IN THE SUPREME COURT OF FLORIDA

AMERICAN OPTICAL CORP., et al.,

Appellants/Petitioners,
v.

WALTER R. SPIEWAK and BETTY J. SPIEWAK, et al.,

Appellees/Respondents.
_____/

Case Nos. SC08-1616 & SC08-1640

L.T. Case Nos. 4D07-405, 4D07-407

Consolidated With

AMERICAN OPTICAL CORP., et al.,

Appellants/Petitioners,
v.

DANIEL N. WILLIAMS, et al.

Appellees/Respondents.
_____/

Case Nos. SC08-1617 & SC08-1639

L.T. Case Nos. 4D07-143, 4D07-144 4D07-145, 4D07-146, 4D07-147, 4D07-148, 4D07-149, 4D07-150, 4D07-151, 4D07-153, and 4D07-154

AMICI CURIAE BRIEF OF CERTAIN SILICA DEFENDANTS IN SUPPORT OF APPELLANTS/PETITIONERS

David J. Schenck (*pro hac* pending)
Jones Day
2727 North Harwood Street
Dallas, Texas 75201-1515
Telephone: (214) 220-3939

Gregory R. Hanthorn (*pro hac* pending)
Amber B. Shushan (*pro hac* pending)
Jones Day
1420 Peachtree Street, N.E.
Suite 800
Atlanta, Georgia 30309-3053
Telephone: (404) 521-3939

Gordon James III
Valerie Shea
Sedgwick, Detert, Moran & Arnold LLP
2400 East Commercial Boulevard
Suite 1100
Fort Lauderdale, Florida 33308
Telephone: (954) 958-2500

Attorneys for *North Safety Products, Inc.* and *Saint-Gobain Abrasives, Inc.*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

CASES (continued)

STATUTES AND LAWS

STATUTES AND LAWS (continued)

RESTATEMENTS

OTHER AUTHORITIES

STATEMENT OF INTEREST

As defendants named in silica products liability actions pending in Broward County, Florida, *amici* [1] have a substantial interest in whether Florida law recognizes a cause of action for damages arising from alleged silica-related disease without evidence of medical impairment.

INTRODUCTION AND SUMMARY OF ARGUMENT

On June 20, 2005, the Florida Asbestos and Silica Compensation Fairness Act (the "Act") was signed into law. 2005 FLA. LAWS ch. 274, § 774.201, *et seq*., Fla. Stat. (2008). Designed to stem a floodgate of baseless or premature litigation, and to preserve resources needed to compensate the sick, the Act defers the claims of all exposed, yet unimpaired, parties until such time that they have demonstrable evidence of medical impairment.

The Florida Legislature, like other state legislatures, recognized that asbestos litigation had developed into an entrepreneurial, lawyer-driven industry, and that the same entrepreneurial model would be applied to silica litigation if not concurrently addressed.[2] *See* Jonathan D. Glater, Suits on Silica Being Compared

---

[1] All of the Certain Silica Defendants are named as defendants in silica products liability actions pending in Broward County. *See In re: Silica Litigation*, Case No. 05-40,0000(27) (Fla. 17th Cir. Ct.). Bacou Dalloz Safety, Inc. f/k/a Dalloz Safety, Inc. f/k/a WGM Safety Corporation d/b/a Wilson Safety Products, Clemco Industries Corporation, Fairmount Minerals, Ltd., Gardner Denver, Inc., Ingersoll-Rand Company, Mine Safety Appliances Company and Parmalee Industries, Inc. d/b/a CESCO Safety Products Company have consented through counsel to join North Safety Products, Inc. on this *amici curiae* brief.

[2] *Amici* have included this article in a separate appendix to this brief, along with other materials they believe will be helpful to the Court. See Motion of Certain Silica Defendants for Leave to File Appendix. References are to appendix page numbers.

to Asbestos Cases, N.Y. TIMES, Sept. 6, 2003 (A40-A41). It was not until three days of hearings were held in February 2005, however, that the entrepreneurial model as applied to silica litigation was exposed in a single courtroom. *In re Silica Products Liability Litigation* ("*MDL 1553*"), 398 F. Supp. 2d 563 (S.D. Tex. 2005). In MDL 1553, Judge Janis Jack presided over multidistrict silica litigation involving more than 10,000 plaintiffs' claims against more than 250 defendants. *MDL 1553*, 398 F. Supp. 2d at 573. The plaintiffs hailed from numerous states, including Florida. *Id.* at 574. In her landmark 249-page opinion, Judge Jack exposed the silicosis litigation industry as a proverbial house of cards. In view of the decline of silicosis in the United States, the only explanation for the number of silicosis claims filed was the deliberate manipulation of medical screenings by "plaintiffs' lawyers and screening companies scouting for a new means of support." *Id.* at 620.

