STATE OF NEW YORK
COURT OF APPEALS

IN RE: NEW YORK CITY ASBESTOS LITIGATION

ELIZABETH HOLDAMPF and JOHN HOLDAMPF

Plaintiffs-Respondents,

-against-

A.C. & S., INC., et al.,

Defendants

Index No.: 118971/01
(Sup. Ct., NY County)

Docket No: 3478/04
(Appellate Div. First Dep't)

-and-

THE PORT AUTHORITY OF NEW YORK & NEW JERSEY,

Defendant-Appellant

# *AMICI CURIAE* BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AMERICAN CHEMISTRY COUNCIL, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF DEFENDANT-APPELLANT

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**STATEMENT OF INTEREST**

The Coalition for Litigation Justice, Inc. ("Coalition") was formed by insurers as a nonprofit association to address and improve the toxic tort litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future toxic tort litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[1] The Coalition files *amicus curiae* briefs

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[1] The Coalition for Litigation Justice, Inc. includes the following: ACE-USA companies, Chubb & Son, a division of Federal Insurance Company; CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General Reinsurance Corp., Liberty Mutual Insurance Group, Everest Re, and the Great American Insurance Company.

in important cases before state courts of last resort and the United States Supreme Court that may have a significant impact on the toxic tort litigation environment.

The National Federation of Independent Business Legal Foundation, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 600,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a $504 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $173 billion in direct written premiums. They account for 50.2% of all personal auto premiums written in the United States, and 37.8% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the U.S. property and casualty insurance industry. In 2003, PCI members accounted for 35.7% of the homeowners' insurance premiums in New York, 56.3% of the personal automobile insurance policies issued in New York and wrote $11,768,235,000 of direct written premiums in New York. Fifty-three PCI members are domiciled in New York. In light of its involvement in New York, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

The Chamber of Commerce of the United States ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the

Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 1000 *amicus curiae* briefs in state and federal court.

## STATEMENT OF FACTS

*Amici* adopt the Statement of Facts of Defendant-Appellant The Port Authority of New York and New Jersey ("Port Authority").

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The subject claim must be considered against the background of the current asbestos litigation environment and the recent increase in silica litigation. Both asbestos and silica claims principally arise from occupational exposures that could give rise to substantial new litigation if the broad new duty rule advocated by plaintiffs is adopted.

The United States Supreme Court has said that this country is in the midst of an "asbestos-litigation crisis," *Amchem Prods., Inc. v. Windsor* 521 U.S. 591, 597 (1997), as a result of the "elephantine mass" of claims that have been filed. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). Claims continue to pour in at an extraordinary rate. Over seventy employers have been forced into bankruptcy. Due to these bankruptcies, payments to the sick are threatened.[2] More than 8,500 defendants have been named in the litigation.

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[2] *See In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 751 (E.D.N.Y. & S.D.N.Y. 1991) ("Overhanging this massive failure of the present system is the reality that

(Footnote continued on next page)

Recently, there has been a marked increase in litigation against industrial sand companies, respirator (dust mask) manufacturers, and makers of other protective safety equipment. *See* Mark A. Behrens et al., *Silica: An Overview of Exposure and Litigation in the United States*, 20:2 Mealey's Litig. Rep.: Asbestos 33 (Feb. 21, 2005).[3] These lawsuits are primarily brought by workers who allegedly developed silicosis after being occupationally exposed to silica. Some plaintiffs' lawyers appear to have modified their "asbestos litigation kits" to bring silica claims; some claims are even asbestos "re-treads" - brought by claimants that have already obtained recoveries for asbestos exposure. *See* David Hechler, *Silica Plaintiffs Suffer Setbacks: Broad Effects Seen in Fraud Allegations*, Nat'l L.J., Feb. 28, 2005, at 18 ("One of the most explosive revelations that

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there is not enough money available from traditional defendants to pay for current and future claims. Even the most conservative estimates of future claims, if realistically estimated on the books of many present defendants, would lead to a declaration of insolvency - as in the case of some dozen manufacturers already in bankruptcy."), *vacated*, 982 F.2d 721 (2d Cir. 1992); *see also* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331, 333 (2002); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

[3] *See also* Kelly Barron, *Bonanza or Boondoggle? Plaintiffs' Lawyers Hope Silica Could be the Next Asbestos*, 28:9 Crain's Chi. Bus. 35 (Feb. 28, 2005), *available at* 2005 WLNR 3322581; Roy T. Atwood et al., Commentary, *In Silica Litigation, The Numbers Alone Dictate Careful Scrutiny of Injury and Causation*, 26:2 Andrews Asbestos Litig. Rptr. 12 (Dec. 4, 2003).

has emerged from the [federal silica MDL proceeding in the Southern District of Texas] is that at least half of the approximately 10,000 plaintiffs in the silica MDL had previously filed asbestos claims.") Discovery in the MDL litigation has established that many of the 10,000 diagnoses were fraudulently prepared. *See* Jerry Mitchell, *Silicosis Screening Process Irks Judge*, Clarion-Ledger, Mar. 6, 2005, at A1, *available at* 2005 WLNR 3546204 (explaining that U.S. District Judge Janis Graham Jack used the word "fraudulent" to describe the process that led to the diagnosis of many of the MDL plaintiffs); Mary Alice Robbins, *Judge In Silicosis Suits Critical of Plaintiffs' Counsel*, 21:3 Tex. Law. 1 (Mar. 21, 2005).

