STATE OF MICHIGAN
IN THE COURT OF APPEALS
(ON APPEAL FROM THE WAYNE COUNTY CIRCUIT COURT)

REED W. AVRAM, Plaintiff-Appellee, v. McMASTER-CARR SUPPLY CO., Defendant-Appellant, and ALLIANCE MACHINE CO., ALLIED GROVE CORP., AMCHEM PRODUCTS, INC., AMERICAN OPTICAL CORP., AMERICAN STANDARD, INC., ANDERSON GREENWOOD & CO., AO SMITH, ARGO PACKING CO., ARMSTRONG PUMPS, INC., ATLAS ASBS/ATLAS TURNER, INC., BEHLER YOUNG CO., BORG WARNER CORP., BW/IP INTERNATIONAL, INC., CBS CORP., CERTAINTEED CORP., CHEMTURA CORP., COLTEC INDUSTRIES, INC., COLUMBUS McKINNON CORP., COPES VULCAN, INC., CRANE CO., CROWN CORK & SEAL CO., INC., DAUBERT CHEMICAL CO., DETREX CORP., DETROIT STOKER CO., DURAMETALLIC CORP., EDWARD VOGT VALVE CO., ELLIOTT TURBOMACHINERY CO., INC., EVERLASTING VALVE CO., INC., F B WRIGHT CO., FLOWSERVE CORP., FMC CORP., FOSECO., INC., FOSTER WHEELER CORP., FRIENDSHIP MATERIALS, INC., GARLOCK SEALING TECHNOLOGIES, GENERAL ELECTRIC CO., GENERAL REFRACTORIES CO., GLOBAL MECHANICAL SALES, INC., GOODALL RUBBER CO., GOODRICH CORP., GOODYEAR CANADA, INC., GOODYEAR TIRE & RUBBER CO., GOULD ELECTRONICS, INC., GOULD'S PUMPS, INC., GREENE TWEED & CO., HARRISON PIPING SUPPLY CO., HERCULES CHEMICAL CO., INC., HONEYWELL INTERNATIONAL, INC., HOWDEN BUFFALO, INC., IMO INDUSTRIES, INC., INGERSOLL RAND CO., ITT CORP., IU NORTH AMERICA, INC., JOHNSON CONTROLS, INC., K & C SUPPLY, INC., KVAERNER US, INC., LEE WILSON ENGINEERING CO., INC., MAGNETEK NAT. ELEC. COIL, McCORD CORP.,	Court of Appeals No. 296605 L.C. Case No.: 07-714597-NP and In Re: All Asbestos Personal Injury Case No. 03-310422-NP

McWANE, INC., MELRATH GASKET, INC., METALLO GASKET CO., METROPOLITAN LIFE INSURANCE CO., MICHIGAN MEDICAL, MIDLAND ROSS CORP., MILTON ROY CO., NASH ENGINEERING CO., OGLEBAY NORTON CO., PARKER HANNIFIN CORP., PNEUMO ABEX CORP., RAPID AMERICAN CORP., REX ROTO CORP., RIC WIL, INC., RICHARD KLINGER, INC., RILEY POWER CORP., ROCKWELL AUTO-MATION, INC., ROCKWELL INTERNATIONAL DE, ROCKWELL INTERNATIONAL NV, ROGER ZATKOFF CO., RUST INTERNATIONAL, SATTERLUND SUPPLY CO., SCHAD BOILER SETTING CO., SEALITE, INC., SEAWAY MECHANICAL CONTRACTORS, STANDARD FUEL ENGINEERING COMP., STANLEY CARTER CO., STERLING FLUID SYSTEMS USA, INC., STOCKMAN VALVE & FITTINGS, INC., SURE SEAL PRODUCT CO., THE BOOMER CO., THERMO ELECTRON CORP., THIEM CORP., TOLEDO ENGINEERING, INC., TOWNSEND & BOTTUM, UNION CARBIDE CHEM. AND PLASTIC, UNION PUMPS CO., VIKING PUMP, INC., WILLIAM POWELL CO., YARWAY CORP., YORK RUBBER CO.,

Defendants.

AMICI CURIAE BRIEF OF THE MICHIGAN CHAMBER OF COMMERCE, MICHIGAN MANUFACTURERS ASSOCIATION, COALITION FOR LITIGATION JUSTICE, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AMERICAN INSURANCE ASSOCIATION, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF THE QUESTIONS PRESENTED

I.

Does the application of traditional legal standards, due process of law and the prior guidance of the Michigan Supreme Court, require reversal of the judgment against McMaster-Carr because the special asbestos rules of the Wayne Circuit Court, as applied in this case: (a) denied McMaster-Carr a fair trial by denying it discovery, fair notice of the claims and supporting evidence, and the opportunity to raise and pursue viable defenses including the sophisticated user and statute of limitations defenses; and (b) conflicted with the general guidance and specific admonitions of the Michigan Supreme Court on the fair and proper handling of asbestos litigation?

Trial Court's Answer: No
Plaintiff-Appellee's Answer: No
Defendant-Appellant's Answer: Yes
Amici's Answer: Yes

II.

Did the Wayne Circuit Court abuse its discretion by: (a) denying McMaster-Carr's motion for a two-week adjournment to afford it a chance to take discovery before the start of trial; (b) denying McMaster-Carr an opportunity to take meaningful, individualized discovery of the plaintiff's claims; and (c) refusing to let McMaster-Carr raise and pursue viable defenses including the sophisticated user and statute of limitations defenses?

Trial Court's Answer: No
Plaintiff-Appellee's Answer: No
Defendant-Appellant's Answer: Yes
Amici's Answer: Yes

III.