Judge Jack's insights help to explain the crush of silica lawsuits filed in Florida during the first half of 2005 as many sought to beat the effective date of the Legislature's response to the crisis. In the Seventeenth Judicial Circuit alone, more than 100 silica claims were filed. *See In re: Silica Litigation*, Case No. 05-40,0000(27) (Fla. 17th Cir. Ct.). Since the Act was signed into law, however, a number of claims were voluntarily dismissed. *Id.*

Plaintiffs would have this Court nullify the Act's effect of discouraging baseless or premature silica claims until claimants can demonstrate an impairing condition caused by silica. Plaintiffs' proposed course would deplete the resources available for meritorious silica claimants. This result is neither supported by Florida law nor sound public policy.

By changing the timing of a plaintiff's proof requirements, the Act ensures that resources needed for deserving claimants are preserved. Importantly, statutes of limitations are tolled for claimants who cannot make the Act's requisite showing so that they may bring a claim when and if they can demonstrate an impairing condition caused by silica. Thus, the law provides a benefit to claimants that are presently impaired by silica as well as claimants who might have previously been time-barred. Accordingly, *Amici* urge this Court to respect the Legislature's authority to enact meaningful silica litigation reform to promote the broad public policy needs of the State.

ARGUMENT

While the narrow question presented in this case is whether the retroactive application of the Act infringes upon a vested right of asbestos claimants as to result in a denial of due process, resolution of this question also impacts silica claims filed during what a federal district court judge identified as a "phantom epidemic" of silicosis.[3]

I. THE ACT IS THE LEGISLATIVE RESPONSE TO THE MASS ASBESTOS AND SILICA ENTREPRENEURIAL LITIGATION MODEL.

For years, federal and state courts were increasingly steeped in asbestos litigation. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (describing asbestos litigation as a "crisis"); *Williams v. Am. Optical Corp.*, 985 So. 2d 23, 25 (Fla. 4th DCA 2008) (stating that asbestos litigation "has been

[3] *MDL 1553*, 398 F. Supp. 2d 563, 572 (S.D. Tex 2005) ("In short, this appears to be a phantom epidemic, unnoticed by everyone other than those enmeshed in the legal system: the defendants, who have already spent millions of dollars defending these suits; the plaintiffs . . .; and the courts . . .").

considerable and persistent for a number of years"). As legislative attention focused on asbestos litigation abuse, the number of silica-related lawsuits steadily climbed.[4]

By adopting the entrepreneurial model that had fueled the asbestos litigation machine, plaintiffs' law firms sought to maintain a steady volume of silica claims and the attendant access to a pool of settlement money. Although they initially denied that silicosis-related injury claims were on the verge of paralleling the asbestos crisis, the number of silicosis suits filed and settlements collected by the plaintiffs' firms support the comparisons.[5]

An understanding of the big business of silica lawsuits and an appreciation for potential deleterious effects of the entrepreneurial model are essential to analyzing the Act; they underscore the legislative judgment brought to bear in Florida and several other states that enacted reforms.

In the period immediately preceding the Act, plaintiffs' lawyers and screening companies referred to potential silicosis litigants as "inventory."[6] Asbestos clients were "re-screened" for silicosis and "retreaded" as silica plaintiffs.

---

[4] Although comprehensive data about the number of silica lawsuits filed nationwide is elusive, U.S. Silica Company (a single corporate defendant) saw a rise in lawsuits filed in early 2000 with nearly 15,300 new silica lawsuits filed in the first 6 months of 2003, up from about 5,200 for all of 2002 and approximately 1,400 in 2001. Jonathan D. Glater, *Suits on Silica Being Compared to Asbestos Cases*, N.Y. TIMES, Sept. 6, 2003 (A40-A41).

[5] *See* Affidavit of John M. Black, *In re: Texas State Silica Prods. Liab. Litig.*, Master Docket No. 2004-70000, Harris County Dist. Ct., Tex. (10/08/2008) (A11-A13).

[6] *See* Hearing Transcript (Heath Mason Testimony) at 286:2-21, *MDL 1553*, S.D. Tex. (02/17/2005) (A14-A18).