It is against this background that the instant case must be considered. Here, this Court must decide whether an employer may be held liable for a non-employee spouse's personal injury from "secondary exposure" to asbestos. The appeal involves injuries allegedly sustained by the plaintiff as a result of laundering her husband's asbestos-contaminated clothes during the thirty-year period he worked for the Port Authority.

The issue of employers' liability for secondary exposures to substances emitted in the workplace is an emerging issue in asbestos litigation. In January, the Georgia Supreme Court held in *CSX Transportation, Inc. v. Williams*, 608 S.E.2d 208, 210 (Ga. 2005), that "Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at

locations away from the workplace." The appeals of these two cases seeking expanded duties for employers, closely in succession, provides evidence that the plaintiffs' asbestos bar is pursuing secondary exposures as a potential "next wave" in the litigation.

A broad new duty requirement for employers could allow plaintiffs' lawyers to begin to name countless scores of employers directly in asbestos, silica and other personal injury suits. The impact would be to exacerbate the current asbestos litigation "crisis" and augment silica as well as other claims.

Furthermore, imposition of a broad new duty rule for employers would bring about a perverse result - non-employees with secondary exposures would have *greater rights* to sue and potentially far greater recoveries than employees. Namely, secondarily exposed non-employees could obtain recoveries for noneconomic damages, such as pain and suffering, and possible punitive damages; neither of these awards are generally available to injured workers under New York's workers' compensation law.

If this Court were to create a duty on employers with respect to non-employees, the decision would have significant negative consequences for employers in New York and beyond when future state courts are asked to permit non-employee recoveries against employers in their own jurisdictions.

Major changes in substantive tort law, such as the recognition of the duty sought by plaintiffs in this action, are much better left to the Legislature. The Legislature is better

equipped to make far-reaching changes in the substantive law because of its information-gathering ability, prospective treatment of new laws, and broad perspective.

For these reasons, a*mici curiae* respectfully request that this Court affirm the Order and Decision of The Hon. Helen E. Freedman, J.S.C., granting Summary Judgment to Defendant-Appellant Port Authority.

## ARGUMENT

### I. AN OVERVIEW OF THE LITIGATION ENVIRONMENT IN WHICH THE SUBJECT APPEAL MUST BE CONSIDERED

#### A. The Current Asbestos Litigation Crisis: An Overview

When asbestos product liability lawsuits emerged almost thirty years ago, nobody could have predicted that courts today would be facing an ever growing "asbestos-litigation crisis." *Amchem*, 521 U.S. at 597. Instead of easing, however, "the crisis is worsening at a much more rapid pace than even the most pessimistic projections." Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Briefly, Vol. 6, No. 6, June 2002, at 2 (Nat'l Legal Center for the Pub. Interest), *available at* <http://www.nlcpi.org> (last visited Apr. 2, 2005) [hereinafter Bell, *Courts' Duty*].

At least 300,000 asbestos claims are now pending. *See* S. Rep. 108-118 (2003). More than 100,000 new claims were filed in 2003 - "the most in a single year." Editorial, *The Asbestos Blob, Cont.*, Wall St. J., Apr. 6, 2004, at A16. The RAND

Institute for Civil Justice predicts that at least one million more claims may be filed. *See* Stephen Carroll et al., *Asbestos Litigation Costs and Compensation* 77 (RAND Inst. for Civil Justice, Feb. 2004) [hereinafter RAND Rep.].

### 1. Mass Filings by the Non-Sick Threaten Payments to the Truly Sick

Today, the vast majority of new asbestos claimants are "people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be." *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Committee on the Judiciary,* 106th Cong., at 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School).[4]

Recent estimates indicate that up to ninety percent of new asbestos claims filed nationally are brought by plaintiffs with little or no impairment. *See* RAND Rep., *supra,* at 11; *see also*

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[4] *See also In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) ("In virtually all pleural plaque and pleural thickening cases, plaintiffs continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring."); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541, 555 (1992) (many asbestos claims "are premature (because there is not yet any impairment) or actually meritless (because there never will be)."); Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A15, *available at* 2002 WLNR 4092639.

Roger Parloff, *Asbestos*, Fortune, Sept. 6, 2004, at 186 ("According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are 'unimpaireds' - that is, they have slight or no physical symptoms.").

Mass screenings conducted by plaintiffs' lawyers and their agents have "driven the flow of new asbestos claims by healthy plaintiffs." Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 5 (2003) [hereinafter Bell, *Asbestos*]; *see also* Lester Brickman, *On The Theory Class's Theories of Asbestos Litigation: The Disconnnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33 (2003). These screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos.[5] Plaintiffs are recruited through exaggerated ads, such as "Find out if YOU have MILLION DOLLAR LUNGS!" Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36, *available at* 2001 WL 30366341. "These screenings often do not comply with federal or state health and safety law. There often is no medical

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[5] *See Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed.").

purpose for these screenings and claimants receive no medical follow-up." Bell, *Asbestos, supra,* at 5.

