

IN THE SUPREME COURT
FOR THE STATE OF MICHIGAN

IN RE: CERTIFIED QUESTION FROM
THE FOURTEENTH COURT OF
APPEALS DISTRICT OF TEXAS

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

Supreme Court No. 131517
Court of Appeals No. 1405-0026-CV
Lower Court Case No. 15077*JG01

Appellees,

v.

FORD MOTOR COMPANY,

Appellant.

**BRIEF AMICUS CURIAE OF MICHIGAN TRIAL LAWYERS
ASSOCIATION**

CHARFOOS & CHRISTENSEN, PC
BY: DAVID R. PARKER (P39024)
COUNSEL FOR AMICUS CURIAE MTLA
5510 WOODWARD AVE
DETROIT, MI 48202

TABLE OF CONTENTS

	<u>PAGE</u>
INDEX OF AUTHORITIES.....	iii
STATEMENT OF QUESTION PRESENTED	v
DESCRIPTION OF THE <i>AMICUS CURIAE</i>	vi
INTRODUCTION AND STATEMENT OF INTEREST	1
STATEMENT OF FACTS	3
ARGUMENT	3
I. UNDER MICHIGAN LAW, FORD OWED A DUTY TO CAROLYN MILLER, AND OTHERS SIMILARLY SITUATED, TO ACT APPROPRIATELY WHEN EMPLOYING PEOPLE TO WORK WITH ASBESTOS ON ITS PROPERTY.	3
A. Ford owed a duty to all persons who might foreseeably be affected by negligent conduct that could lead to a predictable injury.	3
B. The fact that the injury occurred to Carolyn Miller as a result of being exposed to asbestos on a relative's clothing does not affect the duty analysis herein.....	6
C. The fact that the person, whose asbestos laden clothing led to Carolyn Miller's mesothelioma, was an independent contractor does not affect the nature of the duty owed by Ford.	7
II. CASES FROM OTHER JURISDICTIONS SUPPORT THE IMPOSITION OF A DUTY UPON FORD UNDER THE CIRCUMSTANCES PRESENTED TO THE JURY IN THIS CASE.	9
III. MICHIGAN POLICY FAVORS THE COMPENSATION OF SERIOUS ASBESTOS INJURIES, SUCH AS THAT INCURRED BY CAROLYN MILLER HEREIN.	12
CONCLUSION	16
PROOF OF SERVICE	17

INDEX OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Babula v Robertson</i> , 212 Mich App 45; 536 NW2d 834 (1995)	4
<i>Buczowski v McKay</i> , 441 Mich 96; 490 NW2d 330 (1992).....	4
<i>Chaisson v. Avondale Industries</i> , 947 So2d 171 (La App 2006).....	11
<i>Clark v Dalman</i> , 379 Mich. 251; 150 NW2d 755 (1967).....	3, 5
<i>DeShambo v. Nielsen</i> , 471 Mich 27; 684 NW2d 332 (2004)	7, 8
<i>Funk v General Motors</i> , 392 Mich 91; 220 NW2d 641 (1974)	9
<i>Ghaffari v Turner Construction Co</i> , 473 Mich 16; 699 NW2d 687 (2003)	12
<i>In re Certified Question</i> , 416 Mich 558; 331 NW2d 456 (1982)	1
<i>Johnson v A&M</i> , 261 Mich App 719; 683 NW2d 229 (2004).....	12
<i>Johnson v. Bobbie's Party Store</i> , 189 Mich App 652; 473 NW2d 796 (1991)	5, 6
<i>Olivo v. Owens Illinois, Inc.</i> , 186 NJ 394; 895 A2d 1143 (2006)	9, 10
<i>Ormsby v Capital Welding, Inc.</i> , 471 Mich 45; 684 NW2d 320 (2004).....	8, 9
<i>Pinnix v Toomoy</i> , 242 NC 358; 87 SE2d 893 (1955)	4
<i>Ross v Glaser</i> , 220 Mich App 183; 559 NW2d 331 (1996).....	4, 5
<i>Shepard v. Redford Community Hospital</i> , 151 Mich App 242, 390 NW2d 239 (1986).....	6, 7
<i>Zimko v. American Cyanamid</i> , 905 So2d 465 (La App 2005).....	11
 <u>STATUTE:</u>	 <u>PAGE</u>
MCL 408.1009	12
 <u>ADMINISTRATIVE ORDER:</u>	 <u>PAGE</u>
AO 2006-06	14