Is McMaster-Carr entitled to judgment because plaintiff's newly-asserted position at trial that he had stopped working in 1997 because of shortness of breath (especially when combined with his awareness of his exposure to asbestos and its danger) means that the statute of limitations had begun to run at that time?

Trial Court's Answer: No
Plaintiff-Appellee's Answer: No
Defendant-Appellant's Answer: Yes
Amici's Answer: Yes

IV.

Is McMaster-Carr entitled to judgment because the expert opinion of Dr. Parker, who has never once in over 3,000 cases failed to diagnose asbestos-related disease for lawsuits, should have been stricken as inconsistent with *Daubert* standards because it was shown that his judgments were outside the range of reasonable medical opinions and methods?

Trial Court's Answer: No
Plaintiff-Appellee's Answer: No
Defendant-Appellant's Answer: Yes
Amici's Answer: Yes

INTEREST OF *AMICI CURIAE*

Amici are organizations that represent Michigan companies that are named as defendants in asbestos cases and their insurers. *Amici*, therefore, have a substantial interest in ensuring that justice in asbestos-related civil trials is meted out fairly, consistent with constitutional due process protections, and pursuant to the Michigan Supreme Court's orders. *Amici* also have an interest in ensuring that expert evidence presented at such trials is reliable and does not undermine the integrity of the civil tort system. The trial at issue here, which is unfortunately emblematic of the way asbestos litigation appears to be handled in the Wayne County Circuit Court, violated all of these principles. At a broader level, trial practices which are plainly intended to force defendants to resolve nonmalignant injury claims (which are often cases with little or no support) not only rob those job creators of resources that could be used more productively but also harm those who are most deserving of and in need of adequate and timely compensation – i.e., persons diagnosed with mesothelioma, persons diagnosed with asbestos-related lung cancer, and persons appropriately diagnosed with asbestosis evidencing respiratory impairment related thereto. Every dollar that is paid to someone who is not sick, or whose claim is unreliable, is a dollar that is no longer available to compensate a cancer victim, now or in the future. The recent bankruptcies of some of the largest companies in the world provide clear

evidence that defendants' resources are not infinite. *Amici* file this brief to provide a broad perspective on the practical issues present in this case to help educate the Court. *Amici* believe that the judgment and verdict below should be reversed or vacated.

STATEMENT OF FACTS

Amici adopt Defendant-Appellant McMaster-Carr's Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Asbestos litigation is the "longest-running mass tort" in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw U L Rev 511, 511 (2008). "For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.*, 391 F3d 190, 200 (3d Cir 2005). As far back as 1997, the United States Supreme Court described the litigation as a "crisis." *Amchem Prods., Inc. v. Windsor* 521 US 591, 597 (1997). Through 2002, approximately 730,000 claims had been filed. *See* Stephen J. Carroll et al., *Asbestos Litigation* xxiv (Rand Inst. for Civil Justice 2005), *available at* http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf.

In one of the most objectionable aspects to the asbestos litigation from the perspective of defendants and lawyers who primarily represent cancer victims, courts became plagued by mass filings by the non-sick. *See* ABA Comm'n on Asbestos Litig., *Report to the House of Delegates* (2003), *available at* http://www.abanet.org/leadership/full_report.pdf (recommending "Standard for Non-Malignant Asbestos-Related Disease Claims");[1] James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental*

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[1] In February 2003, the ABA's House of Delegates adopted the Commission's proposal for the enactment of federal medical criteria standards for nonmalignant asbestos-related claims. *See Asbestos Litigation Crisis: Hearings Before the S. Comm. on the Judiciary*, 108th Cong. 21–22 (2003) (statement of Hon. Dennis W. Archer, ABA President-Elect).

Distress, and Medical Monitoring, 53 SC L Rev 815, 823 (2002) ("By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic."). Many of these claims have arisen through for-profit lawyer-sponsored screenings, the goal of which is to create for plaintiffs' counsel an inventory of cases. Cardozo Law School Professor Lester Brickman, an expert on asbestos litigation, has said that "the 'asbestos litigation crisis' would never have arisen" if not for the claims filed by unimpaired claimants. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm & Mary Envtl L. & Pol'y Rev 243, 273 (2001).[2]

By 2006, asbestos-related liabilities had forced over eighty-five companies into bankruptcy. *See* Martha Neil, *Backing Away from the Abyss*, A.B.A. J., Sept. 2006, at 26, 29, *available at* http://www.abajournal.com/magazine/article/backing_away_from_the_abyss/. Payments to legitimate claimants with cancer were threatened by the increasing number of claims from unimpaired claimants.

To address these problems, a number of key courts and legislatures adopted sound and fair case management tools to give priority to the sick plaintiffs and preserve defendants' resources for legitimate claimants. *See* James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 20:23 Mealey's Litig. Rep.: Asbestos 19 (Jan. 10, 2006). Greater judicial scrutiny of litigation screening practices also has improved the asbestos litigation climate for those with legitimate claims. *See* Barbara Rothstein, *Perspectives on Asbestos Litigation: Keynote Address*, 37 Sw U L Rev 733, 739 (2008) (Federal Judicial Center Director

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[2] *See also* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss LJ 1 (2001); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L Rev 331 (2002).

stating, "One of the most important things . . . I think judges are now alert for is fraud, particularly since the silicosis case . . . and the backward look we now have at the radiology in the asbestos case.").[3]

The Michigan Supreme Court was one of the pioneering courts in the movement to address abuse connected with the mass filing of claims by non-impaired claimants and to restore a semblance of fairness and rationality to the state's asbestos litigation. In 2006, the Court issued an administrative order requiring individualized trials, removing an economic incentive for plaintiffs to file claims that may have little or no value unless they are joined or "bundled" with other, more serious cases. *See* Prohibition on "Bundling" Cases, Mich Admin Order No. 2006-6 (2006). *Amici* supported the Michigan Supreme Court's efforts to develop a fair and workable solution to Michigan's asbestos litigation problem. The Court's anti-bundling order was a significant step, *see* Editorial, *Unbundling Asbestos*, Wall St. J., Aug. 21, 2006, at A10, *abstract available at* 2006 WLNR 14482501; Editorial, *Judging Asbestos Claims Separately Makes Sense*, Detroit News, Aug. 21, 2006, at A8, *available at* 2006 WLNR 25102236, and consistent with the practice of a growing number of states.