Sometimes a single chest x-ray resulted in two separate interpretative reports – one with a diagnosis of asbestosis and the other with a diagnosis of silicosis – with neither report referencing the other and both resulting in lawsuits. *See MDL 1553*, 398 F. Supp. 2d at 605-06. Although this may be good for generating business, it is not good medicine and does not advance the interests of the civil justice system. [7]

Of the approximately 110 silica plaintiffs in Broward County alleging only a silica-related injury, more than half were "retreads" who had previously filed lawsuits claiming only an asbestos-related basis for their alleged injury. *E.g.*, *compare Adams v. Am. Optical Corp.*, Case No. 05-06355 (Fla. 17th Cir. Ct.) (alleging injuries due to silica-related disease), *with Adams v. ACandS, Inc.*, Case No. 99-18223 (Fla. 17th Cir. Ct.) (alleging injuries due to asbestos-related disease). In most instances, the same counsel filed separate, contradictory asbestos and silicosis claims. *Id.*

For years, silica defendants sounded alarms that plaintiffs' law firms were manipulating the justice system for financial gain by filing groundless silicosis suits on behalf of people who already filed asbestosis claims.[8] While these sirens

[7] The fact that a claimant has filed suit alleging an asbestosis related injury is highly significant to any subsequent allegation of silicosis and presents a scenario ripe for fraud. Although silicosis and asbestosis appear differently on an x-ray of the lung, the symptoms of both are similar and each affect the same organ, the lung. *See* NIOSH Safety and Health Topic: Pnemoconioses at http:// www.cdc.gov/ niosh/ topics/ pneumoconioses/ [Accessed August 14, 2009].

[8] Approximately 65 percent of the 10,000 plaintiffs in the MDL 1553 had also filed asbestos lawsuits. *See MDL 1553*, 398 F. Supp. 2d at 603. While it is medically possible to suffer from both asbestosis and silicosis, the likelihood of having both diseases is highly improbable. *Id.* To put it in perspective, "a golfer is

resulted in proposals for reform in Florida and elsewhere, Judge Jack exposed the big business of silica litigation, and the lack of a silicosis crisis, in February 2005.

Judge Jack began by observing that silica is an entirely natural substance and "is the second most common mineral in the earth's crust and is the primary ingredient of sand and 95 percent of the earth's rocks." *MDL 1553*, 398 F. Supp. 2d at 569. When silica is cut, drilled, ground or used for abrasive blasting, respirable-sized particles may be produced. *Id.* These small particles, which if inhaled and deposited in the alveolar region of the lung in a sufficient concentration, over a sufficient period of time, and after a sufficient latency period, are capable of contributing to the disease silicosis. *See* Hans Weill et al., *Silicosis and Related Diseases*, OCCUPATIONAL LUNG DISORDERS 285 (Butterworth Heinemann 3d ed. 1994).

Despite the prevalence of silica, due to the facts that (1) silicosis is one of the earliest recognized occupational diseases, and (2) the use of protection from silica has increased, Judge Jack found the sudden rise in silicosis claims unexpected. *MDL 1553*, 398 F. Supp. 2d at 569-570. The "Centers for Disease Control [] found that the number of U.S. workers exposed to silica dust *declined* steadily from 1970 to 2002." *Id*. at 570-571 (emphasis added). Additionally, NIOSH reports that deaths attributable to silicosis in the United States have steadily declined for decades, from 1,157 in 1968 to 187 in 1999. *Id.* at 571.

(continued…)

more likely to hit a hole-in-one than an occupational medicine specialist is to find a single [person suffering from] both silicosis and asbestosis." *Id.*

Judge Jack found no explanation for the sudden rise of silicosis lawsuits absent economic incentives driven by the entrepreneurial litigation model.

Litigation screenings are the cornerstone of the entrepreneurial model. Mobile x-ray units are manned by temporary non-medical personnel that take "exposure histories" and technicians who perform x-rays on potential litigants without any direct medical supervision. *See MDL 1553*, 398 F. Supp. 2d at 596-599. Trailers housing x-ray machines pull up to parking lots where potential plaintiffs pre-screened by law firms line up like cattle. *Id.* at 598. Sometimes, a doctor would perform a two minute physical exam during the screening process. *Id*. at 600. Some screening companies were paid on a per head basis for only those diagnosed as diseased.[9] *Id.* at 628. For a number of plaintiffs' firms, those clients were a fungible resource.

In many cases, the potential plaintiffs were asymptomatic veterans of the asbestos litigation industry. They were herded through the "diagnosing process" with little regard for normal medical conventions. *See MDL 1553*, 398 F. Supp. 2d at 632. Many diagnosing doctors testified that they had never met, let alone examined the men and women that they diagnosed. *See Id.* at 633. Doctors did not

[9] Screening company abuse extends to the silica actions filed in Broward County. One plaintiff's firm filed more than half of the approximately 110 silica matters originally filed there. This firm admitted that its clients were screened by N&M, a screening company that offered to charge a larger fee for a positive diagnosis of silicosis than for negative results. Although the firm refused this arrangement, it still retained N&M. *Comans v. Am. Optical Corp.*, No. 05-002855 (Fla. 17th Cir. Ct.) (Hearing Transcript Jan. 20, 2006 at 63:9-66:14) (A19-A23). *See also*, *MDL 1553*, 398 F. Supp. 2d at 603 (noting that in "just over two years, N&M found 400 times more silicosis cases than the Mayo Clinic (which sees 250,000 patients a year) treated during the same period.").

take legitimate medical or work histories, and did not even contact those deemed to have silicosis or any other disease to communicate the diagnosis or a course of treatment. Jonathan D. Glater, The Tort Wars, at a Turning Point, N.Y. TIMES, Oct. 9, 2005 (A37-A39).