OTHER:

PAGE

Agudo et. al., *Occupation and Risk of Malignant Pleural Mesothelioma: A Case-Control Study in Spain*, Am. J. Ind. Med. 37:159-168 (2000).....13

Hofmann, "Michigan high court bans bundling of asbestos personal injury cases", 8/14/06 Business Insurance 4.....14

Iwatsubo et. al., *Pleural Mesothelioma: Dose-Response Relation at Low Levels of Asbestos Exposure in a French Population-based Case-Control Study*, Am. J. Epidemiology 148(2):133-142.....13

Rutstein et. al., *Sentinel Health Events (occupational): a basis for physician recognition and public health surveillance*, Am J Public Health.73(9):1054-62 (1983).....13

Teschke, et. al., *Mesothelioma Surveillance to Locate Sources of Exposure to Asbestos*, Can. J. Pub. Health 88(3) 163-168 (1997).....13

STATEMENT OF QUESTION PRESENTED

DOES MICHIGAN RECOGNIZE A DUTY OWED BY FORD TO THOSE WHO WOULD BE FORESEABLY INJURED BY ITS NEGLIGENT ACTIONS, SUCH AS THOSE IN THE POSITION OF CAROLYN MILLER, AS THE TEXAS JURY FOUND UNDER THE FACTS AND EVIDENCE BEFORE IT?

Amicus MTLA submits the answer is "YES"

DESCRIPTION OF THE *AMICUS CURIAE*

The Michigan Trial Lawyers Association (MTLA) is an organization of Michigan Lawyers engaged primarily in litigation and trial work. Comprised of more than 2400 attorneys, the Michigan Trial Lawyers Association recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in the trial courts of this state.

INTRODUCTION AND STATEMENT OF INTEREST

The issue certified by the Texas Appellate Court, and accepted for decision by this Court is:

Whether, under Michigan law, Ford, as owner of property on which asbestos-containing products were located, owed to Carolyn Miller, who was never on or near that property, a legal duty specified in the jury charge submitted by the trial court to protect her from exposure to any asbestos fibers carried home on the clothing of a member of Carolyn Miller's household who was working on that property as the employee of an independent contractor.

This is an issue which, to be properly answered, must be broken down into its component subparts. As a threshold matter, the Michigan Supreme Court has *not* been requested to pass upon the adequacy or sufficiency of the evidence below. This Court should similarly refrain from issuing an advisory opinion as to whether Carolyn Miller's cause of action sounds in negligence as opposed to premises liability. Those matters are better left for the Texas judicial system, based upon the full record available to it, and based on Texas jurisprudence. Indeed, as a matter of Michigan jurisprudence, only those matters of law which are necessary to answer the specific question certified to this Court can be answered. *In re Certified Question*, 416 Mich 558; 331 NW2d 456 (1982).

What this Court *has* been requested to decide can be broken down as follows:

(1) Did Ford owe a duty to Carolyn Miller to refrain from taking actions which could foreseeably cause injury to her, or to anyone similarly situated?

(2) Is this duty affected in any way by the fact that the injury occurred to her as a result of a carcinogenic substance being borne to her on the clothes of her stepfather, John Roland, rather than through other mechanisms?

(3) Is this duty affected in any way by the fact that the person on whose clothes the substance was carried was an independent contractor of Ford?

Amicus is an organization of Michigan attorneys who regularly represent the interests of persons who have been severely injured or killed as the result of the negligence of others. As such, *Amicus* has an abiding interest in the preservation and proper application of Michigan negligence principles in cases such as the instant case.

Amicus will show that Michigan law is clear in answering all the above questions. First, the existence of a duty on the part of Ford to refrain from taking actions that injure others is part of the fundamental bedrock Michigan law of negligence. The fact that one cannot know the identity of all others that might foreseeably be injured is of no significance; Ford's duty to avoid taking actions which might injure others is well established. Second, as long as Carolyn Miller was among a group who predictably and foreseeably would be injured by a breach of duty on the part of Ford, the particular means by which her injury came about is similarly of no significance; Ford's responsibility is not extinguished by unusual facts. Third, the independent contractor status of the person whose clothes carried the asbestos fibers is irrelevant in a negligence analysis; furthermore, even if it were relevant, Michigan law establishes a duty owed by Ford under the facts as presented to the Texas jury.

