IN THE THIRD DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

NORTHROP GRUMMAN SYSTEMS CORPORATION f/k/a NORTHROP GRUMMAN CORPORATION, as successor in interest to NORTHROP CORPORATION and as successor in interest to GRUMMAN CORPORATION, Appellant, vs. ROSA-MARIA F. BRITT, as Personal Representative of the Estate of DENNIS BRITT, Appellee.	CASE No.: 3D16-2583 L.T. Case No.: 2012-030637-CA-01

AMICI CURIAE BRIEF OF FLORIDA JUSTICE REFORM INSTITUTE AND COALITION FOR LITIGATION JUSTICE, INC. IN SUPPORT OF APPELLANT NORTHRUP GRUMMAN SYSTEMS CORPORATION

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INTEREST OF *AMICI CURIAE*

The Florida Justice Reform Institute and Coalition for Litigation Justice, Inc. ("Coalition")[1] file this brief to urge the Court to establish a requirement of dose assessment for any expert supporting asbestos causation.

STATEMENT OF THE FACTS

Amici adopt Appellant's Statement of the Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Dr. Finkelstein's reliance on the "totality of exposures" – to infer that *any* possible exposure within that "totality" is causal – embraces a theory of asbestos causation commonly referred to as the *any exposure* theory. This expert freely admitted that he saw no reason to determine *how much* exposure plaintiff received from any given worksite, since he believes and told the jury that any amount of exposure is part of the "total" exposures in Mr. Britt's history and must therefore be considered causative.

In real life, this theory can only be described as unscientific – we are all exposed to many toxins every day, in small amounts, with no harm whatsoever. Sunlight, radon, many foods, even alcohol all contain toxins but are a regular part

[1] The Coalition includes Century Indemnity Company; San Francisco Reinsurance Company; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

of our normal world. All of this illustrates the prime principle of toxicology – the dose makes the poison. Nothing is toxic unless the exposure is high enough.

In asbestos litigation, however, variations of the dose-ignoring *any exposure* fallacy, until the last decade, had found a fertile breeding ground. In the venues where courts have not yet rejected it, that theory supports the most speculative of causation cases. Many cases today involve not the high, dusty-trades jobs of old in shipyards and asbestos factories, or even the more recent insulator jobs. Instead, today's docket is full of cases alleging disease from removing a few brakes, walking by someone removing gaskets, stripping insulation off wire, or driving a fork lift under an insulated pipe. Mr. Britt's case is an even newer and more speculative type of claim – as an insurance salesman who now has mesothelioma he "must have" encountered asbestos while visiting various facilities. The claim is based on nothing more than mere presence in a building with asbestos insulation, accompanied by vague testimony about "dust."

The Coalition, along with other organizations supporting rational asbestos rules, has addressed the *any exposure* theory and its variants through *amicus* briefs in many appellate courts around the country. Those courts include the federal Ninth Circuit Court of Appeals and the supreme and appellate courts of Virginia, California, Texas, Georgia, New York, Maryland, and Pennsylvania. Those courts,

almost without exception, have rejected testimony that relies on anecdotal stories of "exposure" and eschews any form of dose assessment.[2]

Amici request that the Court provide reasonable and scientifically-based guidance to prevent Florida asbestos litigation from descending into cases with no proof of actual causation other than the expert's say-so. The starting point is to eliminate the use of any form of expert testimony that does not prove and rely on an estimated or scientifically assessed dose. "Any exposure will do" is not a scientific proposition or a legally supportable one. Likewise, testimony that a particular plaintiff breathed unquantified "dust" is not sufficient.

Requiring proof of a dose sufficient to cause disease is not a hard or new standard – it is simply the standard of proof that applies in all toxic tort cases and is Florida law. This Court should hold that the standard applies to asbestos cases.

