Rather Than "Close."

Plaintiff's first husband died years before her from a heart attack and not asbestos related disease. His job as an insulator entailed working with Kaylo and other asbestos-containing products; his spouse never worked with Kaylo or any asbestos products. Unlike her, he had a "close" connection to defendant's product; but she never came to his job sites where Kaylo was present. Her "connection" to the defendant was more attenuated than her husband's "close" relationship; hers was based on the residual Kaylo dust her husband brought home on his work clothes. Her "close" relationship was to her husband, someone with whom she shared a household, perhaps even arguably to his employer, but not to the manufacturer of the product (Kaylo) that her husband's employer provided for him to do his job.

The *meaning* and *function* of this "close connection" factor is apparent from opinions of other courts that have found no duty owed by employers and premises owners toward those exposed to residual dust from their employees' take home work clothes. The meaning of the "close connection" factor is derived largely from the *relationship* between the parties. *In re New York City Asbestos Litigation* (N.Y. 2005) 840 N.E.2d 115, for example, holds that an employer does not owe a duty to third parties to protect them from harm caused by asbestos exposure because they do not have the necessary close relationship to each other. The plaintiff, John Holdampf, worked for the defendant, the Port Authority, between 1960 and 1996, doing various jobs that required him to handle asbestos-containing products. Mr. Holdampf's wife was

exposed to the asbestos dust when she washed her husband's uniforms. Doctors diagnosed Mrs. Holdampf with mesothelioma in 2001. The Court of Appeals, focusing on the lack of a relationship between Mrs. Holdampf and the Port Authority, found there was no duty owed because the Port Authority had *no relationship* with Mrs. Holdampf and, moreover, was not in the best position to protect her from harm because any actions it may have taken depended upon Mr. Holdampf's compliance. *Id.* at 120.

The opinion explains that using foreseeability to find duty in that case could lead to endless liability. *Id.* at 122. Instead, the court explained that the only way to curb this "specter" is to limit a finding of duty to those classes of plaintiffs who have a "special relationship" with the defendant. *Id.* In cases that involve take-home asbestos, there is no "special relationship" or "close connection" between the defendant and the injured third party, and therefore the employer owes no duty to the plaintiff spouse.

Similarly, in *CSX Transp., Inc. v. Williams* (Ga. 2005) 608 S.E.2d 208, 210, the Georgia Supreme Court held that an employer does not owe a duty to third parties who sustained injuries off the employer's premises. Three children of different employees brought a negligence claim in federal court against their fathers' employer, CSX Transportation, Inc. (CSXT), for harms suffered as a result of their exposure to their fathers' asbestos-containing work clothes. In addition, one of the employees brought a wrongful death action claiming that his wife died as a result of the same exposure. The Eleventh Circuit certified to the Supreme Court of Georgia the question of whether an employer owes a duty to third parties who sustain harms from employees asbestos-containing clothing; and the court declined to impose a duty because no

relationship existed between the employer and the third parties. *Id.* at 209-10. While an employer owes its employees a duty to maintain a safe environment, the plaintiffs were owed no duty because they did not work for CSXT. *Id.* at 209.

Finally, The Michigan Supreme Court, in *In re Certified Question from the Fourteenth District Court of Appeals of Texas* (Mich. 2007) 740 N.W.2d 206, held that a premises owner does not owe a duty to injured third parties who, like Mrs. Grigg, never entered the premises to be exposed to asbestos but breathed it in from a take home asbestos worker's clothes. *Id.* at 209-10. Between 1954 and 1965, plaintiff Cleveland "John" Roland worked for independent contractors whom defendant Ford Motor Company hired to reline the interiors of blast furnaces. *Id.* at 210. The material that Mr. Roland used to reline the furnaces contained asbestos, which adhered to his clothing. *Id.* The decedent, Carolyn Miller, Mr. Rowland's stepdaughter, washed his clothing. Doctors diagnosed her with mesothelioma in 1999, and she died a year later. *Id.* In a majority opinion the Michigan Supreme Court explained that, in examining whether the defendant employer owed a duty to one in plaintiff's position, it must consider whether the social benefits of imposing a duty outweigh the costs. *Id.* at 211. This involves balancing factors such as "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Id.* The relationship of the parties, however, represented the most pivotal factor, because it determined whether the defendant should have acted to protect the injured party from harm. *Id.*

