

The Supreme Court of Pennsylvania

No. 38 WAP 2010

DIANA K. BETZ, Executrix of the Estate of **CHARLES SIMIKIAN**, deceased,
Plaintiff/Appellant

v.

PNEUMO ABEX LLC, successor in interest to Abex Corporation; **ALLIED SIGNAL, INC.**,
in its own right and as successor in interest to Bendix Corporation, **BORG-WARNER
CORPORATION**; **CARLISLE COMPANIES, INC.**; **OKONITE COMPANY**; **GENERAL
MOTORS CORPORATION**; **KELSEY-HAYES COMPANY**; **METROPOLITAN LIFE
INSURANCE COMPANY**, a/k/a Metropolitan Insurance Company; **DAIMLERCHRYSLER
CORPORATION**, f/k/a Chrysler Corporation; **FORD MOTOR COMPANY**;
VOLKSWAGEN OF AMERICA, INC.; **NAPA AUTOMOTIVE PARTS GROUP**;
ROHRICH CADILLAC, INC.; **DYKE MOTOR SUPPLY COMPANY, INC.**; **SOUTH
HILLS AUTO PARTS CO.**,

Defendants/Appellants

BRIEF OF *AMICI CURIAE*

**PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY,
PENNSYLVANIA BUSINESS COUNCIL, NFIB/PENNSYLVANIA,
PENNSYLVANIA MANUFACTURERS' ASSOCIATION, INSURANCE
FEDERATION OF PENNSYLVANIA, INC., CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA, COALITION FOR LITIGATION
JUSTICE, INC., AMERICAN INSURANCE ASSOCIATION, AMERICAN
CHEMISTRY COUNCIL, NFIB SMALL BUSINESS LEGAL CENTER,
NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL
ASSOCIATION OF MUTUAL INSURANCE COMPANIES**

IN SUPPORT OF APPELLANTS

*Appeal from the Opinion of the Superior Court, Published as
Betz v. Pneumo Abex, 998 A.2d 962, 970 (Pa. Super. Ct. 2010),
Reversing the Trial Court Exclusion of Expert Testimony in Favor of Defendants.*

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STATEMENT OF INTEREST

Amici are organizations that represent companies and their insurers that are involved in Pennsylvania asbestos cases.¹ *Amici* file this brief due to concern over the

¹ The Pennsylvania Chamber of Business and Industry is the state's largest broad-based business association, with thousands of statewide members representing businesses of all sizes and all industry sectors. The Pennsylvania Chamber is The Statewide Voice of Business™.

The Pennsylvania Business Council envisions a Commonwealth in which residents enjoy a very high quality of life in sustainable communities, where those who are seeking employment find high quality jobs with good compensation, and where those who invest their capital and hard work can grow firms that flourish and are profitable. The Pennsylvania Business Council is focused on solutions that make the Commonwealth more competitive, including efforts to achieve a more fair and predictable civil justice system. For that reason, the subject case is of substantial interest to the Pennsylvania Business Council and its members.

The National Federation of Independent (NFIB) is the nation's leading small business association with offices in all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB gives small and independent business owners a voice in shaping the public policy issues that affect their business. NFIB/Pennsylvania's mission is to promote and protect the right of its members to own, operate and grow their businesses.

The Pennsylvania Manufacturers' Association (PMA) is the leading voice for manufacturing in the Commonwealth. Since 1909, PMA has served Pennsylvania workers and employers by defending free enterprise and working to build a more competitive and prosperous Pennsylvania.

The Insurance Federation of Pennsylvania, with approximately 200 insurer members, is the Commonwealth's leading trade association for commercial insurers of all types.

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. The U.S. Chamber represents 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 U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

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The Coalition for Litigation Justice, Inc. is a nonprofit association formed by insurers to address and improve the asbestos and tort litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system. The Coalition for Litigation Justice includes Century Indemnity Company, Chubb & Son, a division of Federal Insurance Company, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association representing major property and casualty insurers writing business nationwide and globally. AIA members range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts, including this Court.