ARGUMENT

I. A Scientific Quantification of Dose Is Essential in Any Toxic Tort Case.

The most critical flaw in Dr. Finkelstein's "totality" approach – the same or a highly similar theory as *any exposure* or *cumulative exposure* testimony – is that he assumes that all parts of the "totality" are equally causative and the experts do

[2] The highest courts of Virginia, Texas, Georgia, New York, and Pennsylvania, and the Sixth and Ninth Circuit Courts of Appeal have all issued opinions rejecting any exposure or similar testimony that does not account for the actual dose of the plaintiff. California's Supreme Court has yet to review the theory, and Maryland's Court of Appeals took a middle ground based on a causation approach (the *Lohrmann* standard) not applicable in Florida. The cases are discussed *infra*.

not need to demonstrate whether a particular exposure is actually trivial or de minimis and not reasonably capable of causing asbestos disease. Dr. Finkelstein and the other experts blatantly ignore the most important principle of toxicology: "the dose makes the poison." Or put another way, no substance is toxic to the human body unless the dose is sufficient.[3]

The fundamental "dose" requirement is set forth in the Federal Judicial Center's *Reference Manual on Scientific Evidence, Reference Guide on Toxicology* 403 (2d ed. 2000), and even more concretely in one of the best medical descriptions of the application of toxicology to litigation, by Dr. David Eaton of the University of Washington. As Professor Eaton's article explains: "***Dose is the single most important factor*** to consider in evaluating whether an alleged exposure caused a specific adverse effect."[4]

Asbestos, like any toxin, requires some level of overall dose to produce disease. The human body is capable of defending itself against a whole array of

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[3] Federal Judicial Center, *Reference Manual on Scientific Evidence Third Edition* 403 (2011) (the "fundamental tenet" of toxicology).

[4] David L. Eaton, *Scientific Judgment and Toxic Torts – A Primer In Toxicology For Judges and Lawyers*, 12 J.L. & Pol'y 5, 11 (2003) (emphasis added). Many courts have looked to the Eaton article in recent years to apply the dose principle and reject various forms of the any exposure theory. *See Watkins v. Affinia Group,* 54 N.E.3d 174, 179 (Ohio Ct. App. 2016); *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233 (11th Cir. 2005); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007); *Adams v. Cooper Indus., Inc.*, 2007 WL 2219212 (E.D. Ky. July 30, 2007); *Henrickson v. ConocoPhillips Co*., 605 F. Supp. 2d 1142 (E.D. Wash. 2009).

small, daily exposures to known carcinogens and other toxins. Disease results when those exposures reach a level that overwhelms our defenses, called the "threshold" point. Aspirin, alcohol, sunlight, even known poisons like arsenic are only poisonous if the dose is high enough. At lower doses, they are harmless or, in some instances, beneficial.

As Professor Eaton notes, this dose principle holds true for carcinogens like asbestos as much as it does for any other toxin:

> Most chemicals that have been identified to have "cancer-causing" potential (carcinogens) do so only ***following long-term, repeated exposure for many years. Single exposures or even repeated exposures for relatively short periods of time (e.g., weeks or months) generally have little effect*** on the risk of cancer, unless the exposure was remarkably high and associated with other toxic effects.

Id. at 9 (emphasis added). Airplane passengers receive doses of radiation above background at high elevations, but scientists do not ascribe cancer to those flights.[5] Foods often contain low levels of natural carcinogens not known to cause any harm. Science has cleared even a lifetime of such "exposures" through the use of epidemiology studies that have found no link between such low-level exposures and cancer. This finding is true even when the substance is without question a

[5] *See* Health Physics Soc'y, *Radiation Exposure During Commercial Airline Flights* (2014); Health Physics Soc'y, *Airport Screening Fact Sheet* (2011) (compiling studies).

carcinogen at high doses.[6] To claim that every such exposure is "cumulative" of the "totality" of an overall lifetime exposure and therefore a cause of disease is nonsensical, not found in any published literature, and contrary to established toxic-tort causation law.

The principles that apply to other carcinogens apply to asbestos as well. Mesothelioma and other asbestos diseases, for instance, are dose-dependent – disease typically occurs only at sufficient doses and increases as the dose increases.[7] The human body has many mechanisms for defending against minor exposures, both for asbestos and for other carcinogens.[8] Thus, humans are regularly exposed to low levels of asbestos, either naturally-occurring or from limited occupational exposures, without incurring disease.[9]

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[6] Epidemiology is universally recognized as the "most desirable evidence" for assessing causation in the science of toxicology. Michael Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of the Agent Orange and Bendectin Litigation*, 86 Nw. U. L. Rev. 643 (1992); *see also id*. at 648.

[7] *See* Eaton, *supra,* at 13 ("Most chemicals that have been identified to have 'cancer-causing' potential (carcinogens) do so only following long-term, repeated exposure for many years.").

[8] *See id*. at 32 (describing some of the body's protective mechanisms).