In MDL 1553, approximately 9,000 plaintiffs were diagnosed with silicosis by one of the twelve screening doctors who maintained a business relationship with the plaintiffs' counsel. *See MDL 1553*, 398 F. Supp. 2d at 580. Judge Jack concluded that "these diagnoses were about litigation rather than health care." *Id.* at 635. She went on to state:

> [a]nd yet this statement, while true, overestimates the motives of the people who engineered them. The word "litigation" implies (or should imply) the search for truth and the quest for justice. But it is apparent that truth and justice had very little to do with these diagnoses - otherwise more effort would have been devoted to ensuring they were accurate. Instead, these diagnoses were driven by neither health nor justice: they were manufactured for money.

Id.

Florida is not immune to the abuse exposed in MDL 1553. For example, one of the plaintiffs' experts in the Broward County silica litigation is an infamous screening doctor, Robert Mezey, M.D. (A26-A30). *E.g., Adams v. Am. Optical Corp.*, Pls' Notice of Filing Worksheet, Case No. 05-06355 (Fla. 17th Cir. Ct.) (identifying Dr. Mezey) (A26-30). Dr. Mezey is often "engaged by various screening companies and law firms to screen and/or diagnose individuals with pneumoconiosis for litigation rather than medical purposes." *In re Asbestos Prods. Liab. Litig. (No. VI), MDL 875* (E.D. Pa.) (Order of Feb. 17, 2006) (A36) (finding

HIPAA's confidentiality provisions inapplicable to Mezey's records due to the lack of a physician-patient relationship with persons screened for litigation purposes).

In fact, several of the physicians associated with Florida plaintiffs' silica cases, including Dr. Mezey, appear on an infamous "who's-who" list of asbestos screening doctors identified through The Manville Personal Injury Settlement Trust ("Manville Trust"), the entity created as a consequence of the Johns-Manville bankruptcy for handling asbestos claims. *See* Lester Brickman, *On The Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 35, 39-40 (2006) (explaining that in 2005, fifteen physicians were identified as being responsible for 40% of all asbestosis "diagnoses" with primary physician information submitted to the Manville Trust). For example, one Broward County silica plaintiff disclosed his association with four of the physicians appearing on the Manville Trust list of fifteen;[10] each of whom are responsible for thousands of Manville Trust claim diagnoses: Schonfeld (28,645); Levine (13,896); Rao (5,277); Mezey (4,713).

The effects of mass misdiagnoses are widespread. Judicial resources are wasted and every form of litigation, not just asbestosis and silicosis claims, is delayed as judges struggle with expanding MDL proceedings and other massed dockets. Defense costs can cripple companies, harming their shareholders and employees. Such costs also often threaten a company's viability and, hence, their ability to pay even meritorious claims. Likewise, the prospect of endless

[10] *Adams v. Am. Optical Corp.*, Pls' Notice of Filing Worksheet, Case No. 05-06355 (Fla. 17th Cir. Ct.) (identifying Drs. Schonfeld, Levine, Rao, and Mezey (A24-A35).

settlements of meritless claims may affect the willingness and ability of defendants to settle meritorious claims.

But the costs of the entrepreneurial model of litigation go beyond wasted money and delayed justice. Many healthy plaintiffs were told that they have a life threatening condition. Indeed, many received this diagnosis in the form of a letter from a law firm rather than a doctor. Some plaintiffs surely took this "diagnosis" for what it was, and simply ignored it in the tacit understanding that they were gaming the system. But others were simply exploited and suffered a serious emotional toll.[11] Moreover, some misdiagnosed plaintiffs may have abnormal x-rays that are not fully investigated. In their zeal to make a silicosis diagnosis, the doctors failed to exclude the other conditions that could result in similar radiographic findings. These misdiagnosed plaintiffs are at risk for having a treatable condition go undiagnosed and untreated. *MDL 1553*, 398 F. Supp. 2d at 636.