The Michigan Supreme Court noted that although it considered foreseeability as one of the factors to weigh in ascertaining duty, other considerations were more important. *Id.* at 212-13. Specifically, the court found the relationship between the

defendant and Ms. Miller to be extremely tenuous. *Id.* at 216. Ms. Miller, like Mrs. Grigg here, did not work for the defendant, nor had she ever appeared on the defendant's premises. *Id.* The court then considered the burden on the defendant, and held that the burden would be severe, because the defendant would have to protect every individual who came into contact with its employees and the employees of its independent contractors. *Id.* at 217. While conceding that the risk was serious because of the highly dangerous properties of asbestos, the majority held that the defendant could not foresee the risk, because during the period when Mr. Roland worked on the defendant's premises (several years later than here), the risks relating to asbestos were not well known. *Id.* at 218. Hence, a finding that no duty existed.

The function of the "close connection" factor is, like foreseeability and duty, to place reasonable limits on the reach of liability. See, *e.g.*, *Van Fossen v. MidAm. Energy Co.* (Iowa 2009) 777 N.W.2d 689, 699 (explaining that the plaintiffs proposed expansion of duty "would be incompatible with public policy" and "would arguably also justify a rule extending the duty to a large universe of other potential plaintiffs who never visited the employers' premises but came into contact with a contractor's employee's asbestos-tainted clothing in a taxicab, a grocery store, a dry-cleaning establishment, a convenience store, or a laundromat"); *In re Asbestos Litig.*, No. 04C-07-099-ASB, 2007 WL 4571196, at *12 (Del. Super. Ct. June 26, 2007) ("[T]here 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."); *Adams v. Owens-Ill., Inc.* (Md. Ct. Spec. App. 1998) 705 A.2d 58, 66 ("If liability for exposure to asbestos could be premised on [decedent's] handling of her husband's clothing, presumably Bethlehem [the premises owner] would owe a duty to others who came in close contact with [decedent's husband], including other family members, automobile passengers, and co-workers."); *Campbell*, *supra*, 206 Cal.App.4th at 33 ("[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 [than just family members of an occupationally exposed employee], including fellow commuters, those performing laundry services and more.").

C. The Extent Of The Burden On Defendant And The Consequences To The Community If The Court Imposes Liability Here Are Too Great For It To Have Done So.

As explained by *Oddone, supra,* 179 Cal.App.4th at 822, in a closely related context, the "principal difficulty [in applying] these [*Rowland*] factors is that it is hard to draw the line between those nonemployee persons to whom a duty is owed and those nonemployee persons to whom no duty is owed." *Id.* at 822.

Once a duty is determined to be owed to a nonemployee household occupant for her exposure to asbestos from her spouse employee's work clothes, it is at once a category either too large and too small. Does liability attach only to spouses? Why not all household occupants? Not all household occupants will, of course, invariably be in the same amount of contact with the employee occupant. How frequently or long must one reside in the same house to have sufficient exposure for a duty to be imposed?

What about household guests or those who spend time working on the inside of the house? Should the duty run only to those in the household who are exposed to asbestos from laundering the take home work clothes of the asbestos worker, or to those who walk through or spend time next to the laundry room?

Campbell, supra, 206 Cal.App.4th at 33 answered these thorny questions by quoting approvingly from *Oddone* as to what made the most sense:

> 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. [¶] Assuming for the purposes of argument that there is some risk to nonemployee persons, in a less than perfect world it appears to make more sense to look to the nonemployee person's insurance to cover the risk. In the normal course of events, such insurance will be already in place and its cost is not likely to be influenced by the risk created by the employer's conduct.

Id., quoting *Oddone, supra*, 179 Cal.App.4th at 822-823.

The trial court here should, for the same reasons as the opinions in *Campbell*, *Oddone* and the other cited authorities, have found that defendant owed no duty to the plaintiff and hence had no liability for her injury. It did not, depriving defendant of a fair trial and warranting reversal.

II. THE COURT'S CONFLATION IN THE STRICT LIABILITY CLAIMS OF "CAUSE-IN-FACT" FORESEEABILITY WITH LEGAL CAUSE IS AN ABDICATION OF ITS RESPONSIBILITY AND WARRANTS REVERSAL.