Given the way in which mass litigation screenings are conducted, it is hardly surprising that the medical "findings" they generate are notoriously unreliable. An American Bar Association Commission formed to craft a legal standard for asbestos-related impairment[6] reported that the rate of "positive" findings (*i.e.*, findings consistent with prior asbestos exposure) generated by litigation screening companies is "startlingly high," often exceeding fifty percent and sometimes reaching ninety percent. *See* Am. Bar Ass'n Comm'n on Asbestos Litig., *Report to the House of Delegates,* at 8 (2003).[7]

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[6] The ABA Commission proposed the enactment of federal medical criteria standards for nonmalignant claims. The ABA's House of Delegates adopted the Commission's proposal in February 2003.

[7] As one physician has explained, "the chest x-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's behalf." David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 Pepp. L. Rev. 11, 13 (2003) (quoting Lawrence Martin, M.D.). In 2004, researchers at Johns Hopkins University re-evaluated 551 x-rays and 492 matching interpretive reports used as a basis for an asbestos claim. The x-ray readers who had been retained by plaintiffs' lawyers found that 95.9% of the films revealed abnormalities. When six independent radiologists reinterpreted the x-rays, they found abnormalities in only 4.5% of the cases. *See* Joseph N. Gitlin et al., *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad. Radiology 843 (2004).

### 2. Bankruptcies Are Placing a Heavy Toll on Workers and their Employers

Asbestos has forced more than seventy companies into bankruptcy. *See* Mark A. Behrens & Rochelle M. Tedesco, *Two Forks in the Road of Asbestos Litigation*, 18:3 Mealey's Litig. Rep.: Asbestos 1 (Mar. 7, 2003). The "process is accelerating," *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001), due to the "piling on" nature of asbestos liabilities. *See* Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, 16:6 Mealey's Litig. Rep.: Asbestos 20 (Apr. 20, 2001).[8]

These bankruptcies impact the job prospects of employees, the retirement savings of ordinary citizens, and the economy as a whole. For instance, a study by Nobel Prize-winning economist Joseph Stiglitz of Columbia University and two colleagues on the direct impact of asbestos bankruptcies on workers found that bankruptcies resulting from asbestos litigation put up to 60,000 people out of work between 1997 and 2000. *See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt*

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[8] *See also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 201 (3d Cir. 2005) ("For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy."); Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 392 (1993) (explaining that each time a defendant declares bankruptcy, "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited.").

*Firms* 12 J. Bankr. L. & Prac. 51 (2003). Those workers and their families lost $175 million to $200 million in wages. *See id.* at 76. Employee retirement assets declined roughly twenty-five percent. *See id.* at 83.

A study by National Economic Research Associates found that workers, communities, and taxpayers will bear as much as $2 billion in additional costs, due to indirect and induced impacts of company closings related to asbestos. *See* Jesse David, *The Secondary Impacts of Asbestos Liabilities* (Nat'l Econ. Research Assocs., Jan. 23, 2003). For every ten jobs lost directly, the community may lose eight additional jobs. *See id.* at 8. The shutting of plants and job cuts decrease per capita income, leading to declining real estate values, and lower federal, state and local tax receipts. *See id.* at 11-13.

Asbestos litigation has brought about a staggering loss to the U.S. economy. RAND recently estimated that $70 billion had been spent in the litigation through the end of 2002. *See* S. Rep. 108-118, at 59 (2003) (citing RAND's Stephen Carroll). The remaining future cost of the litigation is an estimated $130 billion. *See Solving the Asbestos Litigation Crisis: Hearing on S. 1125, the Fairness in Asbestos Injury Act of 2003, Before the Sen. Comm. on the Judiciary*, 107th Cong., at 1 (June 4, 2003) (statement of Jennifer Biggs, Consulting Actuary, Tillinghast-Towers Perrin). To put these vast sums in perspective, former United States Attorney General Griffin Bell has pointed out that asbestos litigation costs will exceed the cost of "all Superfund

sites combined, Hurricane Andrew, or the September 11th terrorist attacks." Bell, *Courts' Duty, supra*, at 4.

### 3. Peripheral Defendants Are Being Dragged into the Litigation

As a result of these bankruptcies, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14. Even plaintiffs' attorney Richard Scruggs has remarked that the litigation has turned into the "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation' — A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002).[9]

There are now more than 8,500 asbestos defendants, *see* Deborah R. Hensler, *California Asbestos Litigation - The Big Picture*, Columns - Raising the Bar in Asbestos Litig., Aug. 2004, at 5, up from only 300 in 1982. *See* RAND Rep., *supra*, at 6. Many of these defendants are familiar names; others are small businesses facing potentially devastating liability. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1.

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[9] *See also In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 747-48 (E.D.N.Y. & S.D.N.Y. 1991) ("[a] newer generation of peripheral defendants are becoming ensnarled in the litigation."); Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1.

Asbestos litigation now involves firms "in industries engaged in almost every form of economic activity that takes place in the American economy." RAND Rep., *supra,* at 42.

As described later, the new duty rule sought by the plaintiffs in this action could exacerbate the spread of the litigation to even more defendants, including employers such as the Port Authority.