Instead of rewarding the multitude of silicosis lawyers who sent their clients to screening companies or the hired doctors that attested to diagnoses based solely on scarring of the lungs visible only by x-ray and in the absence of any sort of

---

[11] *See* Egilman DS, Bohme SR. *Attorney-Directed Screenings Can Be Hazardous*, AM J IND MED 45:305-207 (2004). This case report discusses a 66-year-old male maintenance worker who attended a law firm sponsored asbestos screening. He suffered from various cardiovascular and pulmonary diseases before his screening. After the screening, the law firm sent him a letter informing him that his x-ray "show[ed] markings consistent with asbestos-related disease." He was not contacted by a physician. Six months after the letter, he committed suicide. His autopsy revealed no asbestosis. His children reported that he was very concerned about asbestosis before his death. On review, two psychiatrists concluded that the screening diagnosis and his fear of dying from asbestosis were significant contributing factors of his suicide.

physical impairment, legislatures noticed. The United States Congress held hearings and state legislatures, including Florida, Kansas, Ohio, South Carolina, Tennessee and Texas passed reforms to curb abuses in silica litigation and preserve resources for the truly deserving. *See e.g.,* K.S.A. § 60-4901, *et seq*.; Ohio Rev. Code Ann. §§ 2307.71-80; 2307.84-90; 2307.901; S.C. Code Ann. § 44-135-10, *et seq*. (2009); Tenn. Code Ann. § 29-34-301, *et seq.*; Tex. Civ. Prac. & Rem. Code § 90, *et seq*.

II. THE ACT COMPORTS WITH FLORIDA COMMON LAW UNDER WHICH A PRODUCT LIABILITY CLAIM ACCRUES WHEN SOME EVIDENCE EXISTS TO DEMONSTRATE A CAUSAL RELATIONSHIP BETWEEN A PRODUCT AND A DISEASE.

The common law of Florida, like that of other states, has long recognized causes of action in negligence and strict liability under section 402a of the RESTATEMENT OF TORTS to recover damages "for physical harm . . . caused to the ultimate user or consumer" by unreasonably dangerous or defective products. In the context of claims relating to asbestos and other, like products, this Court has never read Section 402a or the general common law to recognize a claim on the basis of exposure alone, any more than it would recognize a claim for "damages" in connection with a handshake from a person with a potentially communicable disease. Indeed, the national consensus flatly rejects such a claim. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424 (1997) (discussing and rejecting emotional recovery claim based on exposure to asbestos without manifested symptoms of disease after surveying general common law principles).

Rather, as the Fourth District recognized in this case, this Court has recognized a claim for damages to recover for *disease*; and, recognizing that

asbestosis is a "creeping disease" by its nature, the Court has recognized the action "when the accumulated effects of the substance manifest themselves in a way which supplies some evidence of the causal relationship to the product." *Celotex Corp. v. Copeland*, 471 So. 2d 533, 539 (Fla. 1985). That causative diagnosis is beyond the ability of judges and lay jurors, and, thus, must be made by a medical expert. *Sims v. Helms*, 345 So. 2d 721, 723 (Fla. 1977); *Atkins v. Humes*, 110 So. 2d 663 (Fla. 1959). For an asbestosis or silicosis claim to survive directed judgment in this state, then, a plaintiff has always been required to obtain a qualified diagnosis of some actual injurious disease. The Act's physical impairment and diagnosis requirements memorialize and detail the historic, common-law standard.

To be sure, no Florida law has attempted to prohibit the filing of a lawsuit before a viable medical diagnosis confirms that a cause of action has accrued. And, because the line between the unripe and ripe claim is often difficult to perceive, any lawyer representing a client with a potential claim faces a strong incentive to file at the outset for fear of a potential lapse in the statute of limitations, if not to advance the business interests reflected in the entrepreneurial model. What results in the case of widely distributed products like asbestos and widely available elements like silica is a large volume of filings by claimants, only a portion of whom could presently claim to be the "victims" of a medically-recognized disease. Indeed, an entire industry has grown up around the consolidation and processing of these claims with very few—including those of the actual "victims"—ever reaching a trial on the merits.

In 2007, the Third District held that the Legislature had not destroyed a vested right in requiring asbestos claimants to present a competent medical diagnosis of disease. *DaimlerChrysler Corp. v. Hurst*, 949 So. 2d 279 (Fla. 3d DCA 2007). The Fourth District's decision in this case created a conflict by finding a vested right to proceed to judgment without a medical diagnosis.

Recently, the Ohio Supreme Court confronted the same question in examining that state's similar statute against a similar common law landscape. *Ackison v. Anchor Packing Co.*, 897 N.E.2d 1118 (Ohio 2008). An Ohio intermediate appellate authority had suggested a viable cause of action in the absence of actual disease; the Ohio Supreme Court found no such opinion of its own, and, after exhaustively examining authority from other states and the most recent draft of the RESTATEMENT OF TORTS, concluded that the common law had not vested a right to recover for exposure to asbestos (or like products) in the absence of a demonstrable, causatively related disease.

