

**STATE OF MICHIGAN  
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 AMY ROLAND,

Supreme Court No. 131517

Plaintiffs-Appellees,

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

vs.

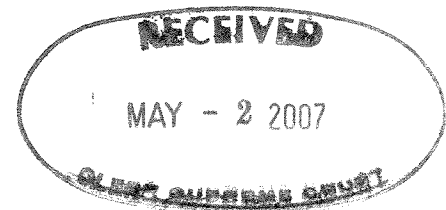
FORD MOTOR COMPANY,

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

Defendant-Appellant,

**BRIEF OF AMICUS CURIAE MICHIGAN MANUFACTURERS ASSOCIATION**

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**STATEMENT OF THE QUESTION INVOLVED**

Whether, under Michigan law, Ford, as the 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.

The trial court answered "Yes"

Plaintiffs answer "Yes"

Defendant answers "No"

*Amicus curiae* Michigan Manufacturers Association ("MMA") answers "No"

## **INTRODUCTION & STATEMENT OF INTEREST OF AMICUS CURIAE**

Michigan Manufacturers Association (“MMA”) is a business association composed of more than 3,000 Michigan businesses, organized and existing to study and promote the interests of Michigan businesses and of the public in the proper administration of laws relating to its members, and otherwise to promote the general business and economic welfare of Michigan. MMA appears before this Court as a representative of business concerns employing over 90% of the industrial workforce in Michigan, all of whom are potentially affected by the issues currently before this Court.

An important aspect of MMA’s activities is representing the interests of its member-companies in matters of importance before state and federal courts, the United States Congress, the Michigan legislature, and state agencies. Accordingly, the MMA regularly submits *amicus curiae* briefs to the Michigan Court of Appeals and the Michigan Supreme Court advocating the interests of its members.

The issue on appeal in this case is whether Ford, a large manufacturer of automobiles, may be held liable for an asbestos fiber exposure that allegedly occurred off of its premises to a person who had never been on or near Ford’s premises. The asbestos was allegedly carried to her vicinity on the clothing of an employee of an independent contractor hired to work on Ford’s premises. This is an important issue to Ford, the rest of Michigan’s manufacturers, and the entire Michigan economy because of the potentially devastating impact of far-reaching asbestos liability.

The major economic significance of asbestos liability can be demonstrated by considering this very case. Plaintiff Carolyn Miller never went on or near Ford property. Her only connection to Ford was the fact that her stepfather, Plaintiff John Roland, worked as a

laborer for an independent contractor that performed some work on Ford's premises in the 1960's. Roland's work included the repairing, building, and rebuilding of blast furnaces used to melt iron ore. Ford's Rouge Steel Plant was only one of several blast-furnace sites at which Roland worked. As the only defendant remaining in the case at the time of trial, however, Ford alone was held responsible for a \$9,500,000 verdict for Carolyn Miller (who died of mesothelioma) and a \$500,000 verdict for John Roland (who had pleural plaques on his lungs but suffered no symptoms or impairment).

The verdict was huge despite the facts that (1) the experts agreed that asbestos was not typically used inside of blast furnaces (where John Roland worked) because asbestos could not withstand the extremely high temperatures involved, (2) Plaintiffs' asbestos expert conceded that it was not possible to determine the level of asbestos dust to which Roland had been exposed at Ford, and (3) Plaintiffs' medical experts conceded that the leading book on mesothelioma states that "the bulk of [mesothelioma] cases in women have no defined cause, and there is nothing to suggest such cases are associated with asbestos exposure." On these weak facts, Ford was found liable for an eight-figure sum. If such liability were to extend to all persons allegedly suffering from asbestos-related disease who have ever lived in the same household with—or had some other connection to—any person who ever performed construction work on Ford's premises, the potential economic impact on Ford (or any other manufacturer) would be devastating.