Finally, *Amicus* will also deal with the policy implications of the above law. Carolyn Miller contracted mesothelioma, which is a rare and deadly disease. Mesothelioma is a marker condition for asbestos exposure. There is no danger that any "floodgates" will be opened if this Court properly reaffirms the bedrock principles of duty and foreseeability such that Ford is seen as owing a duty to Carolyn Miller. Instead,

when this rare disease causes the loss of a life, as a result of shoddy procedures which predictably allowed the dissemination of deadly asbestos dust beyond Ford's property lines, such is an instance where the law of Michigan, which allows compensation to be made, should be resoundingly reaffirmed.

STATEMENT OF FACTS

Amicus Curiae adopts the statement of facts set forth in Appellee Carolyn Miller's brief on appeal.

ARGUMENT

I. UNDER MICHIGAN LAW, FORD OWED A DUTY TO CAROLYN MILLER, AND OTHERS SIMILARLY SITUATED, TO ACT APPROPRIATELY WHEN EMPLOYING PEOPLE TO WORK WITH ASBESTOS ON ITS PROPERTY.

A. Ford owed a duty to all persons who might foreseeably be affected by negligent conduct that could lead to a predictable injury.

The liability of Ford as to Carolyn Miller was submitted to the jury under a negligence cause of action, and no other. Therefore, the legal question of the extent of the duty owed by Ford to this particular plaintiff is governed by principles of negligence law.

The case of *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967), sets out the fundamental rule of when a duty is owed, and to whom it is owed, under Michigan negligence law. In *Clark*, the defendant applied a coating of extremely slippery substance to a water tank without informing plaintiff inspector that such had been done, causing him to be injured in the tank. This Court's ruling for plaintiff in *Clark* recognized that every person engaged in the prosecution of any undertaking is under a duty to "govern his actions as not to unreasonably endanger the person or property of others." *Id.*

This rule of the common law “arises out of the concept that every person is under the general duty to so act, or to use that which he controls, as not to injure another.” *Id.*, citing *Pinnix v Toomoy*, 242 NC 358; 87 SE2d 893 (1955).

This rule has been applied to a number of factual situations. One such case is *Ross v Glaser*, 220 Mich App 183; 559 NW2d 331 (1996). In *Ross*, defendant Glaser was accosted outside his parents’ house by members of decedent’s family, who had a history of tension between the Glaser family and Ross family. Glaser left the situation, went into his house, and asked his father, John Glaser, to hand him a loaded gun. John Glaser did so. Anthony went out and killed one of the Rosses.

Under the circumstances of the *Ross* case, the father was found to have owed a duty to the member of the Ross family who was shot. The *Ross* court went through an analysis of Michigan negligence principles governing when a duty exists:

Several considerations underlie the determination whether a duty exists: (1) the foreseeability of the harm; (2) the degree of certainty of injury; (3) the closeness of the connection between the conduct and the injury; (4) the moral blame attached to the conduct; (5) the public policy of preventing future harm; and (6) the burdens and consequences of imposing a duty and the resulting liability for breach. *Id.* at 187; citing *Buczowski v McKay*, 441 Mich 96, 101, n 4; 490 NW2d 330 (1992) and *Babula v Robertson*, 212 Mich App 45, 49; 536 NW2d 834 (1995).

It reached the following conclusion:

Under these circumstances, the harm was foreseeable. When defendant handed the gun to Anthony, it was foreseeable that Anthony would shoot someone. It is true that the harm did not befall one of the four antagonists while outside the Glaser home. Nevertheless, when defendant gave the gun to Anthony, it was foreseeable that he would respond to a perceived threat by firing it at a member of the Ross family. The Rosses were at the center of the antagonism. It is not necessary that the manner in

which a person might suffer injury be foreseen or anticipated in specific detail. *Id* at 188.