As detailed below, the Third District correctly held that the Legislature did not interfere with a vested right to proceed in the absence of disease. Florida's common law, like Ohio's and the federal common law recognized by the U.S. Supreme Court, has never approved a claim for exposure to a product in the absence of a disease. The Fourth District's recognition of a vested right in this case, absent any symptoms of *disease*, runs contrary to Florida law.

III. PLAINTIFFS BEAR THE BURDEN OF ESTABLISHING THAT THE ACT VIOLATES THE DUE PROCESS GUARANTEE.

In their briefing in the court below, the plaintiffs took a remarkably broad view of the standard applicable to their challenge to the Act. In particular, plaintiffs suggested that the Act should fail because the Legislature had not

undertaken a sufficiently rigorous study of the asbestos health problem and, thus, could not justify its decision to impose a gatekeeping standard at the outset of asbestos or silica litigation, regardless of whether the gatekeeping standard actually affected a substantive change to a vested right. That argument misunderstands the standard of scrutiny and is at odds with the actual legislative record. Ch. 2005-274, Preamble, Laws of Fla.

Florida's Constitution assigns the power to make laws to the Legislature and the Governor. These legislative judgments are entitled to deference and a presumption of constitutionality. Thus, when reviewing the constitutionality of a statute, the Court begins with a presumption that the statute is valid and, concomitantly, that the Legislature has not acted unreasonably or arbitrarily. *Chicago Title Ins. Co. v. Butler*, 770 So. 2d 1210 (Fla. 2000). *See also Wright v. Bd. of Public Instruction of Sumter County*, 48 So. 2d 912 (Fla. 1950) (Court presumes the legislature would not knowingly enact an unconstitutional measure). The presumption of constitutionality applies to appellate review of a statute found unconstitutional below. *In re Caldwell's Estate*, 247 So. 2d 1 (Fla. 1971).

Plaintiffs urge that the Legislature has the burden of proving the wisdom, and in turn, the constitutionality of its decision, and, further, of making an administrative record to prove it. This is wrong. Except in the rarest of circumstances, this Court resolves all doubt *in favor of* the constitutionality of a statute, *Bonvento v. Bd. of Public Instruction of Palm Beach County,* 194 So. 2d 605 (Fla. 1967), and a legislative Act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt. *Knight and Wall Co. v. Bryant,* 178 So. 2d 5 (Fla. 1965); *Biscayne Kennel Club, Inc. v. Fla. State Racing*

Comm'n, 165 So. 2d 762 (Fla. 1964) (presumption of constitutionality continues until the contrary is proved beyond all reasonable doubt).

While plaintiffs urge that the Act is presumptively unconstitutional and suggest that the Legislature is obliged to make a record defending its policy choices, that elevated level of scrutiny is applicable only to legislation drawn a suspect classification or infringing on a fundamental right, such as the substantive right to privacy. *E.g., N. Fla. Women's Health & Counseling Servs. v. State*, 866 So. 2d 612 (Fla. 2003). In those rare cases, the "State must prove that the legislation furthers a [compelling] State government interest." *Id.* at n.16. But, "[u]nder 'ordinary' scrutiny, which applies to most legislation, an act is presumptively constitutional unless proved otherwise by the challenging party." *Id.* at 625.

Plaintiffs have never alleged, much less attempted to show, that the Legislature is discriminating on the basis of a suspect classification,[12] or that the right to file suit without a medically discernable injury is a "fundamental" one in Florida. Indeed, as detailed below, that "right" did not exist at all prior to the Act. Thus, any infringement, retroactive or otherwise, with the claimed right to proceed to trial without proof of an injury should be sustained as a reasonable response to a serious crisis. By preserving the ability of all potential claimants to proceed without fear of a limitations bar and clearing the way for those with a demonstrable

[12] There is no basis for heightened scrutiny on this basis in this case, as "this Court has determined that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. *See Graham v. Ramani*, 383 So.2d 634, 635 (Fla.1980)." *N. Fla. Women's Health & Couns.*, 866 So.2d at 646 n.73; *see also B.S. v. State*, 862 So. 2d 15 (Fla. 2d DCA 2003).

disease to receive something approaching a prompt, merits-based resolution, the Legislature acted not only rationally, as it must to survive ordinary scrutiny, it acted wisely and compassionately.

