

**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.,
CERTAINTED CORP., CHEMTURA CORP., COLTEC
INDUSTRIES, INC., COLUMBUS McKINNON CORP.,
COPEES 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
REFRATORIES 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
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INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL
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AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF DEFENDANT-APPELLANT**

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<i>Bernier v. Raymark Indus., Inc.</i> , 516 A2d 534 (Me 1986)	10
<i>Burns v. Jaquays Mining Corp.</i> , 752 P2d 28 (Ariz Ct App 1987).....	10
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 US 579 (1993)	18
<i>Ford Motor Co. v. Miller</i> , 260 SW3d 515 (Tex App-Hous 2008).....	10
<i>Gilbert v. DaimlerChrysler Corp.</i> , 470 Mich 749; 685 NW2d 391 (2004).....	18
<i>Harold's Auto Parts, Inc. v. Mangialardi</i> , 889 So 2d 493 (Miss 2004).....	14
<i>Ill. Cent. RR v. Gregory</i> , 912 So 2d 829 (Miss 2005).....	14
<i>In re Asbestos Litig.</i> , No. 77C-ASB-2 (Del Super Ct New Castle County Dec. 21, 2007)...	14
<i>In re Asbestos Litig.</i> , 1994 WL 721763 (Del Super Ct June 14, 1994) (unpublished), <i>rev'd on other grounds</i> , 670 A2d 1339 (Del 1995).....	10
<i>In re Combustion Eng'g, Inc.</i> , 391 F3d 190 (3d Cir 2005).....	3
<i>In re Hawaii Federal Asbestos Cases</i> , 734 F Supp 1563 (D Haw 1990)	10
<i>In re Massachusetts Asbestos Cases</i> , 639 F Supp 1 (D Mass 1985).....	10
<i>In re Silica Prods. Liab. Litig.</i> , 398 F Supp 2d 563 (SD Tex 2005).....	5, 20
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<i>Kumho Tire Co., Ltd. v. Carmichael</i> , 526 US 137 (1999).....	18

<i>Miles v. Sure Seal Prods Co.</i> , No. 04-434812-NP (Mich Cir Ct Wayne County Nov. 19, 2008)	23
<i>Owens Corning v. Credit Suisse First Boston</i> , 322 BR 719 (D Del 2005).....	7, 20
<i>Owens-Illinois v. Armstrong</i> , 591 A2d 544 (Md Ct Spec App 1991).....	10
<i>Simmons v. Pacor, Inc.</i> , 674 A2d 232 (Pa 1996).....	10

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Fla Stat §§ 774.201–.209	11
Ga Code Ann §§ 51-14-1 to 51-14-13	11, 14
Kan Stat Ann §§ 60-4901 to 60-4911	11, 14
Ohio R Civ P 42(A)(2).....	14
Ohio Rev Code Ann §§ 2307.91–.96.....	11
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SC Code Ann §§ 44-135-30 to 44-135-110.....	11
Tex Civ Prac & Rem Code Ann §§ 90.001–.012	11, 14

OTHER AUTHORITIES

ABA Comm’n on Asbestos Litig., <i>Report to the House of Delegates</i> (2003), available at http://www.abanet.org/leadership/full_report.pdf	3, 19
Am. Acad. of Actuaries’ Mass Torts Subcomm., <i>Overview of Asbestos Claims Issues and Trends</i> 5 (Aug. 2007), available at www.actuary.org/pdf/casualty/asbestos_aug07.pdf	9
<i>Asbestos Litigation Crisis: Hearings Before the S. Comm. on the Judiciary</i> , 108th Cong. 21–22 (2003) (statement of Hon. Dennis W. Archer, ABA President-Elect).....	3
Jeb Barnes, <i>Rethinking the Landscape of Tort Reform: Legislative Inertia and Court-Based Tort Reform in the Case of Asbestos</i> , 28 Just Sys J 157 (2007)	9
Mark A. Behrens, <i>Asbestos Litigation Screening Challenges: An Update</i> , 26 TM Cooley L Rev 721 (2009)	<i>passim</i>