[9] http://www.cancer.gov/about-cancer/causes-prevention/risk/substances/radon/radon-fact-sheet; *see* Eaton, *supra,* at 25, 29 (discussing accumulation of dioxin in the human body).

For this reason, dozens of courts have required some form of scientific dose estimate before an expert can opine on causation.[10] Plaintiffs' causation experts like Dr. Finkelstein, however, studiously avoid developing any dose estimate because (1) they cannot come up with enough evidence of exposure even to estimate any meaningful dose; or (2) if there were sufficient evidence, the estimated dose would be far below even today's OSHA standard and consistent with background. It is highly likely that even if Mr. Britt encountered any asbestos fibers in his occasional plant excursions, his dose there was no different than the lifetime dose he received simply from living in a world with asbestos in the air.

Dr. Finkelstein never proved otherwise. This is clear scientific error, and even more blatant legal error. The *any exposure* approach is a shell game designed to hide the lack of meaningful exposure from experiences such as a salesman walking through a plant.

II. The *Any Exposure* Theory by Any Formulation Is No Longer Accepted Testimony in Most Courts.

Dozens of courts have rejected the *any exposure* theory (along with other testimony that does not provide a meaningful dose assessment) as applied in asbestos and other contexts.[11] The determinations of those courts, and the manner

[10] Appellant's brief and the numerous decisions rejecting any exposure theory below contain cites to the many cases requiring proof of dose.

[11] For a survey of any exposure opinions and issues, see Mark Behrens & William Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation*

in which the national law has flagged this testimony as insufficient and unscientific, can help this Court understand why neither *any exposure* testimony nor Dr. Finkelstein's "totality" version of that approach should be part of Florida law. All versions of this approach ignore the scientific reality that small doses are typically *not* causative. The experts must utilize a rational and principled method for distinguishing between inconsequential and consequential exposures.

The *any exposure* theory is used in today's litigation to support cases based on pure guesswork. Once the original insulation defendants in asbestos litigation went into bankruptcy, the targets of the litigation became thousands of solvent building owners, product manufacturers, and end users of asbestos-containing products often bound in hard resins or otherwise not readily friable. More recently, the litigation has shifted to ever more tangential exposures, often involving "passers-by" who merely walk through an area involving asbestos work; the "take-home" exposure cases involving low workplace exposures resulting in even lower exposures to spouses in home settings; and increasingly inconsequential workplace

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and Expert Testimony, 37 Sw. U. L. Rev. 479 (2008); William Anderson et al., *The "Any Exposure" Theory Round II – Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008*, 22 Kan. J. L. & Pub. Policy 1 (2012); William L. Anderson & Kieran Tuckley, *The Any Exposure Theory Round III: An Update on the State of the Case Law 2012-2016*, Def. Counsel J. 264 (July 2016); Joseph Sanders, *The 'Every Exposure' Cases and the Beginning of the Asbestos Endgame*, 88 Tul. L. Rev. 1153 (2014).

and hobby exposures. There is no competent epidemiology supporting causation in these cases. They are supported only by the speculative *any exposure* testimony.

This case – Mr. Britt's visits to a plant without performing any asbestos-related work – falls into the third and most speculative wave. In this case, as in others recently appearing on the docket, plaintiffs in asbestos litigation are now claiming that merely being present in a building containing asbestos causes disease.[12] The *any exposure* theory and its variants are the engine driving this wave of ultra-low exposure litigation – there is *no credible science* supporting causation for such low and speculative exposures. The experts often freely admit that they have no epidemiological studies documenting that these exposures have produced an excess of mesothelioma or any other asbestos disease. They rely instead on entirely theoretical constructs such as the notion that "there is no known safe dose of asbestos" and the linear no-threshold theory of regulatory risk identification.[13]

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[12] Mr. Britt testified only in the vaguest terms to any form of insulation work he actually encountered at the two plants, with no clear proximity or duration of an exposure. His references to "dust" cannot be distinguished from ubiquitous, non-asbestos and non-harmful dust that would have been present in many large industrial facilities of the time.

[13] Regulatory bodies often state that there is no known safe dose to justify setting protective limits far below the levels of proven disease occurrence as documented in epidemiology studies. They often utilize the linear no-threshold theory to do so – that theory posits that the dose-disease regression line runs straight down to zero, even though there is no data at the lower exposure end supporting that assumption.