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[3] *See also In re Silica Prods. Liab. Litig.*, 398 F Supp 2d 563 (SD Tex 2005); Elise Gelinas, Comment, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 Md L Rev 162, 162 (2009) ("Although her opinion dealt with silica litigation, Judge Jack's findings significantly affect asbestos reform. By conducting *Daubert* hearings and court depositions that exposed the prevalence of fraud in silica litigation, Judge Jack exposed the prevalence of fraud in asbestos litigation as well. As a result, it is reasonable to conclude that the number of asbestos claims compensated through the tort system was greatly inflated due to fraud."); Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 Conn Ins LJ 289 (2005–2006) (evaluating the implications of the findings in the federal court silica litigation on the "entrepreneurial model" of asbestos litigation).

Unfortunately, the effectiveness of Michigan's anti-bundling order has been compromised and substantially undermined in practice by the Wayne County Circuit Court. Consequently, in one recent year Michigan led the nation with over 900 new asbestos-personal injury filings, most of which involved plaintiffs alleging nonmalignant conditions. *See* Mark A. Behrens, *Asbestos Litigation Screening Challenges: An Update,* 26 TM Cooley L Rev 721, 735 (2009).

Applying case management tactics that are plainly intended to manipulate and force defendants to resolve cases, the Wayne County Circuit Court routinely appears to violate the spirit, if not the letter, of the Michigan Supreme Court's asbestos anti-bundling order. In the subject case, for example, the Court effectively forced Defendant-Appellant into an ambush-like trial in which it had no reasonable opportunity to mount a fair defense. The court further compounded the inherent unfairness of the trial by allowing expert testimony which, by any rational standard, was unreliable and should have been excluded. The result was as predictable as it was unjust; in the first asbestos personal injury trial to go to verdict in Michigan in more than ten years, a claimant who alleged a nonmalignant condition and on the eve of trial reportedly changed his story of asbestos impairment was awarded nearly a half-million dollars.

The tactics of the Wayne County Circuit Court harken back to a less enlightened era in asbestos litigation, when overwhelmed courts flooded with asbestos claims often sacrificed fairness and integrity for the sake of efficiency. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am J of Trial Advoc 247 (2000). Now, however, there is a clear understanding that ignoring due process considerations and bending procedural rules to create

exceptions to put pressure on asbestos defendants to settle cases does not make cases go away; the practice invites new filings. It is an example of the law of unintended consequences at work.

This court should require asbestos trials to be conducted fairly, in accordance with constitutional due process safeguards, and pursuant to both the letter and spirit of the Michigan Supreme Court's anti-bundling order. Because these things were not done below in this case, the judgment and verdict should be reversed or vacated.

ARGUMENT

I. THE SPECIAL ASBESTOS RULES OF THE WAYNE COUNTY CIRCUIT COURT SACRIFICE FAIRNESS AND DUE PROCESS FOR EFFICIENCY AND HAVE HAD THE UNINTENDED EFFECT OF WORSENING THE LITIGATION ENVIRONMENT FOR MICHIGAN JOB CREATORS, THREATENING PAYMENTS TO THE TRULY SICK AND INJURED

A. An Overview of the Asbestos Litigation Environment in Which The Subject Litigation Should be Considered

Nationally, up to ninety percent of recent asbestos-related lawsuits have been filed by unimpaired claimants who may never become sick from asbestos exposure. *See* Roger Parloff, *Welcome to the New Asbestos Scandal*, Fortune, Sept. 6, 2004, at 186, *available at* 2004 WLNR 17888598 ("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."); Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, NY Times, Apr. 10, 2002, at A1, available at 2002 WLNR 4092639.

Many of these claims have been generated through for-profit lawyer-sponsored screenings. *See Owens Corning v. Credit Suisse First Boston*, 322 BR 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms."); Patrick M. Hanlon & Anne Smetak,

Asbestos Changes, 62 NYU Ann Surv Am L 525, 529 (2007) ("The clearest examples [of fraud and abuse] come from lawyer-sponsored screening programs that recruit tens of thousands of mostly bogus asbestosis and other non-cancer claims.").

Filings by unimpaired claimants have intentionally and strategically created judicial backlogs and exhausted resources needed to pay cancer victims. *See* James Stengel, *The Asbestos End-Game*, 62 NYU Ann Surv Am L 223, 262 (2006). As of today, asbestos litigation has forced at least ninety-six companies into bankruptcy, *see* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Inst. for Civil Justice 2010), *available at* http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf, with devastating impacts on defendants companies' employees, retirees, shareholders, and surrounding communities. *See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr L & Prac 51, 70-71 (2003).

As a result, the asbestos litigation "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, *abstract available at* 2001 WLNR 1993314; *see also* Steven B. Hantler et al., *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy LA L Rev 1121, 1151-52 (2005) (discussing spread of asbestos litigation to "peripheral defendants"). One former plaintiffs' attorney described the litigation as an "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) (quoting Mr. Scruggs).