Plaintiffs argue it does not matter that the trial court erred by ruling, expressly or implicitly, that defendant owed a duty to those who laundered a spouse's take home work clothes contaminated with asbestos dust because the court also found defendant liable under two accompanying strict liability theories: duty to warn and consumer expectations. But this ignores the overlapping relationship between duty and legal cause, both of which are affected by foreseeability determinations. See, *e.g.*, *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 348, 362 ["in strict liability as in negligence," duty must be evaluated based on public policy factors beyond foreseeability].

The court's decision to allow the jury to effectively determine duty under negligence law by its finding of factual foreseeability of exposure to her husband's clothing (but no finding of foreseeability of harm from that exposure) infected the determination of legal cause under the strict liability claims. Under the evidence presented, the court should have ruled that defendant was not liable to plaintiff because it did not, as a matter of law, *cause* her injuries.

Strict liability has been imposed for three types of product defects: manufacturing defects, design defects, and " 'warning defects.' " *Anderson, supra,* 53 Cal.3d at 995. The third category refers to "products that are dangerous because they lack adequate warnings or instructions." *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 428. Typically, under California law, manufacturers are strictly liable for injuries caused by their failure to "warn of dangers that were known to the scientific community at the

time they manufactured and distributed their product." *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64-65. As the record here makes clear, neither defendant nor the scientific community at the time of defendant's manufacture of Kaylo insulation knew of dangers to persons in the position of plaintiff: spouses who had only household contact from their husbands' asbestos dust on work clothes brought home for laundering.

Strict liability for a *design defect* was prosecuted here under the "consumer expectations test," which asks whether the product performed as safely as an ordinary consumer would expect when used in an intended and *reasonably foreseeable* manner. *Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206, 214. A common core to both strict liability claims asserted – failure to warn and consumer expectations – requires that "the plaintiff's injury must have been *caused* by a 'defect' in the [defendant's] product." *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733. This causation is both factual ("cause in fact" or "substantial factor" causation) and *legal*, what used to be called "proximate cause." "A manufacturer is liable only when a defect in its product was a *legal cause* of injury." *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572; emphasis added.

> Factual causation is, as its name suggests, a finding that the defendant actually caused the plaintiff's injury. Proximate [or legal] causation, on the other hand, represents a legal conclusion that the defendant should be liable for the injury. Causation may be factual without being proximate [legal]: the defendant may have caused the plaintiff's injury but not be legally responsible for it. . . [W]hile all injury-causing products are dangerous in the factual sense, defectiveness is a legal conclusion that the manufacturer is responsible for the injury.

Ellen Wertheimer, *The Biter Bit: Unknowable Dangers, the Third Restatement, and the*

Reinstatement of Liability Without Fault (2005) 70 *BROOK. L. REV.* 889, 894-895.

The term "legal or proximate cause" includes two basic components: one is the policy considerations for determining whether to impose liability, a balancing of concerns analogous to the duty determination in negligence claims; and the other is "causation in fact." Causation in fact asks whether the defendant's conduct or defective product was the necessary antecedent to the plaintiff's injury, without which no injury would have occurred, a determination made by the jury and, because of the peculiar and relaxed cause-in-fact formula for asbestos exposure defined by *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968, a foregone conclusion.

The policy consideration component, however, asks the larger, more abstract question of whether a defendant *should* be held responsible for causing the plaintiff's injury. Unlike the *fact* of causation, with which it is often confused, the question of whether a defendant should be held *legally responsible* is primarily (especially when, as here, it is clear there was no published scientific knowledge at the time about the dangers of Kaylo or any other asbestos containing product to take home plaintiffs) an issue of law for the court to decide. See, e.g., discussion and authorities cited in *Evan F. v. Hughson Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 835.

The consequences of injury by a product are potentially limitless, and if the law held the manufacturer of that product accountable for all of these consequences it would be subjected to boundless liability. Accordingly, courts constrain liability when the harm that results from the defendant's product is so clearly outside the risks created by its manufacture and distribution that it would be "unjust or at least impractical to impose liability." Dan B. Dobbs, *THE LAW OF TORTS* § 180, note 18 at 443 (2000).

"Strict liability is imposed for injuries which are the proximate result of product defects, not for the manufacture of defective products. Unless the manufacturer's defective product can be shown to be the [legal] cause of the injuries, there can be no recovery." *Talley v. City Tank Corp.* (1981) 279 S.E.2d 264, 269. Significantly, recognition of this legal principle has been codified in the *Third Restatement of the Law on Products Liability*. "The Third Restatement requires that dangers be 'foreseeable' in both design and warning contexts before the product can be found defective. By including foreseeability in the definition of defect, the Third Restatement foreclosed any liability for unknowable dangers in either the design or warning context." Wertheimer, *supra*, 70 *BROOK. L. REV.* at 924.