Under the *Ross* analysis, a duty was properly imposed upon Ford to refrain from taking actions that could lead to innocent people being exposed to asbestos. When Ford, which knew of the potency of asbestos fibers, arranged for workers to do a job which necessarily exposed them to large quantities of such fibers, and did so without arranging for facilities for the workers to change clothes, it became foreseeable that fibers would be borne on the workers' clothing, thus exposing those who laundered the clothes to dangerous asbestos. The harm from being exposed to asbestos was known by Ford to be great, and Ford's inappropriate reaction to such knowledge provides the moral and public policy underpinnings of a duty to prevent the spread of asbestos fibers. This satisfies the *Ross* and the *Clark* requisites to imposition of a duty under Michigan law.

This duty has also been applied in situations where negligence of a landowner caused injury to one not on the land. In *Johnson v. Bobbie's Party Store*, 189 Mich App 652; 473 NW2d 796 (1991), plaintiffs alleged that the defendant was negligent in allowing cars to be parked on its premises in such a way as to violate a zoning variance. Plaintiff was injured when a car parked on Defendant's premises blocked her view, leading to an accident. Plaintiff never set foot on Defendant's premises. The Michigan Court of Appeals nonetheless held for plaintiff, stating, "both duty and cause depend on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable." *Id* at 660-61. In so doing, the court upheld the existence of a duty to the plaintiff because of the foreseeability of the situation. "Where the parking lot of a shopping center abuts a public highway, it is entirely foreseeable that a serious accident

may occur between a customer entering or exiting from the parking lot and a highway motorist.” *Id.* The court further ruled that, under the facts as shown by Plaintiff, it was “wholly just” to impose a burden upon a defendant landowner to properly maintain its premises. The court noted that a defendant’s duty usually extends only to the boundaries of the premises, and an injury caused by a dangerous condition located outside those boundaries is usually not the legal responsibility of that defendant. The court, however, distinguished Plaintiff’s case because “this general principle does not necessarily preclude liability where a passerby is injured outside the premises, but as a result of a danger posed by a condition existing on the defendant’s premises.” *Id.*

Thus, Michigan negligence analysis supports the finding that Ford owed a duty to Carolyn Miller under the circumstances of this case.

B. The fact that the injury occurred to Carolyn Miller as a result of being exposed to asbestos on a relative's clothing does not affect the duty analysis herein.

Michigan law also supports the proposition that, a duty having been established, the exact identity of the person, and the exact means by which the foreseeable harm occurs, does not serve to extinguish that duty, despite the fact that the harm comes about indirectly, rather than directly, and to a different person, albeit one still within the zone of risk predictable given the breach of said duty.

Michigan has already imposed liability upon a premises owner in a case involving death after household exposure to a deadly substance. In *Shepard v. Redford Community Hospital*, 151 Mich App 242, 390 NW2d 239 (1986), the Michigan Court of Appeals found that a hospital premises owner owed a duty to the son of a woman exposed to deadly meningitis after his mother was misdiagnosed and discharged from the hospital while infected with the disease. Because the hospital owed the mother a duty of due care

and the harm suffered by the boy—death by meningitis—was foreseeable, the Court of Appeals concluded that the hospital also owed a duty to the boy.

It was the existence of the underlying duty to the party that foreseeably exposed the victim that was important to the court in *Shepard*. Similar principles govern the application of the *Shepard* analysis to the case herein. As seen in section 1, *supra*, a duty is properly imposed on Ford for its negligent actions in conducting the activities surrounding exposure to asbestos on its premises. Therefore, this duty is extended not only to those directly exposed, but also to those who predictably could expose family members to the exact same risk which led to the imposition of the duty in the first place.

C. The fact that the person, whose asbestos laden clothing led to Carolyn Miller's mesothelioma, was an independent contractor does not affect the nature of the duty owed by Ford.

Michigan law is clear that a company can owe separate duties to its employees, independent contractors, and third parties that are injured due to the company's hazardous activities.