In the face of these developments, beginning around 2005, defendants began to file motions attacking the *any exposure* theory – or the *single fiber* theory ("a single fiber of asbestos can cause mesothelioma") as it was then called. The Sixth Circuit Court of Appeals rejected such testimony in the *Lindstrom* case in that year.[14] The same year, a Pennsylvania trial judge – in what later became *Betz v. Pneumo Abex LLC*, 44 A.3d 27 (Pa. 2012), on appeal – issued a thorough and thoughtful opinion dissecting both the logical and scientific fallacies in "each and every exposure" testimony that failed to consider the actual dose from lifetime automotive mechanic work.[15] In short order, over the next two years courts excluded or criticized a number of key plaintiff experts who failed to assess the dose, including the Supreme Courts of Pennsylvania and Texas and lower courts in both of those states plus Washington state and Delaware.[16]

See Betz v. Pneumo Abex LLC, 44 A.3d 27, 49 n.25 (Pa. 2012) (citing cases rejecting linear no-threshold approach to support causation).

[14] *See Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005).

[15] *See In re Toxic Substances Cases*, 2006 WL 2404008 (Pa. Ct. Com. Pl. Allegheny County Aug. 17, 2006), *aff'd sub nom. Betz v. Pneumo Abex, LLC,* 44 A.3d 27 (Pa. 2012).

[16] *See Gregg v. V-J Auto Parts Co.,* 943 A.2d 216 (Pa. 2007); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007); *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304 (Tex. App. 2007); Transcript of Record at 144-45, *Anderson v. Asbestos Corp*., No. 05-2-04551-5SEA (Wash. King County Super. Ct. Oct. 31, 2006); *In re W.R. Grace & Co*., 355 B.R. 462 (Bankr. D. Del. 2006).

After these early rejections, plaintiffs' experts learned not to testify based on the patently extreme *single fiber* theory – and instead began to testify that "each and every exposure above background is a substantial factor in causing mesothelioma." The shift in language, intended to dodge court rulings, did not change the outcome – the two approaches are grounded on a failure to assess the dose, and courts continued to exclude such testimony. Between 2008 and 2010, the Sixth Circuit Court of Appeals again rejected *any exposure* testimony, joined by another Pennsylvania trial court, a second Washington state court, and another Texas appellate court.[17]

By the end of 2013, over 20 state and federal courts had issued opinions criticizing and rejecting dose-less causation theories as the basis for expert testimony or as insufficient evidence in asbestos litigation. The new courts adding their opinions included Georgia's intermediate appellate court, the Supreme Court of Virginia, the federal court for the District of Columbia, another Texas appellate court, the Sixth Circuit again, a Mississippi trial court in one of the most favorable plaintiff jurisdictions in the country, and two federal judges in Utah.[18]

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[17] *See Martin v. Cincinnati Gas & Elec. Co*., 561 F.3d 439 (6th Cir. 2009); *Free v. Ametek*, 2008 WL 728387 (Wash. Super. Ct. King County Feb. 28, 2008); *In re Asbestos Litig. (Certain Asbestos Friction Cases Involving Chrysler LLC),* 2008 WL 4600385 (Pa. Ct. Com. Pl. Phila. County Sept. 24, 2008); *Smith v. Kelly-Moore Paint Co., Inc.,* 307 S.W.3d 829 (Tex. App. 2010).

[18] *See Butler v. Union Carbide Corp.*, 712 S.E.2d 537 (Ga. App. 2011); *Ford Motor Co. v. Boomer*, 736 S.E.2d 724 (Va. 2013); *Wannall v. Honeywell Int'l, Inc*.,

The string of opinions did not end there. In the last three years, at least *seventeen more courts* have rejected *any exposure* and similar forms of testimony. Those opinions include two from the Ninth Circuit Court of Appeals, one rejecting *any exposure* testimony outright and the other reversing an $11 million verdict in part because the judge did not critically examine the theory; another Sixth Circuit opinion; the Georgia Supreme Court; the Texas Supreme Court for the second time; an Ohio appellate court; eight federal court decisions from five different states; and most recently the New York intermediate court of appeals in the just-issued *Juni* opinion.[19] Appellants' brief highlights the findings of the *Juni* court.

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292 F.R.D. 26 (D.D.C. 2013), *aff'd*, 775 F.3d 425 (D.C. Cir. 2014); *Moeller v. Garlock Sealing Tech., LLC*, 660 F.3d 950 (6th Cir. 2011); *Smith v. Ford Motor Co.*, 2013 WL 214378 (D. Utah Jan. 18, 2013); *Anderson v. Ford Motor Co.*, 950 F. Supp. 2d 1217 (D. Utah 2013).