Legal cause (or foreseeability as a matter of law), then, goes to the scope of the defendant's liability, and asks whether the defendant should have foreseen the type of harm that befell the plaintiff. W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts* (2005) 58 *VAND. L. REV.* 739, 748-49. "[B]ecause duty is the sole element of negligence not left in the first instance to the jury, duty – and hence, [legal] foreseeability – has become the primary source of judicial power to weed out cases deemed by a judge to be unworthy." *Id.* at 740.

As the record here shows, there was no medical or scientific reports in the 1950s when Mrs. Grigg's first husband worked as an insulation installer of Kaylo that asbestos dust brought home on his work clothes posed any danger of any kind to her. While it is arguable whether defendant had sufficient knowledge of possible danger to the husband because of his use of the product at work, his wife who never saw or used the

product and never visited him on any of his job sites, was not one whose stay-at-home status made her risk of harm *reasonably foreseeable*.

III. THE PUNITIVE DAMAGE AWARD SHOULD BE REVERSED BECAUSE IT IS UNCONSTITUTIONAL AND UNSUPPORTED BY THE EVIDENCE.

A. The Punitive Damage Award Is Excessively High When Measured Against The Economic Loss To Plaintiff.

State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 424 (*State Farm*) states that as a general due process guideline "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process." But the Court also recognized that, because very large awards for emotional distress serve to punish the offender as much as to compensate the victim, a punitive damage award may be duplicative. *Id.* at 426. In making this observation, the Court was doubtless referring to similar purposes underlying awards for "punitive" and "pain and suffering" damages. "[P]unitive damages serve much the same function as the criminal law—to both punish and deter." *The Roman Catholic Bishop of Oakland v. Superior Court* (2005) 128 Cal.App.4th 1155, 1162. Likewise, "damages for pain and suffering . . . stem not so much from an interest in compensating injured persons for actual loss as buying off the anger of the victim's family and forestalling vengeful retaliation." Jeffrey O'Connell & Rita James Simon, *PAYMENT FOR PAIN AND SUFFERING: WHO WANTS WHAT, WHEN & WHY*? 108 (1972).

The duplicative nature of pain and suffering and punitive damages as a reason for reducing the punitive award is recognized in *Casumpang v. International Longshore & Warehouse Union, Local 142* (D. Hawaii 2005) 411 F.Supp.2d 1201, a retaliatory discharge case. The jury awarded $1 million in punitive damages and $240,000 in compensatory

damages ($90,000 for injury to reputation and $150,000 for emotional distress). The court reduced the punitive award to $240,000, explaining that, although the ratio of punitive to compensatory damages was "approximately 4:1," the amount of punitive damages was nevertheless too high: "Where a compensatory damages award is based on emotional distress damages caused by humiliation and outrage, it likely contains a punitive element of punishment in addition to an element of compensation . . . In light of the substantial compensatory damages awarded and the duplicative considerations in the compensatory and punitive awards, the Court finds that the punitive damages award of one million dollars is excessive." *Id.* at 1220; citing *State Farm*, *supra*, 538 U.S. at 426.[14]

Here the court affirmed the jury's award of $11 million for punitive damages on top of the $12 million award for her emotional distress and pain and suffering and $4 million for her husband's loss of consortium, all variants of nonpecuniary loss. Given the comparatively nominal amount of plaintiff's special medical damages – $42,500 – this constitutes a 1 to 588 ratio of objectively measurable (economic) to subjectively unmeasurable (noneconomic) damages awarded for vindication. When, as here, the bulk of the compensatory award is large and for nonpecuniary loss, the punitive damage award should, in fairness, be compared for due process ratio purposes with the special damage award, not with another companion and duplicate award for punishment. *State Farm* makes clear that the plaintiffs' emotional distress was covered by the

[14] See also *Graselli v. Barr* (2006) 142 Cal.App.4th 1260, 1290, citing and quoting from *REST.2D TORTS* § 908, com. c, p. 466: "In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both."

compensatory damages and should not be duplicated in the punitive damages. "Here the argument that [defendant] will be punished in only the rare case, coupled with reference to its assets . . . had little to do with the actual harm sustained by the [plaintiffs]." *Id.* at 426.