In *DeShambo v. Nielsen*, 471 Mich 27, 31; 684 NW2d 332 (2004), this Court acknowledged that an employer or premises owner can owe a duty to an innocent third-party separate from that owed to its own employees or the employees of a contractor working on the premises. Specifically, this Court held that such a defendant owes a duty to innocent parties from harm arising from a dangerous activity that occurred on the premises, because “the inherently dangerous activity doctrine was designed to protect third parties, not those actively involved in the dangerous activity.” *Id* at 38. The duty that Ford owed to Mrs. Miller arising out of its use of asbestos on its premises has thus been recognized as distinct from any duty it owed to her stepfather. Thus, any other claims against Ford are irrelevant to this Court's inquiry as to whether Ford has a duty to

Mrs. Miller. Indeed, Ford's contention that imposition of a duty in this case "would create a broader duty to strangers than is owed to persons actually working on the premises" runs afoul of the rule of *DeShambo*. Michigan law has long recognized, as acknowledged in *DeShambo* that, in the limited situation in which a premises owner initiates an inherently dangerous activity on its premises, a duty exists as to strangers injured by virtue of a breach of that duty, whether or not the Defendant owes such a duty to independent contractors working on the premises.

Again, Ford's arguments that certain facts in the record should allow this court to make a factual finding that it owed no duty of care to Carolyn Miller's stepfather are not properly before this court. The question certified in this case is one of law. The certified question, as posed, precludes a review of the sufficiency of the factual record. This Court must simply assume that the record facts support the verdict. Since the jury in this case found that Ford had a duty to Mr. Roland, Ford's arguments to the contrary are moot.

Furthermore, even if this matter was to be determined according to the law governing premises owners in their dealings with independent contractors working on a common area within the premises owner's property, Ford would still retain liability. Ford acknowledges that an employer has a duty to the employee of an independent contractor working on its premises if the injury occurred in a common work area and the employer controlled the performance of the work the employee was doing.

The "common work area" requirement is easily satisfied in this case. Under *Ormsby v Capital Welding, Inc.*, 471 Mich 45, 57; 684 NW2d 320 (2004), a premises owner such as Ford can be held liable to injury to an independent contractor where it (1) failed to take reasonable steps within its supervisory and coordinating authority (2) to

guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. See also *Funk v General Motors*, 392 Mich 91, 104-105; 220 NW2d 641 (1974). In the instant case, there was ample evidence presented to the jury that the furnace relining jobs performed by Carolyn Miller's stepfather occurred in an area where he worked with numerous bricklayers and other Ford employees - thus satisfying the numerosity and commonality requirements of *Ormsby*. Of course the dangerous nature of asbestos, well known to Ford, but not communicated to the workers, and their negligent actions in failing to take adequate precautions in light of the known potentially fatal hazards of asbestos exposure, satisfy the remainder of the *Ormsby* requirements.

**II. CASES FROM OTHER JURISDICTIONS
SUPPORT THE IMPOSITION OF A DUTY UPON
FORD UNDER THE CIRCUMSTANCES
PRESENTED TO THE JURY IN THIS CASE.**

Although no reported cases in Michigan have applied its common law duty rule to a case like this one, courts that analyze questions of duty in the manner that Michigan does have reviewed this fact situation, and have concluded that a premises owner like Ford owes a duty to persons exposed to asbestos in their homes by an asbestos worker.

The New Jersey Supreme Court's decision in *Olivo v. Owens Illinois, Inc.*, 186 NJ 394; 895 A2d 1143 (2006) is both factually analogous and persuasive. In that case, plaintiff Anthony Olivo was hired out of his local union hall to work at various job sites, including a facility owned by ExxonMobil. While working at Exxon's facility, Olivo worked around asbestos-containing products and eventually developed an asbestos-related disease. As it relates to the instant matter, Olivo also wore work clothes covered

with asbestos dust home, where his wife, Eleanor, laundered them. Like Carolyn Miller, Eleanor Olivo eventually developed mesothelioma, which caused her death.

The New Jersey Supreme Court ruled that ExxonMobil owed a duty to Elenoar Olivo. Under New Jersey law, the imposition of a duty upon Exxon was appropriate because Eleanor Olivo's disease and death were completely foreseeable to Exxon. Comparable to the record here, the *Olivo* record revealed that as early as 1916, industrial hygiene texts recommended that workers be provided with uniforms and changing areas so that dirty work clothes would not be taken home, and that the deadly properties of asbestosis dust were knowable by at least 1937. *Id.*, 895 A2d at 1149. As in this case, there was no evidence that Exxon took any precautions to protect workers from the dust, or from tracking the dust home, and it was therefore completely foreseeable that dirty clothes would be worn home and washed by a family member, exposing them to the deadly dust.