[19] *McIndoe v. Huntington Ingalls Inc.,* 817 F.3d 1170 (9th Cir. 2016); *Estate of Barabin v. AstenJohnson, Inc.,* 740 F.3d 457 (9th Cir. 2014); *Stallings v. Georgia-Pacific Corp.*, 2017 WL 87023 (6th Cir. Jan. 10, 2017); *Scapa Dryer Fabrics v. Knight*, 788 S.E.2d 421 (Ga. 2016); *Georgia-Pacific Corp. v. Bostic*, 439 S.W.3d 332 (Tex. 2014); *Watkins v. Affinia Group,* 54 N.E.3d 174 (Ohio Ct. App. 2016); *Comardelle v. Pa. Gen. Ins. Co.,* 76 F. Supp. 3d 628 (E.D. La. 2015); *Sclafani v. Air & Liquid Sys. Corp.*, 2013 WL 2477077 (C.D. Cal. May 9, 2013); *Smith v. Ford Motor Co*., 2013 WL 214378 (D. Utah Jan. 18, 2013); *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841 (E.D.N.C. 2015); *Vedros v. Northrup Grumman Shipbuilding, Inc.*, 119 F. Supp. 3d 556 (E.D. La. 2015); *Davidson v. Georgia Pacific LLC,* 2014 WL 3510268 (W.D. La. July 14, 2014), *vacated and remanded on other grounds*, 819 F.3d 758 (5th Cir. 2016); *Crane Co. v. DeLisle*, 206 So. 3d 94 (Fla. 4th DCA 2016); *Suoja v. Owens-Illinois, Inc.,* 2016 WL 5660299 (W.D. Wis. Sept. 30, 2016); *In re New York City Asbestos Litig.* (*Juni v. A.O. Smith Water Prods.)*, 2017 WL 778358 (N.Y. App. Div. Feb. 28, 2017).

Several of these opinions rejected yet another shift in plaintiffs' experts' terminology. Around 2013 the experts who were getting excluded began to claim that they were *not* testifying that "each and every exposure" was a cause, but only that "*this* plaintiff's exposures cumulatively over his lifetime (but not background) were the cause." This new phrasing is in all relevant aspects the same as Dr. Finkelstein's view that all of Mr. Britt's exposures in "totality," taken together, constitute the cause of his disease, no matter how small or inconsequential any of those exposures from one site or product might have been. Most of these experts refer to this meaningless shift in terminology as the *cumulative exposure* theory.

Several courts have recognized that this shift in language is nothing more than a litigation tactic, not a genuinely different theory. Those courts have rejected *cumulative exposure* testimony as unscientific and not grounded in any dose assessment. *See In re New York City Asbestos Litig.* (*Juni v. A.O. Smith Water Prods.)*, 2017 WL 778358 (N.Y. App. Div. Feb. 28, 2017); *Yates v. Ford Motor Co.*, 113 F. Supp. 3d 841 (E.D.N.C. 2015).

Florida has not been silent during this progression. A Florida trial court first joined in rejecting *any exposure* testimony in *Daly v. Arvinmeritor, Inc*., 2009 WL 4662280 (Fla. Cir. Ct. Broward County Nov. 30, 2009), holding that *any exposure* testimony would eviscerate Florida's causation standard:

> Dr. Frank's testimony was insufficient as a matter of law, because his theory that "any exposure above background" could cause

> mesothelioma ***would eviscerate the standard established by Florida law, to wit,*** **a substantial contributing factor.** Dr. Frank's testimony appears to disregard the Legislature's specific inclusion of the word "substantial" and treats all exposures as the same. ***His view cannot be consistent with the intention of the Florida Legislature in specifically including the word "substantial"***, and therefore the court thus finds plaintiffs did not prove specific causation. Accordingly, ***they did not prove that Abex products proximately caused Lynda Daly's injury***. This is, of course, a necessary component to plaintiffs' claims. Without it plaintiffs cannot succeed as a matter of law.