**B. The Rise in Silica-Related Lawsuits**

For years, silica litigation was stable, with only a low number of people pursuing silica claims in any given year. Recently, however, the number of silica lawsuits has increased, with many cases brought by the same lawyers and law firms who have specialized in bringing asbestos claims. *See* Mark A. Behrens et al., *Silica: An Overview of Exposure and Litigation in the United States*, 20:2 Mealey's Litig. Rep.: Asbestos 33 (Feb. 21, 2005) [hereinafter Behrens et al.]; Patti Waldmeier, *Business Fears Silica Lawsuits Could Wreak Same Havoc as Asbestosis*, Fin. Times USA, Feb. 2, 2005, at 3, *available at* 2005 WLNR 1400086; *Asbestos: The Mixed Dust and FELA Issues: Hearing Before the Senate Committee on the Judiciary,* 109th Cong., at 9 (Feb. 2, 2005) (statement of Lester Brickman, Professor, Benjamin N. Cardozo School of Law of Yeshiva University).

One large insurance company is handling more than 25,000 silica claims in twenty-eight states - a tenfold increase from August 2002. *See* Susan Warren, *Silicosis Suits Rise Like Dust/ Lawyers in Asbestos Cases Target Many of the Same Companies*, Wall

St. J., Sept. 4, 2003, at B5. Before 2002, one respirator manufacturer had about 200 silicosis claims filed against it each year. Between 2002 and 2004, 29,000 silicosis claims were filed - a *5000% increase*. *See* Behrens et al., *supra*.[10]

One would expect that such an explosion in filings would correspond to a dramatic rise in the incidence of silica-related diseases. Yet there is no evidence of a burgeoning silica medical crisis. *See* Jonathan D. Glater, *Suits on Silica Being Compared to Asbestos Cases*, N.Y. Times, Sept. 6, 2003, at C1, *available at* 2003 WLNR 5662921. In fact, the National Institute for Occupational Safety and Health reports that over the past thirty years, silica-related deaths have dropped nearly eighty-four percent, from 1,157 in 1968, to 448 in 1980, to 308 in 1990, to 187 in 1999.[11] To show how relatively low these numbers are,

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[10] E.D. Bullard Co., the inventor of the hard hat, faced one silica-related lawsuit in 1975. In the 1990s, multiplaintiff suits began to crop up, and have jumped in recent years: 62 cases with 200 plaintiffs in 1999; 156 cases with 4,305 plaintiffs in 2002; and 643 cases with 17,288 plaintiffs in 2003. *See* Susanne Sclafane, *Silica Dust: The Next Asbestos?*, 108:18 Nat'l Underwriter Prop. & Cas. / Risk & Ben. Mgmt. 18 (May 10, 2004).

[11] Dep't of Health & Human Servs., Centers for Disease Control & Prevention, Nat'l Inst. for Occupational Safety & Health, *The Work-Related Lung Disease Surveillance Report, 2002* 54 tbl. 3-1 (Pub. No. 2003-111, 2003); Dep't of Health & Human Servs., Centers for Disease Control & Prevention, Nat'l Inst. for Occupational Safety & Health, *Worker Health Chartbook, 2000: Fatal Illness* 3 (Pub. No. 2003-111, 2002), *available at* <http://www.cdc.gov/niosh/00-127pd.html> (last visited Apr. 2, 2005).

the U.S. Center for Disease Control and Prevention reports that on average, 400 people in the United States die each year from extreme heat,[12] and the Bureau of Labor Statistics reports that 671 workers die annually from falls "to [a] lower level."[13]

Consideration of federal asbestos reform legislation appears to have spurred plaintiffs' attorneys specializing in asbestos cases to diversify their litigation portfolios. As indicated above, some plaintiffs' lawyers are even filing "re-tread" asbestos cases. *See* David Hechler, *Silica Plaintiffs Suffer Setbacks: Broad Effects Seen in Fraud Allegations*, Nat'l L.J., Feb. 28, 2005, at 18; *see also* Jonathan D. Glater, *Companies Get Weapon In Injury Suits; Many Silica-Damage Plaintiffs Also Filed Claims Over Asbestos*, N.Y. Times, Feb. 2, 2005, at C1, *available at* 2005 WLNR 1415209.

## II. THIS COURT SHOULD HOLD THAT EMPLOYERS OWE NO DUTY TO THIRD-PARTY NON-EMPLOYEES

"It is well established that before a defendant may be liable for negligence it must be shown that the defendant owes a duty to the plaintiff." *Pulka v. Edelman*, 40 N.Y.2d 781, 782, 390 N.Y.S.2d 393, 395, 358 N.E.2d 1019, 1022 (1976), *reargument denied*, 41 N.Y.2d 901, 393 N.Y.S.2d 1028, 362 N.E.2d 640 (1977).

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[12] *See Extreme Heat* (Centers for Disease Control & Prevention, U.S. Dep't of Health & Human Servs., Washington, D.C.), *available at* <http://www.cdc.gov/nceh/hsb/extremeheat/> (last visited Apr. 2, 2005).

[13] Bureau of Labor Statistics, U.S. Dep't of Labor, *Census of Fatal Occupational Injuries Data*, *available at* <http://www.bls.gov/iif/> (last visited Apr. 2, 2005).

