

IN THE SUPREME COURT

IN RE CERTIFIED QUESTION FROM THE COURT OF APPEALS FOR  
THE FOURTEENTH JUDICIAL DISTRICT, HOUSTON, TEXAS

GLENN MILLER, ESTATE OF CAROLYN  
MILLER, SHAWN DEAN, JOHN ROLAND,  
and ALMA ROLAND,

Plaintiffs-Appellees,

v

FORD MOTOR COMPANY,

Defendant-Appellant.

Supreme Court No. 131517

Court of Appeals for the Fourteenth  
Judicial District, Houston, Texas  
No. 14-05-00026-CV

Appeal from the 239<sup>th</sup> District Court  
Brazoria County, Texas  
Trial Court Cause No. 15077\*JG01

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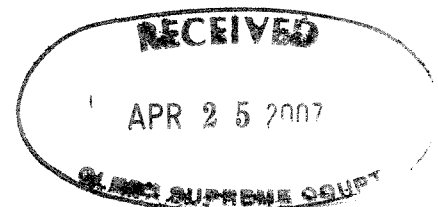
**DEFENDANT-APPELLANT FORD MOTOR COMPANY'S REPLY BRIEF ON  
QUESTION OF LAW CERTIFIED BY THE COURT OF APPEALS FOR  
THE FOURTEENTH JUDICIAL DISTRICT, HOUSTON, TEXAS**

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**I. PLAINTIFFS HAVE NOW ABANDONED PREMISES LAW AS A SOURCE OF ANY DUTY TO CAROLYN MILLER**

Plaintiffs have now conceded that any duty Ford owed to John Roland as the owner of the premises on which Roland worked cannot be extended to Carolyn Miller because "the analytical framework of premises liability . . . does not apply in cases where the plaintiff never entered onto the premises." (Plaintiffs' Br, p 18). This was the main point of Ford's appeal brief on the certified question and Plaintiffs apparently now agree with Ford.<sup>1</sup> But Plaintiffs argue that this does not matter because Carolyn Miller's claim was "submitted . . . on a negligence theory, not on a premises liability theory." (Plaintiffs' Br, p 18). Plaintiffs and their supporting amicus further contend that Ford "waived its arguments with respect to premises liability" because it "never requested that the trial court actually instruct the jury with respect to premises liability on Carolyn Miller's claims." (*Id.* at 17-18).

The first point begs the question: what is the source of the legal duty to Carolyn Miller supporting the "negligence theory"? That is what the certified question asks and, if no such duty exists under premises liability law, then Plaintiffs have to come up with some other source of such a duty. Although Plaintiffs' discussion jumps back and forth between legal doctrines, Plaintiffs appear to have proposed three alternative legal theories for why Ford owed a duty to Carolyn Miller: (1) everyone owes a duty to everyone; (2) misfeasance, as opposed to

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<sup>1</sup> It is not surprising that Ford primarily addressed this question in its opening brief because the certified question from the Texas Court of Appeals specifically asks whether Ford owed a duty to Carolyn Miller "*as the owner of property on which asbestos-containing products were located*" even though she was "never on or near that property." Moreover, this is exactly how Plaintiffs' counsel characterized her claim in the Texas trial court:

MR. EDDINS [Plaintiffs' counsel]: . . . Now, this case is against Ford Motor Company, because they owned a premise, they owned a facility, that my clients worked at where they were exposed to asbestos. They were not my client's employer. [Voir Dire 5/18/04, Apx at 597a].

nonfeasance; and (3) the "inherently dangerous activity" doctrine. The Bricklayers Union, as amicus, suggests a fourth: (4) supplier of a dangerous product. As shown below, none of these alternative theories establish that Ford owed a duty to Carolyn Miller in this case. Accordingly, the answer to the certified question, even under non-premises liability theories, is "no."

As to Plaintiffs' waiver argument, while misplaced in connection with a certified question, it is also flatly wrong. In the first place, Ford repeatedly sought dismissal of Carolyn Miller's claim because Ford owed no legal duty to her under premises liability law or any other theory. (See Apx 911a-912a; 1556a-1619a). When dismissal was denied, Ford, in its First Amended Requested Jury Instructions and Questions (see Plaintiffs' Apx 9b-13b), specifically requested that the trial court give a global instruction concerning the liability of landowners that would apply to both John Roland's claim as well as that of Carolyn Miller. The trial court, however, limited the instruction on the premises liability issue to John Roland's claim. (See Apx 1131a-1133a (Jury Question Nos 1 and 3)). Ford reiterated its position on the issue on the record immediately prior to the jury's charge. (See Supp Apx 2172a-2175a). The more pertinent waiver point is that Plaintiffs raised none of their alternative duty theories in the Texas courts, except the notion that everyone owes a duty to everyone as a matter of "straightforward negligence." This is apparently the theory that the Texas trial court adopted and it is plainly erroneous as a matter of Michigan law.