IV. THE LEGISLATURE WAS JUSTIFIED IN RESPONDING TO A WELL-RECOGNIZED NATIONAL CRISIS.

The Legislature has the power under the Constitution to make a law retroactive where the law is remedial in the sense that it operates "in furtherance of the remedy already existing." *Florida Hosp. Waterman, Inc. v. Buster*, 984 So. 2d 478, 496 (Fla. 2008). Thus, this Court has held that a retroactively applicable "legislative act is invalid 'only in those cases wherein vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed, or an additional disability is established, on connection with transactions or considerations previously had or expiated.'" *Id.* at 497-98 (paraphrasing *McCord v. Smith*, 43 So. 2d 704, 708-09 (Fla. 1949)).

The right to maintain an action in strict liability despite lacking an actual measurable injury was never vested in Florida. Indeed, the right to bring any suit in strict liability was not recognized until 1976. *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976). In the years that followed, this Court has never strayed from the idea that the cause of action accrues upon the realization of a causally-related disease, which invariably requires qualified medical opinion testimony. *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. 1985).

At no point has this Court ever suggested, much less held, that a cause of action accrues before a disease can be medically identified. Instead, the Fourth District discerned the claim to exist in connection with a claim for negligent or intentional infliction of emotional distress based on holdings in cases that all

required proof of an actual injury as a precondition of proceeding. *Eagle-Picher Indus. Inc. v. Cox*, involved a plaintiff with a confirmed diagnosis of asbestosis and would, on that basis, still be permitted to proceed under the Act. 481 So. 2d 517 (Fla. 3d DCA 1985). Nothing in that decision, or in any decision of this Court, amounted to a rejection of this Court's prior holdings that a plaintiff must prove some medically established disease linked to his exposure to asbestos in order to prevail.

The Fourth District also cited this Court's decision in *Zell v. Meek*, 665 So. 2d 1048, 1054 (Fla. 1995), which clearly predates the Act. But that case did not even involve exposure to an allegedly defective product, and actually confirmed the requirement that a plaintiff establish a physical injury as a precondition of any recovery on a theory of emotional trauma. *Id.* at 1054 ("plaintiff must suffer a physical injury"). The same is true of the lower court's resort to this Court's more recent decision in *Willis v. Gami Golden Glades, LLC*, 967 So. 2d 846 (Fla. 2007). That case involved the armed robbery of a hotel guest where the fact of a violent physical impact was also established. As Chief Justice Lewis noted, "the rule reaffirmed by the majority today has been consistently applied in every district court opinion *where there has been contact or an impact*." *Id.* at 852 (Lewis, C.J., specially concurring) (emphasis added). The "contact" that would permit a claim to proceed separate and apart from a physical manifestation is an improper touching, however slight, like the physical assault that involved the touching of a gun to the plaintiff in that case.

No decision from the Court, and certainly none prior to June 20, 2005, has treated the mere exposure to a product containing asbestos or silica as a contact

that would in itself, without impairment or symptoms, sustain a claim for negligent infliction of emotional distress or, much less, a claim for damages in strict liability under the RESTATEMENT. Either claim requires, as this Court held in *Celotex*, that the exposure has had some medically recognizable effect on the person; namely, the "manifest[tation] of some disease." 471 So. 2d at 538-39.

Florida's historic position is not only logical, in that it precludes claims based on nothing more than a passing proximity to a *potentially* dangerous product, it is also supported by the current draft of the RESTATEMENT, which confirms that bodily harm is required to proceed under section 402a and defines it as "*physical impairment* to the human body and includes physical injury, illness, disease, and death." Proposed Final Draft No. 1 RESTATEMENT (THIRD) OF TORTS §4 cmt. a. The commentary accompanying the rule confirms the applicability of the general common-law rule to asbestos claims in particular:

> An unfortunate and aberrational exception to the [general tendency] of small or trivial harms [to remain unlitigated] explained in this Comment is asbestos claims by plaintiffs who suffer no clinical symptoms but who have abnormal lung X-rays, a condition known as pleural plaque. These claims exist only because of the massive number of claimants and the efficiencies of aggregating such claims to make them economically viable for litigation. Some courts have responded by requiring that an asbestos plaintiff prove the existence of clinical symptoms before sufficient bodily injury exists.

Id. Facing a nearly identical statute and common law tradition, the Ohio Supreme Court cited this commentary when it upheld that state's retroactive application of its statute, holding that neither the impairment and diagnosis requirements nor its

definition of a "competent medical authority" altered any vested right. *See Ackison*, 897 N.E.2d at 1126.

The legislative remedy was narrowly drawn and carefully chosen. By simply requiring some proof before trial of the potential viability of a claim, including evidence that the plaintiff suffers from asbestosis like the Plaintiff in *Cox*, the Legislature has not made a substantive change and has not deprived any claimant of a vested right to recover. Instead it has merely protected the rights of all claimants by clearing the way for actual victims to proceed to trial and judgment.

CONCLUSION

Amici respectfully ask this Court to reverse the Fourth District Court of Appeal's decision and find that the trial court's application of the Act to plaintiffs' claims was constitutional.