It is often said that "proof of negligence in the air. . . will not do." *Waters v. New York City Housing Auth.*, 69 N.Y.2d 225, 228, 513 N.Y.S.2d 356, 358, 505 N.E.2d 922, 923 (1987) (citations omitted). The existence and scope of a duty of care, if any, is a question of law to be determined by the court. *See Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 584-85, 611 N.Y.S.2d 817, 820, 634 N.E.2d 189, 192 (1994). "A person may have a moral duty to prevent injury to another, but no legal duty." *Pulka*, 40 N.Y.2d at 786, 390 N.Y.S.2d at 397, 358 N.E.2d at 1022.

Duty questions involve "policy-laden" judgments in which "[a] line must be drawn between the competing policy considerations of providing a remedy to everyone who is injured and of extending exposure to tort liability almost without limit." *DeAngelis v. Lutheran Med. Center*, 58 N.Y.2d 1053, 1055, 462 N.Y.S.2d 626, 627-28, 449 N.E.2d 406, 407-08 (1983). In fixing the point at which a legal duty attaches, courts must balance a variety of factors, "including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." *Palka*, 83 N.Y.2d at 586, 611 N.Y.S.2d at 821, 634 N.E.2d at 193.

Foreseeability of harm alone "does not define the existence of duty," *Eiseman v. New York*, 70 N.Y.2d 175, 187, 518 N.Y.S.2d

608, 613, 511 N.E.2d 1128, 1134 (1987), and "should not be confused with duty." *Pulka*, 40 N.Y.2d at 784, 390 N.Y.S.2d at 396, 358 N.E.2d at 1022.[14]

Lines are drawn to prevent the creation of "a new legal duty that would require the [defendant] to respond in damages, as an insurer, for [a] plaintiff's injuries." *D'Amico v. Christie*, 71 N.Y.2d 76, 86, 524 N.Y.S.2d 1, 5, 518 N.E.2d 896, 900 (1987), or that would result in "crushing exposure to liability," *Strauss v. Belle Realty Co.*, 65 N.Y.2d 399, 402, 492 N.Y.S.2d 555, 557, 482 N.E.2d 34, 36 (1985).

**A. *Widera v. Ettco Wire and Cable Corp.* Should Govern**

Adhering to the principles stated above, the Second Department in *Widera v. Ettco Wire and Cable Corp.*, 204 A.D.2d 306, 611 N.Y.S.2d 569 (2d Dept. 1994), *leave denied*, 85 N.Y.2d 804, 626 N.Y.S.2d 755, 650 N.E.2d 414 (1995), ruled that employers do not owe a duty to third-party non-employees who are

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[14] *See also McCarthy v. Sturm, Ruger and Co., Inc.*, 916 F. Supp. 366, 369 (S.D.N.Y. 1996) (stating, "the issue of foreseeability is only relevant in determining the scope of a preexisting duty; it is not normally used to create a duty."), *aff'd sub nom. McCarthy v. Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997) (holding that "although it may have been foreseeable" to the defendant that its bullets could have been misused by the Long Island Railroad shooter, the defendant was "not legally liable for such misuse."); *Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 316 (3d Cir. 1999) (New York law imposed no duty on fertilizer makers to prevent misuse of their products by terrorists who bombed the World Trade Center in 1993, "even if the misuse of the product might be foreseeable.").

exposed to harmful agents through contact with the clothes of an employee family member.[15]

In *Widera*, the parents of an infant brought a personal injury action against the father's employer for various physical infirmities allegedly caused when the infant was exposed in utero to toxic chemicals as a result of the pregnant mother's washing the father's work clothes. Affirming dismissal of plaintiffs' common-law negligence claim, the court held that an employer's duty to provide employees with a safe workplace "has not been extended to encompass individuals . . . who are neither 'employees' nor 'employed' at the worksite." 204 A.D.2d at 307, 611 N.Y.S.2d at 571.

In reaching this conclusion, the court said "we are not unaware that '[i]n fixing the bounds of . . . duty, not only logic and science, but public policy play an important role.'" *Id.* (quoting *DeAngelis*, 58 N.Y.2d at 1055, 462 N.Y.S.2d at 627, 449 N.E.2d at 407). The court then explained:

> *The recognition of a common-law cause of action under the circumstances of this case would . . . expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs.* Accordingly, we decline to promulgate a policy which would extend the common law so as to bring the infant plaintiff within a

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[15] *See also Ruffing v. Union Carbide Corp.*, 1 A.D.3d 339, 766 N.Y.S.2d 439 (2d Dept. 2003) (allegations that employee carried out of workplace and surrounding area hazardous substances to which his wife and daughter in utero were exposed, resulting in daughter's birth defects, failed to state cognizable cause of action against employer under either common-law negligence or strict products liability).

> class of people whose interests are entitled to protection from the defendant's conduct.

204 A.D.2d at 307-08, 611 N.Y.S.2d at 571 (emphasis added).

This Court should follow the Second Department's holding in *Widera* and rule that the Port Authority owed no duty to the plaintiff in this case. The First Department's result-oriented attempt to distinguish *Widera*, by noting that the infant in *Widera* was exposed in utero whereas the plaintiff in the present case was not, is not sound.

As stated, the *Widera* court was concerned the recognition of a duty of care for employers with respect to non-employees could lead to unlimited liability and "expand tort concepts beyond manageable bounds." *Id.* Here, those concerns are even more pronounced than in *Widera*, not less, as the First Department's holding would suggest. The number of potential non-employees that may suffer harms in utero as a result of a mother's washing her husband's work clothes would pale in comparison to the number of potential plaintiffs - female and male - that may be exposed to substances carried home on an employee's work clothes. Certainly, more people would be exposed in circumstances similar to the one presented in this case than the number exposed under the circumstances present in *Widera*.