**II. THERE IS NO "STRAIGHTFORWARD NEGLIGENCE" CLAIM IN THE ABSENCE OF A DUTY OF CARE TO THE PARTICULAR PLAINTIFF**

Plaintiffs contend that Ford "seeks to convince this Court that the *only* duty landowners owe is to persons who enter onto their premises." (Plaintiffs' Br, p 18). But Plaintiffs have now conceded that the only duties owed by landowners, *as premises owners*, are to persons who enter onto, or at least pass by, their property. (Id.) This, of course, does not preclude persons

who happen to own land from owing other duties based on other duty-creating relationships. Ford did not address any other duty creating theory in its opening brief, other than the notion that everyone owes a duty to everyone, because Plaintiffs had not raised any other basis for imposing a duty in this case. All of the other theories that Plaintiffs now raise are demonstrably inapplicable to Carolyn Miller's claim.

Plaintiffs continue to assert that, as a matter of "straightforward negligence," everyone owes a duty to everyone foreseeably injured by anything they do. (Plaintiff's Br, p 19). Plaintiffs pull language from *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967), to support such an all-encompassing duty. But this language was nothing more than loosely worded *dicta*. *Clark* expressly recognized that duty depends on "the existence of a legal relationship between the parties by which the injured party is owed a duty by the other." *Id.* at 260. The duty recognized in *Clark* was based on a specific contractual undertaking that was determined to have resulted in a duty-creating relationship between a contractor and the owner's inspector "who was lawfully on the premises at defendant's request." *Id.* at 262. In short, *Clark* does not stand for the proposition that every person owes a duty to every other person foreseeably injured by their conduct and no decision from this Court has ever applied *Clark* in such an expansive manner. As this Court explained in *Buczowski v McKay*, 441 Mich 96, 101; 490 NW2d 330 (1992):

"[T]he mere fact that an event may be foreseeable does not impose a duty upon the defendant to take some kind of action accordingly. . . . [T]o require the actor to act, some sort of relationship must exist between the actor and the other party which the law or society views as sufficiently strong . . . ."

But even based on foreseeability, this case does not support the imposition of a duty. Plaintiffs claim that the fact that "household members could sustain injurious exposure to asbestos was known well before Mr. Roland began working at Ford premises." (Plaintiffs' Br, p 11). In the first place, the danger of developing a rare disease 20 or 30 years after exposure to

invisible airborne asbestos particles was not obvious or self-evident in the 1950's and 1960's. Any knowledge of such a risk depended on familiarity with cutting-edge scientific or medical literature. Thus, the risk alleged in this case is not one that ordinary persons working in an industrial activity would recognize as foreseeable or even possible, especially four decades ago.

Moreover, even based on scientific literature, any risk to Carolyn Miller was not sufficiently foreseeable in the 1950's and 1960's to support the imposition of a duty. The testimony of Plaintiffs' industrial hygiene expert, Jerry Lauderdale, along with the articles he discussed (see Apx 903a-907a), focused on what Ford allegedly knew or should have known about the dangers of asbestos exposure *in the workplace* at the time John Roland worked at the Ford Rouge Plant from 1954 to 1965. When it came to secondary "take-home" exposures, Mr. Lauderdale conceded that the first published literature suggesting a "specific attribution" of asbestos exposure to washing of clothes by the family members of workers was not until 1965. (Apx at 896a-897a). The literature recited by Plaintiffs prior to that time was extremely general, with no mention of danger from secondary asbestos exposure. (Plaintiffs' Br, pp 11-12).<sup>2</sup>

The Texas Court of Appeals recently observed that it was not until 1972 that OSHA promulgated regulations prohibiting employers "from allowing workers who had been exposed to asbestos to wear their work clothes home." *Exxon Mobil Corp v Altimore*, \_\_\_ SW3d \_\_\_ (Tex App – Houston, 2006). Even then, the court noted, "there were still mixed messages from the medical and scientific community on the risks associated with asbestos exposure and there was no clear consensus on that risk." *Id.* Accordingly, the Texas court held that the risk of "take home" exposure was simply not foreseeable to Exxon Mobil prior to 1972, and that Exxon Mobil

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<sup>2</sup> The attenuated nature of this risk demonstrates one reason that Michigan law has rejected the imposition of duties based solely on the "foreseeability" of injury. Viewed from hindsight, almost anything can be deemed to have been "foreseeable."

therefore did not owe a duty to the plaintiff in that case. Thus, even if Michigan imposed duties based solely on the foreseeability of injury, no duty could be imposed in this case.