The dockets reflect that the litigation has moved far beyond the era in which manufacturers, producers, suppliers and distributors of friable asbestos-containing products or

raw asbestos were the defendants. The range of defendants has expanded beyond those responsible for asbestos-containing products, producing exponential growth in the dimensions of asbestos litigation and compounding the burden on the courts. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St J, Apr. 12, 2000, at B1, *abstract available at* 2000 WLNR 2042486; Susan Warren, *Asbestos Quagmire: Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St J, Jan. 27, 2003, at B1, *abstract available at* 2003 WLNR 3099209; Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003) (asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities."), *available at* http://www.cbo.gov/doc.cfm?index=4641.

The Towers Watson consulting firm has identified more than 10,000 companies, including subsidiaries, named as asbestos defendants. *See* Towers Watson, *A Synthesis of Asbestos Disclosures From Form 10-Ks - Insights*, Apr. 2010, at 1, *available at* http://www.towerswatson.com/assets/pdf/1492/Asbestos_Disclosures_Insights_4-15-10.pdf. At least one company in nearly every U.S. industry is involved in the litigation. *See* Am. Acad. of Actuaries' Mass Torts Subcomm., *Overview of Asbestos Claims Issues and Trends* 5 (Aug. 2007), *available at* www.actuary.org/pdf/casualty/asbestos_aug07.pdf. Nontraditional defendants now account for more than half of asbestos expenditures. *See* Carroll et al., *supra*, at 94.

To address these very serious problems, courts have adopted common sense case management tools to give priority to the sick and preserve defendants' resources for legitimate claimants. *See* Jeb Barnes, *Rethinking the Landscape of Tort Reform: Legislative Inertia and Court-Based Tort Reform in the Case of Asbestos*, 28 Just Sys J 157 (2007) (documenting how judges have improved the asbestos litigation environment through "court-based tort reform").

For example, many courts have implemented inactive asbestos dockets (also called deferred dockets or pleural registries) to suspend and preserve the claims of the unimpaired, giving trial priority to the sick.[4] *See In re USG Corp.*, 290 BR 223, 226 n.3 (Bankr D Del 2003) ("The practical benefits of dealing with the sickest claimants . . . have led to the adoption of deferred claims registries in various jurisdictions."); Freedman, *supra*, at 513 ("Perhaps the most dramatic change since the dawn of the new century has been the restriction of the litigation to the functionally impaired."). Other courts have held that the unimpaired do not have legally compensable claims.[5]

In addition, several key state legislatures, impacted by the filing of mass numbers of for-profit screening generated unimpaired claims, have enacted "medical criteria" laws requiring asbestos claimants to present credible and objective medical evidence of physical impairment in order to bring or proceed with a claim. Medical criteria procedures for asbestos cases were enacted in Ohio in 2004, Texas and Florida in 2005, Kansas and South Carolina in 2006, Georgia

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[4] The lists of jurisdictions with inactive asbestos dockets includes Cleveland, Ohio (March 2006); Minnesota (June 2005) (coordinated litigation); St. Clair County, Illinois (Feb. 2005); Portsmouth, Virginia (Aug. 2004) (for cases filed by the Law Offices of Peter T. Nicholl); Madison County, Illinois (Jan. 2004); Syracuse, New York (Jan. 2003); New York City, New York (Dec. 2002); Seattle, Washington (Dec. 2002); Baltimore City, Maryland (Dec. 1992); Cook County (Chicago), Illinois (Mar. 1991); and Massachusetts (coordinated litigation) (Sept. 1986). *Cf.* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv J L & Pub Pol'y 541 (1992).

[5] *See Simmons v. Pacor, Inc.*, 674 A2d 232 (Pa1996); *Burns v. Jaquays Mining Corp.*, 752 P2d 28 (Ariz App 1987); *In re Asbestos Litig.*, 1994 WL 721763 (Del Super Ct June 14, 1994) (unpublished), *rev'd on other grounds*, 670 A2d 1339 (Del 1995); *Bernier v. Raymark Indus., Inc.*, 516 A2d 534 (Me 1986); *Owens-Illinois v. Armstrong*, 591 A2d 544 (Md Ct Spec App 1991), *aff'd in part, rev'd in part on other grounds*, 604 A2d 47 (Md 1992); *Kelley v. Cowesett Hills Assocs.*, 768 A2d 425 (RI 2001); *Ford Motor Co. v. Miller*, 260 SW3d 515 (Tex App-Hous 2008) (Mich law); *In re Hawaii Federal Asbestos Cases*, 734 F Supp 1563 (D Haw 1990); *In re Massachusetts Asbestos Cases*, 639 F Supp 1 (D Mass 1985).

in 2007, and Oklahoma in 2009.[6] These laws "set forth rigid criteria for the claimant diagnoses." Matthew Mall, Note, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Litigation*, 48 Wm & Mary L Rev 2043, 2060 (2007).[7]

These various reforms have proven effective in restoring fairness and rationality in asbestos litigation in the jurisdictions where they have been implemented, benefiting sick and impaired claimants and defendants alike. *See* Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev Litig 501 (2009). Nationally, there has been a dramatic reduction in the number of filings by unimpaired claimants. For example, New York Appellate Division Justice Helen Freedman, who adopted a Deferred Docket when she managed the New York City asbestos litigation as a trial court judge, has said that "[a] preliminary estimate indicates that the Deferred Docket reduced the number of cases actually pending in my court by 80 percent." Freedman, *supra*, at 514. Richard Schuster, chairman of the Columbus-based Vorys, Sater, Seymour and Pease's national toxic tort defense litigation practice, has said that Ohio's medical criteria law "dramatically cut the number of new case filings by more than 90%." Peter Geier, *States Taking Up Medical Criteria: Move Is to Control Asbestos Caseload*, Nat'l LJ, May 22, 2006, at 1.