B. Punitive Damages Are Not Appropriate Because Plaintiff Did Not Show Actual Harm From Exposure To Defendant's Product As Opposed To Being Subject To An Increased Risk Of Harm From That Exposure.

Under the remarkably relaxed causation-in-fact rule of *Rutherford v. Owens-Illinois, Inc.*, *supra*, an award of punitive damages cannot pass constitutional muster. *State Farm* is emphatic that "[a] defendant should be punished for the *conduct that harmed the plaintiff*, not for being an unsavory individual or business." 538 U.S. at 423; emphasis added. *Phillip Morris USA v. Williams* (2007) 549 U.S. 346 (*Williams*) clarifies further that punitive damage awards should only be made for *actual harm* the defendant caused the plaintiff, not "for the purpose of punishing a defendant for harming others." These bedrock prerequisites for awarding punitive damages conflict with the relaxed causation standard established by *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 968 that plaintiff was required to meet here: a showing that her exposure to defendant's asbestos-containing product "contributed to [her] risk of developing cancer." The *Rutherford* decision makes it clear that to establish cause-in-fact, the plaintiff does *not* have to establish that the defendant's product actually caused her injury: "In an asbestos-related cancer, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones that actually began the process of malignant cellular growth." *Rutherford*, *supra* at 982; emphasis original.

An increased "risk" of being harmed is not, of course, the same as "actual harm." Thus the standard established by the Supreme Court for obtaining punitive damages – proof of *actual harm* to the individual plaintiff as a result of defendant's conduct or from the use of its product – is at odds with what California law requires for obtaining damages in asbestos exposure claims and what plaintiff showed here – an increased *risk* of being harmed, of contracting mesothelioma. That she *did* contract mesothelioma some forty plus years *after* her exposure to the residual amount of asbestos dust her first husband brought home with him on his person does not prove this was the *legal* or even *factual cause* of her disease.

> First, everybody is exposed to asbestos. Certain forms of asbestos are both naturally occurring in the environment and ubiquitous at very low levels due to the widespread use of the product in urban areas. These levels--called "background" exposures--are not considered harmful. Second, like all other known cancers, mesothelioma occurs from causes in addition to asbestos and from natural causes, without any involvement of asbestos – hundreds of such cases appear annually in the U.S. alone and there is no indication that these cases will disappear. These two realities taken together create the following scenario – every person who has mesothelioma has also been exposed to at least some asbestos, and yet twenty percent or so of those cases are believed to have nothing to do with asbestos exposures. Therefore, there is such a thing as inconsequential asbestos exposure even in persons who have mesothelioma.

William L. Anderson, Lynn Levitan & Lynn Levitan, *The "Any Exposure" Theory Round II – Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008* (2012) 22 *KAN. J.L. & PUB. POL'Y* 1, 11.

Permitting the award of punitive damages under this relaxed causation rule also conflicts with the holding in *Magallanes v. Superior Court* (1985) 167 Cal.App.3d 878, a DES case holding that punitive damages were unavailable where causation was based on the "market-share" theory of liability which permits a finding of liability based, not on a showing that the particular defendant's product actually caused the plaintiff's injury, but that its product was in the market and could have caused the injury.

Punitive damages are not, then, properly awarded under *State Farm* and *Williams* where there is no proof presented that the defendant's product caused *actual*, as opposed to an increased *risk of*, harm to the plaintiff.

Moreover, there was no "malice" "oppression" or "fraud" proven in this case, all of which are required to obtain punitive damages. Civ. C. § 3294. "Fraud" was absent as shown by the court's order granting defendant's motion for JNOV on plaintiffs' fraudulent concealment claim. "Malice" requires an intent by the defendant to injure the plaintiffs, and intent cannot be inferred or imputed when defendant had no knowledge that its product posed any danger at the time to someone exposed like plaintiff to second-hand residual dust from the clothes of another who worked with Kaylo. Neither was there evidence of "oppression" by defendant of plaintiff because, again, that requires knowledge that defendant knew, had *conscious* disregard, at the time that Kaylo was injurious to a bystander exposed to second-hand asbestos dust at her home from her husband's work clothes.

C. Punitive Damages Should Not Be Awarded Against A Defendant Who, As Here, Has Already Been Assessed Multiple Damage Awards By Other Courts For Its Manufacture and Distribution of Kaylo.