**III. PLAINTIFFS CANNOT ESTABLISH A DUTY-CREATING RELATIONSHIP BY CHARACTERIZING FORD'S CONDUCT AS MISFEASANCE OR ACTIVE NEGLIGENCE**

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Similarly unavailing is Plaintiffs' assertion that a duty may be imposed on Ford simply by characterizing it as having engaged in "misfeasance" or "active negligence." (Plaintiffs' Br, p. 23). This Court has previously recognized a distinction between misfeasance and nonfeasance in two discrete areas of negligence: (1) where a claim is based on an individual's alleged failure to protect another from the criminal acts of a third party, see *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499; 418 NW2d 381 (1988); *Ross v Glaser*, 220 Mich App 183; 559 NW2d 331 (1997); and (2) where negligent performance of a contractual duty is claimed to have injured a third party, see *Fultz v Union-Commerce Assocs*, 470 Mich 460, 467; 683 NW2d 587 (2004). Neither this Court nor the Court of Appeals has relied on the distinction between misfeasance and nonfeasance as a basis for imposing a duty of care outside of those contexts.

Moreover, this Court recently retreated from the misfeasance/nonfeasance inquiry in *Fultz*, 470 Mich at 466-467, "because it improperly focuses on whether a duty was breached instead of whether a duty exists at all." The Court explained that the "'slippery distinction' between misfeasance and nonfeasance of a duty undertaken obscures the proper initial inquiry: Whether a particular defendant owes any duty at all to a particular plaintiff." *Id.* In this case, Plaintiffs have failed to establish the existence of any relationship between Ford and Carolyn Miller giving rise to a duty of care, and they cannot fill that void simply by claiming that Ford engaged in "misfeasance."

Even if it were valid, the nonfeasance/misfeasance distinction would not aid Plaintiffs in this case. Plaintiffs claim that Ford engaged in misfeasance by requiring asbestos-containing

materials for the blast furnace relining work. Yet, merely using asbestos products was not, in itself, negligent or the conduct that allegedly resulted in the harm to Carolyn Miller. Rather, according to Plaintiffs, it was Ford's alleged *failure* to take affirmative measures to protect Carolyn Miller from secondary exposure to those products that was negligent and caused her injury. (Plaintiffs' Br, p 8-9, 11-12). Thus, even under the misfeasance/nonfeasance distinction, because Ford had no "special relationship" with Carolyn Miller, it had no duty to take affirmative steps to protect her from harm. See *Ross*, 220 Mich App at 186-187.

#### **IV. THE INHERENTLY DANGEROUS ACTIVITY DOCTRINE HAS NO APPLICATION TO THIS CASE**

Plaintiffs and their amicus also contend that a duty should be imposed on Ford because it "engaged in an inherently dangerous activity on its premises – application and removal of asbestos products." (Plaintiffs' Br, pp 24-26). Michigan case law makes clear that the inherently dangerous activity doctrine has no application to Carolyn Miller's claim.

In *DeShambo v Nielsen*, 471 Mich 27, 33; 684 NW2d 332 (2004), the Court held that in order for the inherently dangerous activity doctrine to apply, the inherent "nature and character of the work" must be such that "in the natural course of things, injurious consequences to [the actor's] neighbor must be expected to arise." *Id.* (citations omitted). In other words, it must be work that "cannot be done without doing damage" and, therefore, "necessarily involves danger" to persons in proximity to the work. *Id.* at 32, 34. The doctrine has most often been applied to impose a duty on those engaged in, or contracting for, destructive activities such as fumigating, blasting, excavating, and land clearing. See, e.g., the cases cited in *DeShambo*, 471 Mich at 31-34. In short, it is based on far more than foreseeability – it involves activities creating a very high likelihood of injury to persons nearby.

Relining a blast furnace inside the Ford Rouge plant does not, by its very nature, "necessarily" endanger persons located miles away like Carolyn Miller. If it involves any inherent danger at all (as opposed to a danger created by negligent performance of the work), that danger is only to the persons doing the work. Any danger to Carolyn Miller arose, not from the work itself, but from John Roland taking asbestos fibers home on his clothing and Carolyn Miller doing his laundry over a period of years. Even then, the alleged injury was a very rare disease that developed years later, not as an inevitable or necessary result of that in-home exposure. Accordingly, there is no basis for applying the inherently dangerous activity doctrine to Carolyn Miller's claim in this case.

**V. FORD HAD NO DUTY TO CAROLYN MILLER AS THE "SUPPLIER" OF A DANGEROUS PRODUCT**

The International Union of Bricklayers, as amicus, argues that Ford had a duty to warn under §§ 388 and 392 of the Restatement of Torts, 2d, because Ford "supplied" dangerous asbestos products for the relining work. Plaintiffs did not raise this theory in the Texas trial or appellate courts, and do not raise it in their brief to this Court. Accordingly, the amicus Union has no standing to raise a new claim not raised by the parties. See *Union Steam Pump Sales Co v Deland*, 216 Mich 261, 263; 185 NW 353 (1921) ("[U]nder our practice the parties to the case have control of the issues, and we find it necessary to only consider the issues raised by them").