Mark A. Behrens, <i>What's New in Asbestos Litigation?</i> , 28 Rev Litig 501 (2009).....	11
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Alex Berenson, <i>A Surge in Asbestos Suits, Many by Healthy Plaintiffs</i> , NY Times, Apr. 10, 2002, at A1, available at 2002 WLNR 4092639	7
David E. Bernstein, <i>Keeping Junk Science Out of Asbestos Litigation</i> , 31 Pepp L Rev 11 (2003)	20
Lester Brickman, <i>The Use of Litigation Screening in Mass Torts: A Formula for Fraud?</i> , 61 SMU L Rev 1221 (2008)	19
Lester Brickman, <i>On the Applicability of the Silica MDL Proceeding to Asbestos Litigation</i> , 12 Conn Ins LJ 289 (2005–2006)	5
Lester Brickman, <i>On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?</i> , 31 Pepp L Rev 33 (2003).....	19
Lester Brickman, <i>Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation</i> , 26 Wm & Mary Env'tl L. & Pol'y Rev 243 (2001).....	4
Stephen J. Carroll et al., <i>Asbestos Litigation</i> (Rand Inst. for Civil Justice 2005), available at http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf	<i>passim</i>
Congressional Budget Office, <i>The Economics of US Tort Liability: A Primer</i> (Oct. 2003), available at http://www.cbo.gov/doc.cfm?index=4641	9
Lloyd Dixon et al., <i>Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts 25</i> (Rand Inst. for Civil Justice 2010), available at http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf	8
Editorial, <i>A Strange Find Up in Michigan: The Evidence for Asbestos Claims Needs to Be Examined Very Carefully</i> , Charleston Gazette & Daily Mail (W. Va.), Nov. 14, 2008, at 4A, available at 2008 WLNR 21798130	21
Editorial, <i>Michigan Malpractice</i> , Wall St J, Nov. 10, 2008, at A18, abstract available at 2008 WLNR 21517487.....	21
Editorial, <i>Judging Asbestos Claims Separately Makes Sense</i> , Detroit News, Aug. 21, 2006, at A8, available at 2006 WLNR 25102236	5

Editorial, <i>Unbundling Asbestos</i> , Wall St. J., Aug. 21, 2006, at A10, <i>abstract available at 2006 WLNR 14482501</i>	5
Editorial, <i>Lawyers Torch the Economy</i> , Wall St J, Apr. 6, 2001, at A14, <i>abstract available at 2001 WLNR 1993314</i>	8
Helen Freedman, <i>Selected Ethical Issues in Asbestos Litigation</i> , 37 Sw U L Rev 511 (2008).....	3, 10, 11
Helen E. Freedman, <i>Product Liability Issues in Mass Torts— View from the Bench</i> , 15 Touro L Rev 685 (1999).....	13
Peter Geier, <i>States Taking Up Medical Criteria: Move Is to Control Asbestos Caseload</i> , Nat’l LJ, May 22, 2006, at 1.....	11
Elise Gelinas, Comment, <i>Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act</i> , 69 Md L Rev 162 (2009)	5
Joseph N. Gitlin et al., <i>Comparison of “B” Readers’ Interpretations of Chest Radiographs for Asbestos Related Changes</i> , 11 Acad Radiology 843 (Aug. 2004).	20
Patrick M. Hanlon & Anne Smetak, <i>Asbestos Changes</i> , 62 NYU Ann Surv Am L 525 (2007)	7-8, 15
Steven B. Hantler et al., <i>Is the Crisis in the Civil Justice System Real or Imagined?</i> , 38 Loy LA L Rev 1121 (2005)	8
James A. Henderson, Jr., <i>Asbestos Litigation Madness: Have the States Turned a Corner?</i> , 20:23 Mealey’s Litig. Rep.: Asbestos 19 (Jan. 10, 2006).....	4
James A. Henderson, Jr. & Aaron D. Twerski, <i>Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring</i> , 53 SC L Rev 815 (2002).....	3-4
Matthew Mall, Note, <i>Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Litigation</i> , 48 Wm & Mary L Rev 2043 (2007).....	11
David Maron & Walker W. Jones, <i>Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms</i> , 26 Miss C L Rev 253 (2007).....	14
Francis E. McGovern, <i>The Defensive Use of Federal Class Actions in Mass Torts</i> , 39 Ariz L Rev 595 (1997).....	13