Respectfully submitted,

s/Valerie Shea
Gordon James III
Florida Bar No. 0150077
Valerie Shea
Florida Bar No. 436800
SEDGWICK, DETERT, MORAN & ARNOLD LLP
2400 E. Commercial Blvd., Suite 1100
Fort Lauderdale, FL 33308
Telephone: (954) 958-2500
Facsimile: (954) 958-2513

- and –

David J. Schenk

Texas State Bar No. 17736870
(*pro hac* pending)
JONES DAY
2727 North Harwood Street
Dallas, TX 75201-1515
Telephone: (214) 220-3939
Facsimile: (214) 969-5100

Gregory R. Hanthorn (Ga. Bar No. 323937)
(*pro hac* pending)
Amber B. Shushan (Ga. Bar No. 644730)
(*pro hac* pending)
JONES DAY
1420 Peachtree Street, N.E.
Suite 800
Atlanta, GA 30309-3053
Telephone: (404) 521-3939
Facsimile: (404) 581-8330

Attorneys for North Safety Products, Inc.

JOINED BY:

Timothy Clark
Florida Bar No. 264423
LAW OFFICES OF TIMOTHY CLARK, P.A.
888 East Las Olas Boulevard, Suite 700
Fort Lauderdale, FL 33324
Telephone: (954) 475-8803
Facsimile (954) 463-3399
Attorneys for Bacou-Dalloz Safety, Inc. f/k/a Dalloz Safety, Inc. f/k/a WGM Safety Corporation d/b/a Wilson Safety Products

Mercer K. Clarke
Florida Bar No. 131322
CLARKE SILVERGLATE & CAMPBELL
799 Brickell Plaza, Suite 900
Miami, FL 33131
Telephone: (305) 377-0700
Facsimile: (305) 377-3001
Attorneys for Clemco Industries Corporation

M. Stephen Smith
Florida Bar No. 0202541
RUMBERGER, KIRK & CALDWELL, P.A.
Brickell Bayview Centre, Suite 3000
80 S.W. 8th Street
Miami, FL 33130-3047
Telephone: (305) 358-5577
Facsimile: (305) 371-7580
Attorneys for Fairmount Minerals, Ltd.

Evelyn M. Fletcher
Florida Bar No. 0162744
HAWKINS & PARNELL, LLP
4000 SunTrust Plaza
303 Peachtree Street, NE
Atlanta, GA 30308
Telephone: (404) 614-7400
Attorneys for Gardner Denver, Inc.

Richard M. Crump
Florida Bar No. 382930
FORMAN PERRY WATKINS KRUTZ & TARDY, LLP
200 South Lamar Street
City Centre Building, Ste. 100
Jackson, MS 39201-4099
Telephone: (601) 960-8600
Facsimile: (601) 960-8613
Attorneys for Ingersoll-Rand

Edward J. Briscoe
Florida Bar No. 109691
FOWLER WHITE BURNETT, P.A.
Espirito Santo Plaza, 14th Floor
1395 Brickell Avenue
Miami, FL 33131-3302
Telephone: (305) 789-9200
Facsimile: (305) 789-9201
Attorneys for Mine Safety Appliances Company

Charles E. Reynolds, II
Florida Bar No. 776262
BUTLER PAPPAS WEIHMULLER KATZ CRAIG LLP
One Harbour Place, Suite 500
777 South Harbour Island Blvd.
Tampa, FL 33602
Telephone: (813) 281-1900
Facsimile: (813) 281-0900
Attorneys for Parmelee Industries, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2009, a copy of the foregoing was served by U.S. Mail on the following:

Joel S. Perwin
Joel S. Perwin, P.A.
169 E. Flagler Street, Suite 1422
Miami, FL 32311-1212
Appellate Counsel for Appellees/Respondents

Dino G. Galardi
David A. Jagolinzer
Case A. Dam
The Ferraro Law Firm
4000 Ponce de Leon Blvd., Suite 700
Miami, FL 33146
Trial Counsel for Appellees/Respondents

Gary L. Sasso
Matthew J. Conigliaro
Christine Davis Graves
Carlton Fields, P.A.
P.O. Box 3239
Tampa, Florida 33601-3239
Attorneys for Appellants/Petitioners

Frank Cruz-Alvarez
Shook, Hardy & Bacon, L.L.P.
201 South Biscayne Blvd., Suite 2400
Miami, FL 33131
Attorneys for *Amici Curiae* Associated Industries of Florida, et al.

s/Valerie Shea
Valerie Shea

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is submitted in Times New Roman 14-point font and complies with the font requirements of Rule 9.210.

s/Valerie Shea
Valerie Shea