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6 *See* Ohio Rev Code Ann §§ 2307.91–.96; Tex Civ Prac & Rem Code Ann §§ 90.001–.012; Fla Stat §§ 774.201–.209; Kan Stat Ann §§ 60-4901 to 60-4911; SC Code Ann §§ 44-135-30 to 44-135-110; Ga Code Ann §§ 51-14-1 to 51-14-13; Okla Stat tit. 76, §§ 60-71.

7 *See also* Joseph Sanders, *Medical Criteria Acts: State Statutory Attempts to Control the Asbestos Litigation*, 37 Sw U L Rev 671, 689 (2008) (criteria laws are a "step in the right direction."); Philip Zimmerly, Comment, *The Answer is Blowing in Procedure: States Turn to Medical Criteria and Inactive Dockets to Better Facilitate Asbestos Litigation*, 59 Ala L Rev 771 (2008) (medical criteria laws help the sick).

B. The Michigan Supreme Court's Attempt to Promote Fairness and Sound Policy in Asbestos Litigation

Michigan experienced similar problems as other states with respect to mass filings by for-profit screened plaintiffs with nonmalignant injury claims. As described below, the Michigan Supreme Court did its part to deal with some of the issues related to the nonmalignant claims historically filed in Michigan and to allow the Michigan trial courts (and defendant companies) to appropriately and fairly evaluate claims and focus their available resources on the truly sick. Rather than suspend the claims of the unimpaired, however, the Michigan Supreme Court chose to require individualized justice, wisely appreciating that the un-bundling of disparate claims should lead plaintiffs' lawyers to pursue claims having value over those that are too weak or meritless to stand on their own merits at trial.

By way of background, earlier in the asbestos litigation, some courts burdened by mass filings encouraged the consolidation of asbestos cases at trial and for settlement because those judges thought that joining the dissimilar cases could more easily and more readily resolve the litigation. *See* Victor E. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 Pepp L Rev 271 (2004). Sick plaintiffs were used to "leverage" settlements for the non-sick. Former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr. described how trial judges inundated with asbestos claims might feel compelled to adopt such procedural shortcuts:

> Think about a county circuit judge who has dropped on her 5,000 cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely

ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder.

The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. 6 (1999) (statement of the Hon. Conrad L. Mallett, Jr.), *available at* http://commdocs.house.gov/committees/judiciary/hju62442.000/hju62442_0f.htm.

Eventually, courts developed a better understanding that modifying due process requirements and bending procedural rules to put added pressure on asbestos defendants to settle cases is a bit like using a lawn mower to cut down weeds in a garden—the practice may provide a temporary fix to a clogged docket, but ultimately the practice leads to an increasing volume of new filings. As Duke Law School Professor Francis McGovern has explained, "[j]udges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz L Rev 595, 606 (1997); *see also* Helen E. Freedman, *Product Liability Issues in Mass Torts—View from the Bench*, 15 Touro L Rev 685, 688 (1999) (judge overseeing New York City asbestos litigation stating that "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases."). Consolidations also raise serious due process issues because defendants lack a meaningful opportunity to defend against unique, individual claims.

The Michigan Supreme Court was one of the pioneering courts in the movement to address abuse connected with the mass filing of claims by non-impaired claimants and to restore a semblance of fairness and rationality to the state's asbestos litigation. In 2006, the Court issued an administrative order requiring individualized trials and removing an economic incentive for

plaintiffs to file claims that may have little or no value unless they are joined with more serious cases. *See* Prohibition on "Bundling" Cases, Mich Admin Order No. 2006-6 (2006).

The court's order was consistent with the practice of a growing number of states. For example, Ohio's Supreme Court adopted a substantially similar rule. *See* Ohio R Civ P 42(A)(2), *available at* http://www.sconet.state.oh.us/LegalResources/Rules/civil/Civil Procedure.pdf. Mississippi's Supreme Court has severed several multi-plaintiff asbestos-related cases.[8] In December 2007, the Delaware Superior Court amended its standing order for asbestos cases to prohibit the joinder of asbestos plaintiffs with different claims.[9] More recently, a San Francisco Superior Court judge entered an order vacating all *sua sponte* consolidation orders and stated that any future consolidations would proceed only by formal motions.[10]

State legislatures also have acted to require individualized trials. Texas, Kansas, and Georgia all generally preclude the joinder of asbestos cases at trial.[11] As two commentators explained, "[t]he Texas law is especially important, because that state has for many years relied

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8 *See Alexander v. AC & S, Inc.*, 947 So 2d 891 (Miss 2007); *Albert v. Allied Glove Corp.*, 944 So 2d 1 (Miss 2006); *Amchem Prods., Inc. v. Rogers*, 912 So 2d 853 (Miss 2005); *Ill. Cent. RR v. Gregory*, 912 So 2d 829 (Miss 2005); *3M Co. v. Johnson*, 895 So 2d 151 (Miss 2005); *Harold's Auto Parts, Inc. v. Mangialardi*, 889 So 2d 493 (Miss 2004); David Maron & Walker W. Jones, *Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms*, 26 Miss C L Rev 253 (2007).

9 *See In re Asbestos Litig.*, No. 77C-ASB-2 (Del. Super. Ct. New Castle County Dec. 21, 2007) (Standing Order No. 1).