Exposures in a worker's household could include non-pregnant women, like the plaintiff in this case, children living in the house, domestic partners, extended family members, renters, and guests. And, these exposures could occur from contacts that may

result in activities beyond merely washing a worker's clothes. Thus, the proposed limit on liability suggested by the First Department - "the scope of the duty should be limited to members of each employee's household who were exposed at home to asbestos dust from an employee's clothes, by washing the clothes or otherwise," *In re New York City Asbestos Litig.*, 786 N.Y.S.2d. 26, 34 (1st Dept. 2004) - is really no limit at all.

### B. The Georgia Supreme Court's Very Recent Opinion in *CSX Transportation, Inc. v. Williams* Provides Added Support For This Court To Hold That the Port Authority Owed No Duty To the Plaintiff in this Case

In January of this year, the Georgia Supreme Court in *CSX Transportation, Inc. v. Williams*, 608 S.E.2d 208 (Ga. 2005), was presented with factual and legal issues virtually identical to those in this case. In *Williams*, three plaintiffs brought negligence actions against CSX Transportation ("CSX") based on each plaintiff's claim that he was exposed at home as a child to airborne asbestos emitted from the clothing his father wore on the job at CSX. A fourth plaintiff brought a wrongful death action based on his late wife's exposure at home to asbestos on clothes he wore to work at CSX facilities. The Georgia Supreme Court, on a certified question from the Eleventh Circuit Court of Appeals, held that "Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace." *Id.* at *3.

The Georgia Supreme Court refused to rely on the potential foreseeability of the plaintiffs' harms "as a basis for extending the employer's duty beyond the workplace." *Id.* at *2. Instead, the court cited *Widera* for the negative policy implications that would result from holding employers liable for exposure-related harms to non-employees. *Id.*

In its opinion, the Georgia Supreme Court acknowledged the First Department's retreat from *Widera* in this case based on the "narrow factual point" that the infant in *Widera* sustained her injuries in utero. Yet, the Georgia Supreme Court rejected this hollow distinction, concluding: "We believe . . . the policy enunciated in *Widera* remains valid and choose, therefore, to adhere to the position that an employer's duty to provide a safe workplace does not extend to persons outside the workplace." *Id.*

### C. Plaintiff's Argument Rests on A Weak Foundation

#### 1. *Baker v. R.T. Vanderbilt* Is Not Analogous

Plaintiff and the First Department cite *Baker v. R.T. Vanderbilt Co.*, Inc., 260 A.D.2d 750, 688 N.Y.S.2d 726 (3rd Dept. 1999), to support the finding of a duty in this action. That reliance is misplaced.

In *Baker*, a group of employees, former employees and the estates of deceased employees filed twenty separate lawsuits for personal injuries suffered from inhalation of asbestos-containing minerals allegedly released in the course of the defendant mine owners' mining activities. After granting summary judgment with respect to the employees' claims against their own employers

based upon the exclusivity provisions of the Workers' Compensation Law, the court considered the claims of plaintiffs against defendant mine owners other than their respective employers. With respect to these claims, the court distinguished *Widera* and held that "[m]ine operators, like all landowners, must exercise reasonable care in the use of their property and can be found liable for the negligent discharge of dangerous substances which injure third parties." 260 A.D.2d at 752, 688 N.Y.S.2d at 729. The court then stated that, on the record before it, the court could not "conclude as a matter of law that defendants, if their mining activities were a source of airborne asbestos in the community generally, did not breach any legal duty to plaintiffs." *Id.*

Here, none of the Port Authority's activities released "asbestos into the community generally." *Id.* The exposures that form the basis for the present action are totally different than the mining activity in *Baker* that was a potential "source of airborne asbestos," prohibiting summary judgment. This important difference mirrors the distinction made by the Georgia Supreme Court in *Williams* when it stated that the case before it did not "involve [the employer] itself spreading asbestos dust among the general population, thereby creating a dangerous situation in the world beyond the workplace." *Williams*, 608 S.E.2d at 210.

Moreover, the *Baker* opinion contains no discussion at all regarding the "important role" that public policy must play "[i]n fixing the bounds of . . . duty." *DeAngelis*, 58 N.Y.2d at 1055,

462 N.Y.S.2d at 627, 449 N.E.2d at 407. Here that consideration lacking in *Baker* is critical because "[t]he recognition of a common-law cause of action . . . would . . . expand traditional tort concepts beyond manageable bounds and create an almost infinite universe of potential plaintiffs." *Widera*, 204 A.D.2d at 307-08, 611 N.Y.S.2d at 571.

**2. *Fuller-Austin* and *Anchor Packing* Are Not Analogous**

Plaintiffs and the First Department also cite two mid-level appellate court decisions from other states, *Fuller-Austin Insulation Co., Inc. v. Bilder*, 960 S.W.2d 914 (Tex. Ct. App. 1998), and *Anchor Packing Co. v. Grimshaw*, 692 A.2d 5 (Md. Ct. Spec. App. 1997), *rev'd on other grounds sub nom. Porter Hayden Co. v. Bullinger*, 713 A.2d 962 (Md. 1998), to support finding the Port Authority liable in this action. In this appeal, plaintiffs also may cite a recent case from the Washington Court of Appeals, *Lunsford v. Saberhagen Holdings, Inc.*, 106 P.3d 808 (Wash. App. Ct. 2005), issued after the First Department's decision. As described below, however, the reliance on all of these cases is misplaced.