The *Olivo* court specifically rejected a defense argument that ExxonMobil's status as a property owner somehow insulated it from liability from negligent actions that caused harm to another. In analyzing the public policy and fairness considerations, the New Jersey Supreme Court found that the factors weighed in favor of a finding of duty. *Id.* Given that the harm to be avoided in both *Olivo* and the instant matter was serious and the burden of taking precautions light, public policy and fairness considerations as articulated in both Michigan and New Jersey weigh in favor of finding a duty. By comparison, there was no earthly way for Carolyn Miller, a ten-year-old child helping her mother wash clothes, to know that each time she shook out her stepfather's dusty work clothes, she was exposing herself to dust that would kill her. That child's vulnerability

was completely foreseeable to Ford, which could have protected her by telling John Roland that asbestos was deadly, and by providing a place for Roland to change those clothes before going home and exposing his family to the dust. Michigan has a strong interest in imposing a duty upon Ford here, where the life of a child is balanced against the negligible burden of providing a warning and a shower.

Louisiana also analyzes duty questions in a manner comparable to Michigan and to New Jersey, and has held that a premises owner owes a duty to those exposed to asbestos on their family member's work clothes. In the case of *Zimko v. American Cyanamid*, 905 So2d 465 (La App 2005), the Louisiana Court of Appeals considered the case of a mesothelioma victim who, like Carolyn Miller, was exposed to asbestos as a child when his father wore asbestos-contaminated clothing home from work. The premises defendant in *Zimko*, like Ford here, defended by claiming that its duty ended at the property lines of the plant. The Louisiana court disagreed, holding that the defendant company owed a duty to act reasonably in view of the foreseeable risks of harm associated with its conduct. The Louisiana Appellate Court recently affirmed the holding of *Zimko* in *Chaisson v. Avondale Industries*, 947 So2d 171 (La App 2006). As is true with New Jersey and Michigan, duty questions are analyzed in a comparable manner. All three states consider foreseeability an important, but not exclusive factor, and both states also consider "fairness" factors, like the economic impact of imposing a duty, the nature of the defendant's activity, and societal interests. Applying these factors, the *Chaisson* court found that the burden of providing a warning would have been "minimal," as it would have been for Ford in this case. It found that the public interest would be served by providing a disincentive to employers who might otherwise turn a blind eye to

workplace hazards, and it found that because society imposed a regulatory burden upon employers to provide a safe workplace, it made sense to impose tort liability when they failed to do so. Under the circumstances of this case, Michigan, like Louisiana, requires that employers provide a safe workplace and adhere to safety regulations. MCL 408.1009. Indeed, it owes this duty, under applicable Michigan law, not only to its own employees, but also to the employees of independent contractors. *Ghaffari v Turner Construction Co*, 473 Mich 16; 699 NW2d 687 (2003); *Johnson v A&M Custom Built Homes of West Bloomfield*, 261 Mich App 719; 683 NW2d 229 (2004).

These cases illustrate that states whose duty analysis is conducted in the way that Michigan courts conduct it, properly find that a duty is owed to all those foreseeably injured by negligent actions, even where such harm occurs outside of property boundaries. In this case, a weighing of the factors set forth in Michigan law - as in New Jersey and Louisiana - results in Ford being under a duty not to act negligently in such a way as to injure those in the position of Carolyn Miller.

**III. MICHIGAN POLICY FAVORS THE
COMPENSATION OF SERIOUS ASBESTOS
INJURIES, SUCH AS THAT INCURRED BY
CAROLYN MILLER HEREIN.**

Underlying much of the arguments made by Defendants and *Amicus Pacific Legal Foundation* is the proposition that, because there is an abundance of "asbestos litigation" in Michigan, and throughout the nation, public policy encourages the elimination of liability for negligent acts which lead to an innocent person contracting mesothelioma. In other words, the Defendants and *Amicus Pacific* are encouraging this Court to distort existing legal concepts, if necessary to "stem the tide" of asbestos litigation.