Id. at 3 (emphasis added). Last November, the Fourth DCA forcefully rejected *any exposure* testimony in *Crane Co. v. DeLisle*, 206 So. 3d 94 (Fla. 4th DCA 2016):

> [The expert] did not know of any study which supported his "every exposure" conclusion, nor did he think such a study could be done…. The opinion that every asbestos exposure level above background level is a substantial contributing factor ***has been rejected repeatedly by courts as insufficiently supported by data or testing*** to satisfy *Daubert.*

Id. at 104, 105 (emphasis added). To date, no Florida appellate court to *amici's* knowledge has approved of *any exposure* testimony – including the *cumulative exposure* or *the totality of exposures* formulations – in asbestos litigation.[20]

The Florida standard for expert review is somewhat in flux given the legislature's adoption of the *Daubert* standard coupled with the Florida Supreme

[20] A Florida federal district court recently permitted testimony under the any exposure approach, but the decision – along with others like it – did not perform anything close to an adequate *Daubert* or *Frye* review. Instead, the judge relied heavily on citations to the ipse dixit statements of the experts themselves with no investigation as to the reliability or general acceptance of their "weight of evidence" claim. *See Waite v. Aii Acquisition Corp.*, 194 F. Supp. 3d 1298 (S.D. Fla. 2016), *appeal filed*.

Court's rejection of that standard "to the extent it is procedural." But the choice between *Daubert* and *Frye* does not matter where the *any exposure* theory is involved. Many of the above decisions were under a *Frye*-type standard, others were *Daubert*-based, and many others were based on the insufficiency of the evidence. The *any exposure* theory, under any standard, is unscientific, illogical, and not found in the published literature.

Today, based on the rulings above, *any exposure* testimony utilizing the same foundations, methodology, and conclusions as Dr. Finkelstein's "totality of the exposures" opinion is insufficient or inadmissible in the Sixth Circuit (under Ohio and Kentucky law); the Ninth Circuit; the District of Columbia federal courts; the highest courts in Virginia, Texas, New York, and Georgia[21]; and in many state and federal courts in Washington, Illinois, Utah, Nevada, California,

[21] Pennsylvania and California are in flux. Pennsylvania's Supreme Court has rejected any exposure testimony, broadly and in clear terms, at least three times. *See Betz v. Pneumo Abex LLC*, 44 A.3d 27 (Pa. 2012); *Gregg v. V-J Auto Parts Co.,* 943 A.2d 216 (Pa. 2007) (the theory is a "fiction"); *Howard ex rel. Estate of Ravert v. A.W. Chesterton, Inc.,* 78 A.3d 605 (Pa. 2013). After a dramatic shift in the makeup of the court in the last election, the court approved a version of *any exposure* testimony in *Rost v. Ford Motor Co*., 151 A.3d 1032 (Pa. 2016), in apparent disregard of that state's stare decisis rule, and in an attempt to narrow the *Betz* holding to a point of uselessness. It remains to be seen how the theory will fare in Pennsylvania under these competing opinions. California courts have issued mixed opinions at both the state and federal level, even though the Ninth Circuit has rejected the theory and the California Supreme Court has not issued a determination on it.

Mississippi, Louisiana, Ohio, Wisconsin, North Carolina, and elsewhere. It is also inadmissible in Florida – as the Fourth DCA held in *DeLisle*.[22]

III. Dr. Finkelstein's Testimony Is on All Fours with the Rejected, "No Dose Needed" Form of Causation Theory.

Like the other experts who have been excluded before him, Dr. Finkelstein has done nothing to address the flood of decisions above rejecting expert testimony claiming causation without even estimating what the plaintiffs' level of exposure was. His testimony stands on the same foundations as *any exposure* theory asserted and rejected across the nation – the claim that there is "no safe dose;" the illogical assertion that any exposures above background (but not background) are causative; and the completely circular assertion that if mesothelioma exists it must be the result of any identifiable exposure to asbestos. And Dr. Finkelstein's approach has the same end result – every workplace exposure, no matter how

[22] In the last few years, some courts have chosen to allow any exposure testimony. Some of those opinions involve causation law not applicable in Florida. *See, e.g., Payne v. CSX Transp.,* 467 S.W.3d 413 (Tenn. 2015) (ruling under FELA's more generous causation standard). Other decisions have been reversed (*e.g*., the Pennsylvania Supreme Court reversed the intermediate *Betz* court approval of testimony). Some courts simply and erroneously declined to apply the opinions rejecting any exposure testimony to the "new" cumulative exposure approach, in the process letting the change in name trump sound science. *See, e.g., Rost v. Ford Motor Co*., 151 A.3d at 1045-46. Others have failed to conduct any inquiry into the support for the expert's testimony, electing instead simply to cite to the expert himself. *See, e.g*., *Neureuther v. Atlas Copco Compressors,* 2015 WL 4978448, at *4 (S.D. Ill. Aug. 20, 2015) (citing only to expert's own claims). These are not persuasive opinions, and the far better reasoned ones reject an approach to toxic tort causation that omits the critical dose finding.