First, *Fuller-Austin*, *Anchor Packing*, *and Lunsford* all involved product liability claims against *manufacturers and suppliers* of asbestos-containing products. None addressed the liability of employers for harm to non-employees. The law of products liability is based on entirely different rationales than the concept of employer liability present here.

The application of strict product liability to commercial sellers and distributors "reflects the origins of liability without fault in the law of warranty, which has traditionally focused on sales transactions." *Restatement Third, Torts: Products Liability* § 20 cmt. *a* (1997). A justification for strict products liability has been that "the seller, by undertaking to market his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it. . . ." *Restatement (Second) of Torts* § 402A cmt. *c* (1965). Here, the plaintiff wife allegedly was exposed to asbestos dust carried home from work by her husband on his work clothes. The husband did not buy asbestos from the Port Authority. No sales transaction was involved, therefore, the Port Authority cannot be said to have "undertaken and assumed" a duty to the plaintiff wife.

Second, the holdings in the cases cited by plaintiffs and the First Department do not reflect product liability law in all jurisdictions. For instance, plaintiffs' position is directly contrary to the opinion of the Tenth Circuit Court of Appeals in *Rohrbaugh v. Owens-Corning Fiberglas Corp.*, 965 F.2d 844 (10th Cir. 1992). In that case, family members sued asbestos manufacturers under Oklahoma law for the death of an insulator's wife, who was exposed to asbestos dust carried home on the insulator's work clothes. The court held that "Appellants did not have a duty to warn [the wife] of the dangers associated with

their products because [she] was not a foreseeable purchaser or user of the product." *Id.* at 846.

### 3. *Kowalski* Should Be Rejected As Inconsistent with New York Law

Finally, plaintiffs and the First Department rely on an opinion by the Western District of New York in *Kowalski v. Goodyear Tire & Rubber Co.*, 841 F. Supp. 104 (W.D.N.Y. 1994). This holding should be rejected as inconsistent with New York law.

In *Kowalski*, a tire manufacturer employee and his wife sued the husband's employer in negligence and strict liability for the wife's bladder cancer allegedly caused by her exposure to a toxic chemical used at the defendant's plant and brought home via the husband's person and work clothes. The court denied summary judgment for the defendant, holding that "Goodyear owed a duty of care to all within the reach of the chemical's 'known destructive power.'" 841 F. Supp. at 111.

Importantly, the federal court's decision was issued in January 1994 - several months *before* the Second Department's May 1994 decision in *Widera*. In light of *Widera*, the *Kowalski* opinion is of little significance and, certainly, provides very weak support for the plaintiffs' argument in this case. In fact, if the circumstances of events were different and *Widera* had been issued prior to *Kowalski*, it is possible (if not probable) that the *Kowalski* court sitting in diversity would have granted summary judgment to Goodyear. The *Kowalski* court's broad holding that "Goodyear owed a duty of care to *all*" (i.e., employees and

non-employees exposed to substances originating in the workplace) is flatly inconsistent with the *Widera* court's holding that New York law does *not* extend liability to "all" such persons. *See Widera, supra*. The *Widera* court itself apparently viewed *Kowalski* as irrelevant or inconsistent with New York law - the Second Department did not even mention *Kowalski* in its opinion.

### D. The Broad New Duty Rule Sought By Plaintiffs Is Unsound And Would Have Perverse Results

#### 1. The Asbestos Litigation Crisis Would Worsen; Silica and Other Claims Would Rise

As a practical matter, judicial adoption of a new cause of action against employers by third-party non-employees would exacerbate the current asbestos litigation crisis and augment silica as well as other claims. A broad new duty requirement for employers would allow plaintiffs' lawyers to begin to name countless scores of employers directly in asbestos and other personal injury suits.

As stated, even if the scope of an employer's liability was to be limited to "members of each employee's household," *In re New York City Asbestos Litig.*, 786 N.Y.S.2d. at 34, the specter of nearly limitless liability remains. Given the number of employees exposed to asbestos and, in turn, members of their households affected by secondary exposures, it is not inconceivable that employer liability actions could outnumber asbestos premises liability cases brought by independent contractors if employer liability to non-employees is widely adopted. *See generally* Susan Warren, *Plaintiffs Target Companies*

*Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1. Creation of a new duty rule for employers based on secondary exposures could generate a vast "next wave" in asbestos litigation.

Furthermore, when courts in other states are asked to permit non-employee recoveries against employers in their own jurisdictions, New York law will provide persuasive authority for their decisions.

### 2. Non-Employees Could Receive Far Greater Recoveries Than Employees

Generally, workers' compensation systems afford the exclusive remedy for an injured worker. See Arthur Larson & Lex K. Larson, *Larson's Worker's Compensation Desk Edition* § 100.01 (2000). Workers' compensation provides a guaranteed recovery for employees who are injured on the job, regardless of fault, while prohibiting employees from seeking recovery through other means, such as the tort system. *See* William Bassin, *An Analysis of Employer Contribution to Third Parties Under Workers' Compensation Statutes*, 30 Tort & Ins. L.J. 843, 843 (1995). "Such a system is recognized as a bargain reached between employers and employees for their mutual benefit." *Id.* Claims brought by third-party non-employees would fall outside of the workers' compensation system.