10 *See San Francisco Trial Judge Vacates His Own Consolidation Order*, HarrisMartin's Columns—Asbestos, May 2008, at 13, 13; *see also* James C. Parker & Edward R. Hugo, *Fairness Over Efficiency: Why We Overturned San Francisco's* Sua Sponte *Asbestos Consolidation Program*, HarrisMartin's Columns—Asbestos, July 2008, at 4, 4 (explaining why the San Francisco Superior court overturned its consolidation program).

11. *See* Ga Code Ann § 51-14-11; Kan Stat Ann § 60-4902(j); Tex Civ Prac. & Rem Code Ann § 90.009.

upon modest-sized consolidations in trying asbestos cases, often with horrific results for defendants." Hanlon & Smetak, *supra,* at 574.

Even in the two states that formerly allowed large trial consolidations, Virginia and West Virginia, the practice has subsided. The reason may be that judges in those states figured out that trial consolidations had the unintended effect of attracting the filing of more unimpaired for-profit screening cases. *See* Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 Miss LJ 531 (2001).

C. The Trial Court's Actions Undermine Improvements in the Fair Handling of Asbestos Claims

Michigan's experience patterns the evolution of asbestos litigation nationally, except that Michigan has not seen a decline in the filing of unimpaired for-profit screened cases like other states because the Wayne County Circuit Court continues practices that echo a less enlightened era. In fact, in one recent year Michigan led the nation with over 900 new asbestos-personal injury filings, most of which involved plaintiffs alleging nonmalignant conditions. *See* Behrens, *Asbestos Litigation Screening Challenges, supra,* at 735.

As the Michigan Supreme Court expressly stated in its anti-bundling rule, "It is the opinion of the Court that each [asbestos] case should be decided on the merits, and not in conjunction with other cases." Admin. Order No. 2006-6. The Wayne County trial court's practice, however, appears to directly contravene both the letter and spirit of this rule: plaintiffs with dissimilar injuries have their cases bundled together into large trial groups and defendants are manipulated, maneuvered and pressured to resolve the entire block of cases, even though the vast majority of cases in each trial group involve nonmalignant conditions and the validity of the claims is highly suspect.

Here, for example, the plaintiff's trial group included ninety-five cases filed by one law firm, seventy-five of which involved nonmalignant disease claims. Similar to other trial groups in Wayne County, a trial date was established, giving defendants about four months to conduct discovery in nearly 100 cases involving around 100 defendants in each case. This period was intended to encompass all witness depositions, expert medical reports, independent medical examinations and other discovery, meaning that each defendant, to prepare for trial, would in theory have to undertake such discovery related to each of the nearly 100 bundled cases not knowing which of the 100 cases would be tried and in what order.

In theory, a defendant can take discovery with respect to the 100 or so plaintiffs in the group, but this is impossible to do as a practical matter. For instance, each plaintiff in the trial group filed a "brochure" that was intended to describe his or her claims. In practice, however, these brochures are easily and routinely manipulated into voluminous materials full of extraneous information lacking the detail necessary for defendants to reasonably conduct discovery. Plaintiff's brochure in this case alone alleged *possible* exposure to over 1,000 products and a *possible* witness list of over 1,100 co-workers. The brochure did not contain any specific information or allegations regarding the nature, frequency, or duration of exposures to Defendant-Appellant's products. The brochures of the remainder of the cases in the entire trial group were just as unhelpful and obfuscatory. They reportedly contained over 30,000 pages of material, including more than 5,500 potential co-worker witnesses and 450 different employers.

Under the Wayne County court procedures, if the trial group setting does not resolve in its entirety, the court chooses one plaintiff from the group for trial, literally on the eve of trial. Of course, because defendants do not know which case will be called for trial, and cannot possibly adequately prepare 100 cases for trial at once, the choice, if it can indeed be called a

choice, becomes to resolve all of the claims or risk trial by ambush. To make matters worse, if the court selected case is not one that is particularly favorable from the plaintiffs' perspective, the plaintiffs' lawyer can simply withdraw the selected case and cause the court to substitute another one until the draw turns up a case deemed by plaintiffs' counsel to be favorable to a positive outcome. That is exactly what happened in this action.

The trial court's pre-trial grouping or consolidation, quite simply, is established to provide defendants with minimal information for evaluation and no reasonable alternative other than to routinely settle all nonmalignant injury cases despite the fact that the history of the asbestos litigation has established that many, if not most, of these claims are weak at best and may be completely unreliable or meritless.

Further compounding these problems in this case, the trial court apparently chose to conduct the trial of Plaintiff-Appellee's case a mere six days after it was substituted for another at trial. Again, this tactic seems to have been intended to pressure defendant to settle. Defendant-Appellant, however, resolved not give in to such unjust pressure and, instead, attempted to conduct discovery and obtain more detailed information about Plaintiff-Appellee. Although Defendant-Appellant was able to obtain some more definite information *on the eve of trial*, such as a list of seventeen potential co-worker witnesses reduced from over 1,100 (only two of which actually testified), it was unable to overcome the multitude of disadvantages. For example, Plaintiff-Appellee changed his story of asbestos impairment, also on the eve of trial, by alleging that his retirement was asbestos-related, not age-related. Defendant-Appellant was also unable to depose each of Plaintiff-Appellee's fact and expert witnesses before trial, or obtain a full explanation as to where and how specific exposures to its products occurred.