Defendant has been a frequent target of negligence and product liability lawsuits in California and elsewhere because of its manufacture and marketing of Kaylo, which ended 56 years ago. As Owen-Illinois filings shows and a cursory review of appellate opinions confirms, these actions have resulted in defendant paying out of its own pocket $3.2 billion over the years in compensatory and punitive damages and in settlements of claims seeking same. Opening Brief of Appellant Owens-Illinois, Inc., p. 46.

Most if not all of the lawsuits against defendant were essentially for the same complained of conduct: manufacturing and marketing. That conduct, however, has long ago ceased and defendant has paid dearly for it. Deterrence is, therefore, no longer a relevant goal for awarding punitive damages against defendant. Only punishment remains an arguably viable objective, but it is difficult to fathom why that punishment should continue in such high amounts as plaintiff seeks given what the defendant has already paid.

Our high court recognizes the due process concerns created by multiple awards from different courts in favor of different plaintiffs against the same defendant for engaging in the same, or similar course, of conduct; but has never directly come to grips with these concerns. See, e.g., *State Farm, supra*, 538 U.S. at 423 (explaining that punishment based on "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised . . . creates the possibility of multiple punitive damages

awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains"); *BMW v. Gore* (1996) 517 U.S. 559, 593: "Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover." (Breyer, J., concurring.)

Lower courts and legal scholars rhythmically call attention to this problem, yet have not agreed upon any solution or answer to it. See, e.g., *Roginsky v. Richardson-Merrell, Inc.* (2d Cir. 1967) 378 F.2d 832, 838-41 (expressing concern about the problem of "claims for punitive damages on the part of hundreds of plaintiffs"); Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs* (2003) 87 *MINN. L. REV.* 583, 587 ("This practice of punishing the defendant . . . has led countless judges and commentators to worry about the potential for excessive multiple punishment: the possibility that several victims will obtain punitive damages awards that were each designed to punish the entire wrongful scheme, resulting in unjustly high cumulative punishment."); Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry* (2005) 99 *NW. U. L. REV.* 1613, 1618-44 (giving an exhaustive review of both scholarly and judicial discussion of the multiple punitive issue); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform* (1994) 39 *VILL. L. REV.* 363, 406 ("Surely the most momentous question as yet unresolved by the Court is whether the Constitution imposes any restraints on the repetitive imposition of punitive damages in mass disaster litigation, such as the litigation that has confronted the asbestos industry for many years."). And not just the spectre of repetitive punitive damage awards justify the

determination that punitive damages are not appropriate here. Where there are very, very large and repetitive compensatory awards, at least one California Court of Appeal has recognized that punitive damages are not justified as a matter of law: "…the objectives of punishment and deterrence appear to be sufficiently met by the enormity of the present and prospective awards of compensatory damages, and the objective of deterrence has little relevance where the offending goods have long since been removed from the marketplace." *Magallanes*, *supra* at 886.

The American Law Institute recognizes the importance of the redundant punishment danger by offering the following illustration:

> Problems arise especially in the context of product litigation alleging defective designs or warnings . . . If a defectively designed product is unduly hazardous, it may injure hundreds or even thousands of purchasers and users. If liability for punitive damages can be established for *any* of the resulting tort claims, then such an award should be available for *all* the claims arising out of the single corporate misdeed. Yet the consequence is that beyond compensatory damages it must pay for the actual losses of its victims, the firm will be penalized again and again for a single wrongful judgment or action, a sanction that is antithetical to the protection against double jeopardy that characterizes overtly penal regimes. In addition, substantial payments for the earlier punitive damage awards may strip the firm of its insurance coverage and assets, thus endangering the ability of later claimants to realize their fundamental tort right to compensatory redress.[15]

When, as here, a defendant has already been made to pay enormous sums

[15] 2 Am. Law Inst., *REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY* (1991) 260-61 n.5; emphasis in original.

because of the sale and marketing of its product, fairness requires that the punitive award be reversed or substantially reduced.

CONCLUSION

For all the reasons aforementioned, CJAC urges the Court in the main appeal to reverse the judgment and, alternatively, grant a new trial or remittitur.

Dated: August 28, 2014

Respectfully submitted,

/s/
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CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, approximately 10,000 words.

Dated: August 28, 2014

/s/
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I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Street, Suite 1, Sacramento, CA 95817.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 28th day of August 2014 at Sacramento, California.

/s/ David Cooper
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