Thus, adoption of a broad new duty rule for employers would bring about a perverse result - non-employees with secondary exposures would have greater rights to sue and potentially reap

far greater recoveries than employees. Namely, secondarily exposed non-employees could obtain recoveries for noneconomic damages, such as pain and suffering, and possible punitive damages; neither of these awards are generally available to injured workers under New York's workers' compensation law. *See* N.Y. Workers' Comp. Law §§ 10-34 (McKinney 2005).

## III. THE LEGISLATURE, NOT THE JUDICIARY, SHOULD DECIDE WHETHER TO PROVIDE RECOVERIES TO NON-EMPLOYEES WHO COME INTO CONTACT WITH A SUBSTANCE CARRIED BY A WORKER TO LOCATIONS OUTSIDE THE WORKPLACE

Major changes in substantive tort law, such as the recognition of the duty sought by plaintiffs in this action, are much better left to the Legislature. Sweeping changes in substantive tort law are different than the implementation of procedural docket management mechanisms, which courts have overlapping authority to develop. *See* Victor E. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Unimpaired Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed By the Non-Sick*, 31 Pepp. L. Rev. 271 (2004). The Legislature is better equipped to make far-reaching changes in the substantive law because of its information-gathering ability and broad perspective.

First, legislatures have certain tools that make them uniquely well situated to reach fully informed decisions about the need for broad public policy changes in the law. This is particularly important in the area of liability law, because the impacts go far beyond who should win a particular case.

Legislatures are in the best position to weigh and balance the many competing policy considerations involved. They have more complete access to information, including the ability to receive comments from persons representing a multiplicity of perspectives, and the ability to use the legislative process to obtain new information. If a point needs further elaboration or clarification, a prior witness can be recalled, or an additional witness can be asked to testify. This process allows the legislature to engage in broad policy deliberations and to formulate policy carefully.

By way of contrast, the source for judicial lawmaking is generally confined to the lawyers arguing a narrow issue in a specific case. While two lawyers before a court presenting their points of view are a good source of information, they are not a substitute for the legislative hearing process. The focus on individual cases does not provide comprehensive access to broad scale information.

Second, judicial lawmaking is retroactive in nature. The sweeping tort law change sought by plaintiffs in this action warrants legislative consideration so that change, if any at all, would be done prospectively. As the United States Supreme Court said in a recent decision on the subject of punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]." *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added).

Third, legislators must act in the glare of public light and are directly responsible to the voters for their decisions.

In this regard, *Forni v. Ferguson*, 232 A.D.2d 176, 648 N.Y.S.2d 73 (1st Dept. 1996) is instructive. In that action, survivors and relatives of victims of a shooting incident brought an action against the makers of the semiautomatic handgun, high capacity magazine, and ammunition used in the attack. The court declined to hold the manufacturers liable for the foreseeable misuse of their products, stating: "*it is for the Legislature to decide* whether manufacturer, sale and possession of firearms is legal." 648 N.Y.S.2d at 73 (emphasis added). *See also Howell v. N.Y. Post Co., Inc.*, 81 N.Y.2d 115, 123-24, 596 N.Y.S.2d 350, 354, 612 N.E.2d 699, 703 (N.Y. 1993)("Balancing the competing policy concerns underlying tort recovery for invasion of privacy is best left to the Legislature.")

With respect to the subject of this appeal, the Legislature could decide whether to expand New York's worker compensation law to non-employee claims stemming from employees' workplace exposures, with non-employees receiving awards equivalent to what an employee would receive for the same injury. Such a change would avoid the perverse result described above, where non-employees could obtain significantly greater rewards than their employee-spouses. Legislative action also could help address harms such as the one sustained by the plaintiff while preventing asbestos litigation from "morphing" once again into another costly and extremely expansive phase. The Legislature also could

weigh the impact of a new duty obligation on employers with respect to job growth and creation in New York.

## CONCLUSION

For these reasons, *amici curiae* ask this Court to affirm the Order and Decision of The Hon. Helen E. Freedman, J.S.C., granting Summary Judgment to Defendant-Appellant Port Authority.

Respectfully submitted,

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Dated: April 4, 2005

**PROOF OF SERVICE**

I hereby certify that I served a copy of the foregoing *Amici Curiae* Brief of the Coalition for Litigation Justice, Inc., National Federation of Independent Business Legal Foundation, American Chemistry Council, Property Casualty Insurers Association of America, and Chamber of Commerce of the United States in Support of Defendant-Appellant upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the United States Postal Service this 4th day of April, 2005, addressed as follows:

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## SECTION 1600.10 CERTIFICATION

I hereby certify pursuant to 22 NYCRR § 600.10 that the foregoing brief was prepared on a computer using Microsoft Word software.

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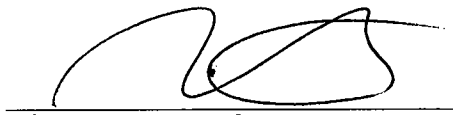

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