MMA urges this Court to answer the certified question in the negative. Under traditional premises liability law, Carolyn Miller could not recover because she was never on or near any property under Ford's control. There is no good reason to make an exception and expand premises liability for "take home" asbestos claims. Nor should tort liability stem from the assertion that the asbestos was carried to Carolyn Miller's presence by a member of her

household who was working on Ford's property as the employee of an independent contractor. As discussed in Ford's brief, there is no basis for holding Ford liable to Carolyn Miller's stepfather, John Roland (the employee of the independent contractor), under the so-called common work area exception to the general rule of nonliability to independent contractors and their employees. Nor is there any other legal theory under which Ford could be liable to Roland. If Ford is not liable to the employee of the independent contractor, then it cannot be liable to a member of the household of an employee of an independent contractor.

MMA's brief as *amicus curiae* is not intended to address every aspect of the issue presented. Excellent briefs already presented by Ford and the other *amici* would make such broad an approach unnecessary and repetitive. Accordingly, MMA offers this brief primarily to indicate Michigan's manufacturer's high level of concern with respect to the issue before the Court and to provide some additional supplementary material for this Court's consideration.

### **STATEMENT OF FACTS**

MMA incorporates and adopts and incorporates that Statement of Facts and Procedural History set forth in the brief of Defendant-Appellant Ford Motor Company.

### **ARGUMENT**

#### **I. As a property owner, Ford's liability should be analyzed under traditional premises liability principles.**

MMA agrees with Ford's argument (and Plaintiffs' concession) that Ford is not liable under traditional premises liability law. Plaintiff seeks to avoid the strictures of premises liability law by drawing a false distinction between "premises liability law" and "the law of negligence." Of course, premises liability law *is* "the law of negligence" as applied to property possessors for injuries allegedly arising out a condition of the land (i.e., the alleged presence of asbestos fibers on Ford's premises). See, e.g., *James v Alberts*, 464 Mich 12, 19; 626 NW2d 158

(2001). There is no alternative basis for tort-liability based on conditions of the land. For a duty to exist, then, it must be based on some relationship other than Ford's status as possessor of the premises.

Plaintiff argues that Ford is liable under an "active negligence" theory pursuant to which every person is under a general duty to use that which he controls so as not to injure any other person. In support of this proposition, Plaintiff relies on *Johnson v A & M Homes*, 261 Mich App 719, 722-723; 683 NW2d 229 (2004), which is a published Court of Appeals decision that was never appealed to this Court. In MMA's view, the *Johnson* holding is wrong because it ignores the duty requirement altogether and skips directly to standard of care. Under Michigan law, before addressing whether the defendant has acted with due care, a court must consider whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. E.g. *Moning v Alfonso*, 400 Mich 425, 438-439; 254 NW2d 759 (1977).

Thus, to answer the question whether Ford owed a duty to Ms. Miller, this Court must do more than simply consider, in 20/20 hindsight, whether Ford could or should have taken precautions to protect Ms. Miller. Rather, it must consider the relationship, if any, between Ford and Ms. Miller and determine whether this relationship gives rise to any legal obligation on the part of Ford.

**II. If Ford is not liable to Roland, then it cannot be liable to Miller, where Miller's only connection to Ford is through Roland and is significantly more attenuated than Roland's connection to Ford.**

Under the facts of this case, Ford had no direct relationship with Ms. Miller. Instead, the allegedly hazardous substance was taken to Ms. Miller by Mr. Roland. Ford's only direct relationship with Mr. Roland was its status as the possessor of the land upon which Mr. Roland worked. The only other potentially relevant relationship is that between Ford and Mr. Roland's

employers (i.e., the independent contractors Ford hired to perform the work that brought Mr. Roland to the premises). Thus, Ms. Miller's indirect relationship with Ford necessarily came about as a by-product of Mr. Roland's relationship with Ford. In short, her connection to Ford is through Mr. Roland. It is also significantly more tenuous than Mr. Roland's connection to Ford because Mr. Roland was actually present on Ford's premises.

Because Ms. Miller's relationship with Ford was necessarily derived entirely from Mr. Roland's relationship with Ford, logic dictates that Ford could not owe a more expansive duty to Ms. Miller than to Mr. Roland. Therefore, to the extent that tort liability ordinarily does not extend to the employees of independent contractors, it also cannot extend to the household members of employees of independent contractors.