These arguments are doubly misplaced. There are almost no reported cases involving "household exposure" to asbestos. Furthermore, this is a mesothelioma case. By definition, a serious injury was inflicted upon Carolyn Miller. A properly instructed jury found that such injury was the responsibility of Defendant Ford, based on the totality of the evidence placed before them. Those decisions are not part of that which is to be reviewed by this court.

Repeated studies have shown that all levels of exposure increase the risk of mesothelioma. See Iwatsubo et. al., *Pleural Mesothelioma: Dose-Response Relation at Low Levels of Asbestos Exposure in a French Population-based Case-Control Study*, Am. J. Epidemiology 148(2):133-142; Agudo et. al., *Occupation and Risk of Malignant Pleural Mesothelioma: A Case-Control Study in Spain*, Am. J. Ind. Med. 37:159-168 (2000). Moreover, unlike many other cancers, for which there are multiple, well-documented causal factors, mesothelioma is overwhelmingly caused by asbestos. As noted by one of the studies upon which the asbestos brake manufacturers rely:

Mesothelioma is a rare cancer with one major etiologic exposure, therefore surveillance using each case as a sentinel event might seem more reasonable for this disease than for cancers with multifactorial causation.

Teschke, et. al., *Mesothelioma Surveillance to Locate Sources of Exposure to Asbestos*, Can. J. Pub. Health 88(3) 163-168 (1997).

In this regard, in 1983, Rutstein et. al. developed a list of Sentinel Health Events for occupational diseases, disability, or untimely deaths ("SHE-O") which are occupationally related. Mesothelioma as a sentinel disease for asbestos exposure was on the initial list of SHE-O and on all subsequent revisions. Rutstein et. al., *Sentinel Health Events*

(occupational): a basis for physician recognition and public health surveillance, Am J Public Health.73(9):1054-62 (1983).

Therefore, the fact that Carolyn Miller died from mesothelioma is *per se* indicative that such occurred as a result of asbestos exposure. As noted above, the jury finding that such exposure occurred as a result of negligent actions and inactions on the part of defendant Ford is not among the issues to be reviewed by this court.

This court last ruled on the policy issues surrounding asbestos litigation in issuing AO 2006-06, which precludes trial courts for "bundling" asbestos cases for settlement or trial. One of the predominant policies underlying the issuance of this order was explicitly stated in the concurring opinion of Justice Markman: "...this administrative order will, I believe, advance the interests of the most seriously ill asbestos plaintiffs whose interests have not always been well served by the present system, where available funds for compensation have been diminished or exhausted by payments made for claims made by less seriously ill claimants." Administrative Order 2006-06 was praised by a defense attorney interviewed for Crain's Business Insurance for much the same reason: "They're getting to the same place we wanted them to get, which is to get claimants who are not sick out of the system to give priority to the sick" Hofmann, "Michigan high court bans bundling of asbestos personal injury cases", 8/14/06 Business Insurance 4 (quoting Mark Behrens, of Shook, Hardy & Bacon LLP).

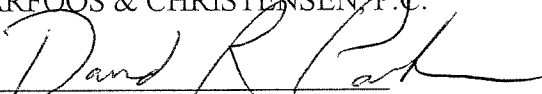
Yet, when a serious injury is presented, the policy considerations suddenly shift from "compensating the most seriously ill" to "avoiding the need to compensate at all". Such is not now, and has never been, the public policy underlying Michigan law. As seen from Section I, *supra*, Michigan law would have to be altered and distorted in order

to reach such a conclusion. This Court should resist Defendant and *Amicus Pacific's* invitation to do so, and instead should reassert the existence of a duty on the part of Ford under the facts as found by the jury.

CONCLUSION

For all these reasons, this Court should answer the certified question from Texas as follows: "Under Michigan law, Ford owed a duty to Carolyn Miller in negligence, which the jury could find to have been breached. Ford's status as a landowner, and the relative's status as an independent contractor do not alter this fundamental analysis in any way."

CHARFOOS & CHRISTENSEN, P.C.


By: 

DAVID R. PARKER (P39024)

Counsel for *Amicus Curiae*

5510 Woodward Avenue

Detroit, MI 48202


(original signature)