In essence, Defendant-Appellant entered the trial blindfolded, and the lack of such vital, case-dispositive information rendered it unable to fairly and adequately conduct its defense. The predictable outcome was a verdict for Plaintiff-Appellee. This outcome was a direct result of the trial court's decision to strongly favor efficiency over fairness and due process in its handling of asbestos cases. The trial court's approach to the asbestos litigation must be reined in to ensure that asbestos-related civil trials are meted out fairly, consistent with constitutional due process protections, and pursuant to the letter and spirit of the Michigan Supreme Court's anti-bundling order. Sound public policy also compels this conclusion.

II. THE TRIAL COURT SHOULD HAVE EXCLUDED DR. JEFFREY PARKER'S TESTIMONY; FAILURE TO PROPERLY EXCLUDE UNRELIABLE LITIGATION SCREENING DOCTOR TESTIMONY ENCOURAGES AND PROMOTES FALSE CLAIMS, HARMS JOB CREATORS, AND THREATENS PAYMENTS TO PLAINTIFFS WITH RELIABLE CLAIMS

The serious legal and policy problems created by the trial court's manner of forcing coerced settlements of "leveraged" asbestos claims is augmented by the trial court's inconsistent preclusion of patently unreliable expert testimony and failure to properly exercise its gatekeeper function under MRE 702 and MCL 600.2922. *See also Gilbert v. DaimlerChrysler Corp.*, 470 Mich 749, 780; 685 NW2d 391 (2004); *cf. Daubert v. Merrell Dow Pharms., Inc.*, 509 US 579 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 US 137 (1999). Again, the trial court's approach in Wayne County is reminiscent of a less enlightened era in asbestos litigation and runs counter to the national trend of the past few years.

A. Litigation Screenings Are Highly Suspect

The plaintiff in this case came into the legal system through a litigation screening company known as Preferred Environmental and Exposure Evaluations, Inc. ("Preferred") and the "diagnosis" of Dr. Jeffrey Parker. Preferred and Dr. Jeffrey Parker are part of a cadre of

firms and physicians whose sole purpose is to provide evaluations to support asbestos litigation based on referrals from attorneys and not from medical doctors.

Because of screening firms like Preferred and experts like Dr. Parker, the asbestos litigation industry has been excoriated as a "massive client recruitment effort" fueled by specious evidence. Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp L Rev 33, 168 (2003); *see also* Lester Brickman, *The Use of Litigation Screening in Mass Torts: A Formula for Fraud?*, 61 SMU L Rev 1221 (2008).

For example, former United States Attorney General Griffin Bell observed that "[t]here often is no medical purpose for these screenings and claimants receive no medical follow-up." Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp L Rev 1, 5 (2003). Bell said that mass screenings conducted by plaintiffs' lawyers and their agents had "driven the flow of new asbestos claims by healthy plaintiffs." *Id.*

An American Bar Association Commission on Asbestos Litigation confirmed that claims filed by the unimpaired generally have arisen from for-profit screening companies whose sole purpose is to identify large numbers of people with minimal X-ray changes consistent with asbestos exposure. *See* ABA Comm'n on Asbestos Litig., *supra*, at 8. The Commission, with the help of the American Medical Association, consulted prominent occupational medicine and pulmonary disease physicians to craft legal standards for asbestos-related impairment. *Id.* at 11. The Commission found: "Some X-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars—in some cases, millions—in the aggregate by the litigation screening companies due to the volume of films read." *Id.* at 8. The Commission also reported that litigation screening companies were finding X-ray evidence that was consistent

with asbestos exposure at a "startlingly high" rate, often exceeding 50% and sometimes reaching 90%. *Id.*

Shortly thereafter, researchers at Johns Hopkins University compared the X-ray interpretations of X-ray interpreters—known as "B Readers"—employed by plaintiffs' counsel with the subsequent interpretations of six independent B Readers who had no knowledge of the X-rays' origins. *See* Joseph N. Gitlin et al., *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 Acad Radiology 843 (Aug 2004). The study found that, while B Readers hired by plaintiffs claimed asbestos-related lung abnormalities in almost 96% of the X-rays, the independent B Readers found abnormalities in less than 5% of the same X-rays—a difference the researchers said was "too great to be attributed to inter-observer variability." *Id.*

One physician, Dr. Lawrence Martin, has explained the reason why plaintiffs' B Readers seem to see asbestos-related lung abnormalities on chest X-rays in numbers not seen by neutral experts. *See* David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 Pepp L Rev 11, 13 (2003) (quoting Lawrence Martin, M.D.). Dr. Martin has said, "[T]he 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." *Id.* Senior U.S. District Court Judge John Fullam has said that many B Readers hired by plaintiffs' lawyers are "so biased that their readings [are] simply unreliable." *Owens Corning,* 322 BR at 723.

Recently, significant progress has been made in exposing numerous screening abuses, and sometimes fraudulent conduct, by litigation physicians, screening companies, and others. *See e.g., In re Silica Prods. Liab. Litig.*, 398 F Supp 2d 563, 635 (SD Tex 2005) ("[T]hese diagnoses were driven by neither health nor justice; they were manufactured for money.");

Behrens, *Asbestos Litigation Screening Challenges, supra.* These and other developments have helped to stem the tide of massive numbers of questionable asbestos claims. For example, asbestos-related bankruptcy trusts have barred claims that rely on the diagnoses, records, and reports of discredited physicians and screening companies. *See* William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 17 Norton J Bankr L & Prac 257, 281 (2008).