Plaintiff argues that Mr. Roland's status as an independent contractor is "irrelevant" to Ford's alleged duty to Ms. Miller. This is a surprising position for Plaintiff to take, given that Mr. Roland's presence at, and relationship with, Ford provides Plaintiff's only basis for making any kind of allegation about having any sort of relationship with Ford—no matter how tenuous it might be. Plaintiff suggests that the Court should disregard Mr. Roland's status and treat Ms. Miller as an "innocent third party." But Plaintiff wants to have it both ways. Plaintiff wants to make arguments that Ms. Miller's injury was foreseeable because of her relationship to Mr. Roland while at the same time arguing that her claim is not limited in the same way that Mr. Roland's might be, because she is an "innocent third party" unaffected by Mr. Roland's status.

If Ms. Miller is to be treated as an "innocent third party," then the duty owed to her would have to be the same as the duty owed to the general public (i.e. *all other* "innocent third parties"). Plaintiff has not articulated any reasonable basis for finding that Ford owed a duty to protect the entire general public from the alleged hazards of asbestos fibers on the clothing of the

employees of independent contractors work on the site. Because Plaintiff relies on Ms. Miller's tenuous connection to Ford's premises when it suits Plaintiff's argument, Plaintiff must take the bad with the good. Ford cannot owe a duty to Ms. Miller where it does not owe a duty to Mr. Roland, whose connection to Ford is less attenuated.

**III. The "common work area" exception to the general rule of non-liability does not extend off the premises.**

Plaintiff argues that Ford was liable to Mr. Roland under the "common work area" exception to the general rule of non-liability to independent contractors. That proposition, in and of itself, is dubious, given the requirement that the dangerous condition be "readily observable" and that it create a "high degree of risk to a significant number of workmen." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004). But even if Ford were liable to Roland under the common work area, Ford's common-work-area liability would not extend beyond the premises. The policy basis for the imposition of common work area liability is the notion that a general contractor (or an owner acting as a *de facto* general contractor) in charge of coordinating work the work of multiple subcontractors at the same work site (i.e., the "common work area") is in the best position to implement reasonable safeguards to ensure that one subcontractor's work does not accidentally harm another subcontractor. *Funk v General Motors*, 391 Mich 91, 102-105; 220 NW2d 641 (1971). No Michigan decision has ever suggested that "common work area" liability could ever exist for an injury occurring to a third party outside of the "common work area." General contractors are not responsible for coordinating safety measures outside of the work site. As created and explained by this Court, common-work-area liability only applies to risks faced by workmen "in a common area." *Ormsby, supra* at 54.

**IV. Liability under the inherently dangerous activity doctrine should not extend to the household members of the employees of independent contractors.**

The inherently dangerous activity doctrine protects “innocent third parties” injured by the occurrence of an inherently dangerous undertaking. *DeShambo v Anderson*, 471 Mich 27, 36; 684 NW2d 332 (2004), quoting *McDonough v General Motors Corp*, 388 Mich 430, 453-456; 201 NW2d 609 (1972) (Brennan, J., dissenting). It does not extend to employees of an independent contractor hired to perform the work because the property owner is entitled to rely on the contractor’s expertise to protect the contractor’s own workers. *Id.* at 36-37. In a nutshell, the property owner’s responsibility runs to the public at large, while the contractor is responsible for any special risks faced by the contractor’s employees. Because household exposure to a hazardous substance located on the clothing of the employee of an independent contractor is a special risk associated with (i) the Plaintiff’s relationship to the employee and (ii) the employee’s special status with respect to the actual performance of the work, the same reasons for holding the contractor responsible for its employees’ safety would also logically extend to the safety of members of its employees’ households.

**CONCLUSION**

For the reasons stated above, in Ford’s briefs, and in the briefs of the other *amici* supporting Ford, MMA urges this Court to answer the certified question in the negative.

Respectfully submitted,

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