small, is captured either by "each and every exposure" or by "the totality of this plaintiff's exposures." Dr. Finkelstein cannot articulate any principled basis for excluding trivial or inconsequential workplace exposures, because without a dose assessment of the work at issue he has to conclude that all exposures are substantial and consequential.

In the end, the *cumulative* or *totality of exposures* version of this testimony conflates a recognized principle – that actual mesothelioma is produced eventually by a cumulative dose resulting from multiple heavy exposures – with the far different notion that every bucket of water thrown into the ocean must be considered cumulative. The theory ignores the common background of exposures we all receive without harm. The many rainstorms preceding Hurricane Katrina did not flood New Orleans, even though they were "cumulative" in some sense of the water in the rivers and levees. Dragging inconsequential exposures into this notion of *cumulative* is, again, not found in any published literature and is a highly unscientific approach to causation.

This case illustrates nicely why the *any exposure* approach makes nonsense out of asbestos litigation. Despite Plaintiff's attempts (in the pleadings below and likely in their opposition brief as well) to exaggerate all the supposed "exposures" Mr. Britt had while simply walking through plants, he was never exposed in proximity to any large amounts of friable material during application or removal.

He does not fit within *any* epidemiological cohort known to incur mesothelioma from asbestos exposures. Without a dose assessment, Plaintiff could manufacture a case in virtually any circumstance by claiming asbestos was nearby and the worksite was dusty.

Multiple courts have rejected the justifications plaintiffs' attorneys often assert to support *any exposure* testimony – those rationales cannot stand up under a legitimate *Daubert* or *Frye* scrutiny. The key rationales are analyzed and rejected in the many cases discussed above, and particular in the *Yates, Juni, Betz, Butler,* and Florida *DeLisle* opinions. The justifications for *any exposure* testimony are smokescreens designed to cover up the complete lack of evidence of causation from exposures like Mr. Britt's. As only one example, this case, more than usual, is built on claims of mere dust in the environment, but several courts have already explained how "dust" even from actual asbestos work cannot substitute for a competent dose assessment.[23] The Court can use this opportunity to confirm that in asbestos litigation – as in all other types of toxic tort litigation – a plaintiff's

[23] *See, e.g., Sterling v. P&H Mining Equip.,* 113 A.3d 1277, 1282 (Pa. Super. 2015) (plaintiff testimony that he "saw dust" insufficient with no proof that dust contained asbestos, multiple potential other sources of dust in industrial facility, no testimony as to distance from dust, etc.); *Yates*, 113 F. Supp. 3d at 853 (critiquing and rejecting expert's reliance on "visible dust" as a basis for causation finding); *Borg-Warner*, 232 S.W.3d at 774 (testimony re "clouds" of dust insufficient because "we do not know the contents of that dust, including the approximate quantum of fibers to which [plaintiff] was exposed.").

experts must assess and establish a causative dose, not mere "dust" on clothes or in the environment.

At bottom, experts like Dr. Finkelstein are abdicating their responsibility. If experts cannot help the jury to make the determination as to how much exposure in the workplace is enough to be causative, then the jury is helpless to decide that critical issue on its own. The exposure and causation experts in a case like this need to take on the hard question of separating trivial and inconsequential exposures (e.g., walking around a plant) from truly causative exposures. Dr. Finkelstein and the other *any exposure* experts instead testify that *they* cannot exclude anything so the jury has to sort it out. *Any exposure* testimony – or, in this instance, the "totality of exposures" testimony – does not serve any legitimate purpose and should have been excluded.

CONCLUSION

Asbestos litigation should be fair and reasonable to all parties concerned – to plaintiffs who in fact have substantial and causative exposures, and to defendants whose buildings and products had nothing to do with asbestos disease. The *any exposure* theory completely skews the fairness of this litigation. *Amici* request that the Court follow the Florida state court *Daly* and *DeLisle* decisions, along with the large majority of cases from other jurisdictions, to exclude testimony without a competent dose assessment from asbestos cases in Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210

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

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