In any event, §§ 388 and 392 do not reflect current Michigan law. In *Greene v A P Products, Ltd*, 475 Mich 502, 508 n 7; 717 NW2d 855 (2006), this Court observed that, as applied in Michigan, § 388 summarizes the common law principles establishing a duty on the part of a "manufacturer or seller" "to warn of dangers involving the use of a product." Moreover,

as *Greene* further explained, the principles set forth in § 388<sup>3</sup> were displaced by Michigan's 1995 tort reform legislation, MCL 600.2945 *et seq.*, which now occupies the field of liability for dangerous or defective products. By their plain terms, the provisions of the product liability statute apply only to harm caused by the "production of a product," MCL 600.2945(h), which means product "manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling." MCL 600.2945(i). It would be inconsistent with this statutory scheme to impose on Ford the sorts of duties that the Legislature has reserved for entities involved in the actual "production" of products.

Finally, the principles stated in §§ 388 and 392 have no application to Carolyn Miller's claim in any event. The duty recognized by those sections extends only to those who the supplier "should expect . . . to be endangered by its probable use" and only if he "has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition." Carolyn Miller was not within the scope of persons that Ford would "expect" to be endangered by the "use" of asbestos products in relining a blast furnace inside the Rouge Plant in the 1950's and 1960's. She was never in the plant or anywhere near the relining work. See *Rohrbaugh v Owens-Corning Fiberglass Corp*, 965 F2d 844, 846-847 (CA 10, 1992) (no duty owed by manufacturer to wife of insulator who worked with asbestos products since she "was never exposed to asbestos as a user or present where the product was used. Her exposure to asbestos dust, it is asserted, was brought about by contact with her husband's work clothes"). Moreover, the fact that Ford engaged an independent contractor experienced with relining blast furnaces

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<sup>3</sup> Although not specifically mentioned in *Greene*, § 392 of the Restatement is related to § 388 and recognizes an "additional duty of inspection thrown upon the person so supplying chattels for a use in which he has a business interest." See comment a.

gave Ford every reason to believe that the contractor would "realize" any dangers associated with the work and take appropriate protective measures. See *Jodway v Kennametal, Inc*, 207 Mich App 622, 628; 525 NW2d 883 (1994) (defendant suppliers had a reasonable basis to rely on employer to take necessary actions to protect against potential hazards inherent in use of powdered cobalt).<sup>4</sup>

## **VI. THE TRADITIONAL FACTORS FOR DETERMINING DUTY MILITATE AGAINST IMPOSING A DUTY IN THIS CASE**

Finally, Plaintiffs claim that the traditional factors for determining duty support imposing a duty on Ford, see *Buczowski*, 441 Mich at 101 n 4.<sup>5</sup> As noted by amicus Michigan Defense Trial Counsel, the decision to create new legal duties is one that primarily rests with the Legislature. Because no recognized legal duty existed between Ford and Carolyn Miller, it would be inappropriate to reach back 40 years to create such a duty now.

Moreover, Plaintiffs' analysis of the "duty" factors is seriously flawed. As discussed above, harm to Carolyn Miller from relining the blast furnaces at the Ford Rouge plant was not reasonably foreseeable in the 1950's and 1960's and even Plaintiffs admit that such harm is very rare. (Plaintiffs' Br, pp 29-30). For the same reasons, "the closeness of connection between the conduct and injury" and the "moral blame attached to the conduct" is weak. The "policy of preventing future harm" is not implicated because there is nothing that Ford can do today to prevent exposures that took place decades ago and such exposures in the future are exceedingly

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<sup>4</sup> The Union argues that Ford never raised the "sophisticated user" defense to liability under §§ 388 and 392 (Amicus Br, p 17). This contention is ironic given that Plaintiffs never raised or invoked either section as a basis for Ford's liability in either the Texas courts or this Court.


<sup>5</sup> Those factors include "foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, policy of preventing future harm, and, finally, the burdens and consequences of imposing a duty and the resulting liability for breach."

unlikely given the regulation of asbestos use that exists today. The "burdens and consequences of imposing a duty and the resulting liability for breach" would be extreme by extending the duties of a premises owner far beyond its property, by further expanding the scope of liability for asbestos exposure which is already at ruinous levels, and by retroactively creating duties when it is no longer possible to do anything to avoid liability for breaching them.

This Court should reject the alternative duty theories advanced by Plaintiffs and their amici and answer the certified question "no."

Respectfully submitted,

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