<i>'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz</i> , 17:3 Mealey's Litig Rep: Asbestos 5 (Mar. 1, 2002).....	8
Martha Neil, <i>Backing Away from the Abyss</i> , ABA J., Sept. 2006, at 26, available at http://www.abajournal.com/magazine/article/backing_away_from_the_abyss	4
James C. Parker & Edward R. Hugo, <i>Fairness Over Efficiency: Why We Overturned San Francisco's Sua Sponte Asbestos Consolidation Program</i> , HarrisMartin's Columns—Asbestos, July 2008, at 4	14
Roger Parloff, <i>Welcome to the New Asbestos Scandal</i> , Fortune, Sept. 6, 2004, at 186, available at 2004 WLNR 17888598.....	7
Barbara Rothstein, <i>Perspectives on Asbestos Litigation: Keynote Address</i> , 37 Sw U L Rev 733 (2008).....	4
Paul F. Rothstein, <i>What Courts Can Do in the Face of the Never-Ending Asbestos Crisis</i> , 71 Miss LJ 1 (2001).....	4
Joseph Sanders, <i>Medical Criteria Acts: State Statutory Attempts to Control the Asbestos Litigation</i> , 37 Sw U L Rev 671 (2008).....	11
<i>San Francisco Trial Judge Vacates His Own Consolidation Order</i> , HarrisMartin's Columns—Asbestos, May 2008, at 13.....	14
Peter H. Schuck, <i>The Worst Should Go First: Deferral Registries in Asbestos Litigation</i> , 15 Harv J L & Pub Pol'y 541 (1992).....	10
Victor E. Schwartz et al., <i>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</i> , 31 Pepp L Rev 271 (2004).....	12
Victor E. Schwartz & Rochelle M. Tedesco, <i>The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims</i> , 71 Miss LJ 531 (2001).....	15
Victor E. Schwartz & Leah Lorber, <i>A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases</i> , 24 Am J of Trial Advoc 247 (2000)	6
William P. Shelley et al., <i>The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts</i> , 17 Norton J Bankr L & Prac 257 (2008)	21
James Stengel, <i>The Asbestos End-Game</i> , 62 NYU Ann Surv Am L 223 (2006)	8

Joseph E. Stiglitz et al., <i>The Impact of Asbestos Liabilities on Workers in Bankrupt Firms</i> , 12 J. Bankr L & Prac 51 (2003).....	8
<i>The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary</i> , 106th Cong. 6 (1999) (statement of the Hon. Conrad L. Mallett, Jr., former Michigan Supreme Court Chief Justice) available at http://commdocs.house.gov/committees/judiciary/hju62442.000/hju62442_of.htm	13
Susan Warren, <i>Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps</i> , Wall St J, Apr. 12, 2000, at B1, available at 2000 WLNR 2042486.	9
Susan Warren, <i>Asbestos Quagmire: Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material</i> , Wall St J, Jan. 27, 2003, at B1, available at 2003 WLNR 3099209	9
Towers Watson, <i>A Synthesis of Asbestos Disclosures From Form 10-Ks - Insights</i> , Apr. 2010, at 1, available at http://www.towerswatson.com/assets/pdf/1492/Asbestos_Disclosures_Insights_4-15-10.pdf	9
Philip Zimmerly, Comment, <i>The Answer is Blowing in Procedure: States Turn to Medical Criteria and Inactive Dockets to Better Facilitate Asbestos Litigation</i> , 59 Ala L Rev 771 (2008)	11

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*

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 Env’tl 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

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.

³ *See also In re Silica Prods. Liab. Litig.*, 398 F Supp 2d 563 (SD Tex 2005); Elise Gelinias, 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 ‘unimpaired’ – 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

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.

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