The American Chemistry Council represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, 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 NFIB Small Business Legal Center, 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). The NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 350,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

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standard adopted by the Superior Court under which trial judges in Pennsylvania can no longer apply their own intellect and analysis to an expert *Frye*² review but instead must rely solely on positions raised by the parties – in essence, trial judges must now check their minds at the courthouse door. *Amici* also file this brief to advise the Court of the implications on Pennsylvania law and the asbestos docket of permitting the experts in this case to testify that any dose of occupational fibers, no matter how small, is a substantial factor in causing asbestos disease. The trial judge properly recognized the logical flaws in that theory and its inconsistency with longstanding causation standards.

INTRODUCTION

Five years ago, in the *Frye* hearings in this case, plaintiff's expert Dr. John Maddox testified that he did not take into account how much dose plaintiff received from his occupational work with brakes to determine causation – five minutes or forty years, high dose or low dose, it made no difference because of his view that any exposure to a brake pad, no matter how small the dose, was a substantial factor in causing mesothelioma. This version of medical causation testimony is known as the *any exposure* theory (also sometimes stated as the *each and every exposure* theory). The

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Founded in 1895, National Association of Mutual Insurance Companies (“NAMIC”) is a full-service, national trade association with more than 1,400 member companies that underwrite more than 40% of the property/casualty insurance premium in the United States. NAMIC members account for 47% of the homeowners market, 39% of the automobile market, 39% of the workers’ compensation market, and 34% of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

² *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

theory stands in sharp contrast to normal causation methodology, which would require an expert to assess the dose first and then demonstrate that the dose received was sufficient to cause disease. Dr. Maddox declined to follow that methodology. No plaintiff expert even attempted to assess Mr. Simikian's actual or estimated asbestos dose.

The trial judge in this matter was one of the first judges in the country to pull the curtain back from the *any exposure* theory. What he saw was not pretty – these experts were relying on illogical and unscientific guesswork, not supported in any published literature, in an apparent attempt to draw as many defendants into asbestos litigation as possible. After reviewing an extensive record and holding a three-day *Frye* hearing in which Dr. Maddox and others testified, Judge Colville quietly but effectively exposed the logical and scientific flaws in that theory. He concluded that Dr. Maddox should not be permitted to testify without at least some reasonable attempt to assess Mr. Simikian's dose and demonstrate that his dose exceeded a dangerous level.

Judge Colville's opinion was an early version of a wave of similar opinions that subsequently issued from courts all over the country.³ Today, there are at least twenty courts that have rejected the *any exposure* theory or similar approaches, under both *Frye* and *Daubert* standards, in asbestos and other toxic tort litigation. These are not merely inconsequential slip opinions – the courts rejecting this theory include the United States Sixth Circuit Court of Appeals (twice), the highest courts of Texas, New York, and this state (in the *Gregg* opinion), and trial and appellate courts in Texas, Washington, Florida,

³ See Behrens, M. & Anderson, W., *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 S.W.U. L. Rev. 480 (2008) (summarizing case law rejecting *any exposure* theory).

Delaware, Ohio, Louisiana, Mississippi, and here in Pennsylvania.⁴ Dr. Maddox's own *any exposure* testimony has been excluded three times.⁵ Virtually all of these courts conducted their analyses independent of Judge Colville's and yet reached the same decision – the *any exposure* theory is scientifically bankrupt and litigation driven and cannot support an asbestos case.

It is hard to believe, with this track record around the country, that Judge Colville could possibly have abused his discretion in reaching the same conclusion that so many