B. The Wayne County Circuit Court Has Properly Excluded Other Asbestos Screening Physician Expert Testimony as Unreliable

The Wayne County Circuit Court has properly excluded other unreliable asbestos for-profit screening physician testimony and should have done the same here. In 2008, following a two-day evidentiary hearing in Wayne County Circuit Court, Judge Colombo, the trial court judge in the instant case, issued a ruling to exclude the testimony of plaintiffs' medical expert, R. Michael Kelly, M.D. *See* Behrens, *Asbestos Litigation Screening Challenges, supra,* at 735; *see also* Editorial, *Michigan Malpractice*, Wall St J, Nov. 10, 2008, at A18, *abstract available at* 2008 WLNR 21517487 ("The medical records also showed that the vast majority of the lung-function tests Dr. Kelly performed failed to meet accepted standards."); Editorial, *A Strange Find Up in Michigan: The Evidence for Asbestos Claims Needs to Be Examined Very Carefully*, Charleston Gazette & Daily Mail (W. Va.), Nov. 14, 2008, at 4A, *available at* 2008 WLNR 21798130 ("Defendants also found from medical records that most of the lung-function tests Kelly performed didn't meet standards.").

The decision to exclude Dr. Kelly was significant in Michigan asbestos litigation because of the broad role that Dr. Kelly had played in thousands of claims in the state. For instance, from 1991 through 2006, Dr. Kelly reported more than 7,000 cases of occupational asbestosis to the Michigan Department of Labor and Economic Growth, primarily cases that he diagnosed for

personal injury law firms. *See* Behrens, *Asbestos Litigation Screening Challenges, supra,* at 738. The assembly of Dr. Kelly's reports and other documents, plus the analysis by certain defendants of Dr. Kelly's diagnostic and pulmonary function test (PFT) reports in over 2,300 primarily previously resolved cases, provided the basis for the motion to exclude Dr. Kelly's testimony. The defendants also analyzed over 1,800 chest X-ray radiology reports prepared by hospital clinical radiologists who had reviewed the same chest X-rays as Dr. Kelly because he had ordered the X-rays to be administered at the hospital. The defendants also were able to take Dr. Kelly's limited deposition in advance of trial. *Id.*

Of the eighty trial-group cases diagnosed by Dr. Kelly that were the subject of the *Daubert* hearing, sixty included a hospital clinical radiologist's report on the same X-ray film in which Dr. Kelly purported to find evidence of asbestos-related disease to support his diagnosis. In 92% (fifty-five) of the sixty cases, the clinical radiologists found no radiographic evidence consistent with asbestos-related disease; a stunning rate of disagreement. In over 1,800 of the more than 2,000 cases analyzed, a hospital clinical radiologist interpreted the same chest X-ray as Dr. Kelly. Dr. Kelly reported evidence of asbestos-related disease in *all* cases, while the clinical radiologists' reports in over 1,600 cases reported no findings consistent with asbestos-related disease, resulting in disagreement in approximately 88% of the cases. *Id.* at 740-741.

After being presented with the evidence of Dr. Kelly's practices, Judge Columbo properly concluded:

> The findings of Dr. Kelly are suspect. The same findings appear in almost every case. Although this Court concedes that many of the Plaintiffs have the same work history, it is hard to believe that they have the same physical conditions. It is also hard to understand how Dr. Kelly, who claims he conducted a complete

> exam, fails to refer Plaintiffs to doctors for their medical conditions. . . . [I]f Dr. Kelly's opinions are medically supportable, why do the medical records of the Plaintiffs and the findings of the treating physicians fail to support Dr. Kelly's findings and diagnosis? The only conclusion in the face of such overwhelming medical evidence is that the opinions of Dr. Kelly are not reliable.

Id. at 746 (quoting Transcript of Judge's Opinion, *Miles v. Sure Seal Prods Co.*, No. 04-434812-NP (Mich Cir Ct Wayne County Nov. 19, 2008)).

C. Dr. Jeffrey Parker's Diagnoses Are Just as Unreliable; His Testimony Should Have Been Excluded in this Action

The facts surrounding Dr. Jeffrey Parker's diagnoses appear to be substantially similar to those which led to Dr. Kelly's exclusion. For example, over the past decade, Dr. Parker has reportedly examined over 3,000 potential asbestos plaintiffs and found asbestos-related disease in *each and every* instance. This is astounding. Furthermore, as noted in Defendant's brief, a blinded panel of independent radiologists asked to examine x-rays reviewed by Dr. Parker disagreed with his affirmative conclusion in 86% of the cases. The panel found indicia of asbestosis in 7% of the cases while Dr. Parker found it in 99%. Yet, unlike Dr. Kelly's testimony, Judge Columbo did not exercise his gatekeeping function here to bar Dr. Parker from testifying. Dr. Parker's diagnostic conclusions were no more reliable than those of Dr. Kelly and were inconsistent with established medical procedures.

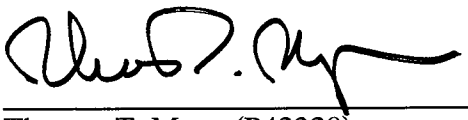
Testimony by experts such as Dr. Parker seriously undermine confidence in the tort system and encourage the filing of false claims, hurting both job creators and claimants with legitimate claims. Around the country, reforms have been made to address asbestos litigation fraud and abuse. The Michigan Supreme Court likewise acted to address these concerns. The Wayne County Circuit Court's inconsistent application of the law has allowed Michigan to

remain perhaps one of the last havens for questionable nonmalignant for-profit screening claims in the entire country. Such policies will not help Michigan get back on its feet. This Court should send a strong message that testimony which appears to be manufactured and patently unreliable will not be tolerated in Michigan courts.

CONCLUSION

For these reasons, the judgment and verdict below should be reversed or vacated.

Respectfully submitted,



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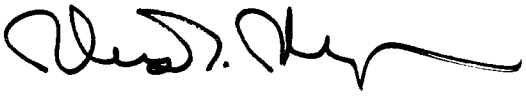

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