⁴ See *Gregg v. V-J Auto Parts, Inc.*, 596 Pa. 274, 943 A.2d 216 (2007); *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 774 (Tex. 2007); *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 857 N.E. 2d 1114 (Ct. App. 2006) (benzene); *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304, 312-21 (Tex. App. 2007); *In re W.R. Grace & Co.*, 355 B.R. 462, 474, 478 (Bkrtcy. D. Del 2006); *Brooks v. Stone Architecture*, 934 So.2d 350, 255-56 (Miss. Ct. App. 2006); *Bartel v. John Crane Inc.*, 316 F. Supp. 2d 603, 611 (N.D. Ohio 2004), *aff'd Lindstrom v. A-C Prod. Liab. Trust*, 424 F. 3d 488 (6th Cir. 2005); *Anderson v. Asbestos Corp., Ltd.*, No. 05-2-04551-5 SEA (Wash. Super. Oct. 31, 2006) (Transcript of Bench Ruling at 144-45); *In re Asbestos Litig.*, No. 2004-3964 (Tex. Dist. Ct., 11th Dist., Harris County Jan. 20, 2004) (Letter Ruling); *In re Asbestos Litig.*, Cause No. 2004-3964 (Tex. Dist. Ct. Jul. 18, 2007) (Letter Ruling); *Basile v. Am. Honda Motor Co.*, No. 11484 CD 2005 (Pa. Ct Com. Pl. Feb. 22, 2007) (Order Granting Caterpillar's Motion to Exclude Plaintiffs' Experts' Testimony); *Free v. Ametek*, No. 07-2-04091-9-SEA (Wash. King County Super. Ct. Feb. 29, 2008) (Barnett, J.) (ruling on motion *in limine*); *In re Asbestos Litig.*, 59 Pa. D. & C. 4th 62, 65-66 (Pa. Ct. Com. Pl. June 11, 2002); *Martin v. Cincinnati Gas & Electric Co.*, No. 07-6385, 2009 WL 188051 (6th Cir. Jan 7, 2009); *Smith v. Kelly-Moore Paint Co.*, No. 2-08-198-CV, 2010 WL 682343 (2d Dist. Texas Ct. App, Feb. 25, 2010); *Daly v. Arvinmeritor, Inc.*, Case No. 07-19211 (Fla. Cir. Ct. Nov. 30, 2009); *Butler v. Union Carbide Corp.*, Civ. Act. No. 2008CA114, (Super. Ct. Morgan Cty, a., June 29, 2010) "Order Granting Defendant's Motion to Strike Certain Testimony of Plaintiff's Pathologist Dr. John Maddox" (Super. Ct. Morgan Cty, Ga., June 29, 2010); *Degrasse v. Anco Insulations*, No. 2007-12736 (Orleans Civ. Dist. Ct., La., Sep. 13, 2007); *Robertson v. Ashby*, No. 532,769, Motion Hearing Tr. (East Baton Rouge Parish, La., Jan. 19, 2010); *Henricksen v. ConocoPhillips Co.*, 605 F.Supp.2d 1142, 1165-66 (E.D. Wa. 2009) (benzene). A compendium of these cases is included in the Appendix to this brief.

⁵ Dr. Maddox has been excluded in the *Betz* case by Judge Colville; in a subsequent Pennsylvania case, *Basile v. American Honda Motor*, by Judge Olson; and in a very recent Georgia state court decision, *Butler v. Union Carbide*, all cited *supra* at n. 2.

other judges in so many other jurisdictions also reached. In fact, he did not. He performed exactly the sort of careful gatekeeping that Pennsylvania law requires of a trial judge – one that does not accept what the experts say at face value but looks behind those statements to determine, under the *Frye* standard, whether their opinions are based on a generally accepted methodology. Most of the trial judge’s criticisms were directed at logical errors that could only be viewed at best as speculation and at worst as outright attempts to mislead the jury. It was not logical to conclude, as Dr. Maddox did, that the smallest brake exposure causes mesothelioma irrespective of dose, but a lifetime dose of background fibers that we all experience does not. It was not logical for Dr. Maddox to conclude that because heavy exposure to asbestos causes mesothelioma, small doses would also (his extrapolation down approach). It was not logical for Dr. Maddox to conclude that mechanic work *causes* mesothelioma just because case reports of automotive mechanics with mesothelioma exist in the literature. It was not logical, nor was it consistent with the science we all learned in fifth grade, for Dr. Maddox to ignore dose entirely. It was not logical to opine that “no known safe level of exposure” is the same thing as “every exposure is a cause.” These are errors of logic, which Judge Colville had every right and obligation under *Frye* to identify and exclude.

Some of Judge Colville’s findings are based on law rather than science and thus fall squarely within his capacity as a judge. The *any exposure* theory has the pernicious effect – as many other courts have found – of shifting the burden of proof from plaintiff to defendant. These experts’ opinion that exposure of any kind is a substantial factor puts defendants in the position of having to prove the amount of exposure that is *not* a causative factor. Other courts have noted that the theory makes a mockery of the

