STATE OF MICHIGAN

COURT OF APPEALS

PHILLIP R. CHAPIN and BERNIE MAE CHAPIN,

Plaintiffs-Appellees,

v

A & L PARTS, INC., AMCHEM PRODUCTS, AMERICAN STANDARD, BONDEX INTERNATIONAL, INC., BORG WARNER CORPORATION, CARRIER CORPORATION, DAP INC., DANA CORPORATION, DURO DYNE CORPORATION, GEORGIA PACIFIC CORPORATION, GOODRICH CORPORATION, HERCULES CHEMICAL COMPANY, INDIANHEAD INDUSTRIES, INC., KELSEY HAYES COMPANY, MCCORD CORPORATION, METROPOLITAN LIFE INSURANCE COMPANY, PARKER HANNIFIN CORPORATION, PNEUMO ABEX CORPORATION, ROYAL INDUSTRIES, INC., AII ACQUISITION CORPORATION, CARQUEST AUTO PARTS OF PINKNEY MICHIGAN, INC., GEORGE FAN SERVICE, INC. & ALL EQUIPMENT COMPANY, STANDCO INDUSTRIES, INC., and MICHIGAN MEDICAL COUNSEL,

Defendants,

and

DAIMLERCHRYSLER CORPORATION, FORD MOTOR COMPANY, GENERAL MOTORS CORPORATION, and HONEYWELL INC., formerly known as ALLIED SIGNAL CORPORATION,

Defendants-Appellants.

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No. 257917
Wayne Circuit Court
LC No. 03-324775-NP

Official Reported Version

Before: Meter, P.J., and O'Connell and Davis, JJ.

METER, P.J. (*concurring).*

I concur in Judge Davis's opinion, but write separately to express my approval of and reliance on the sound analysis presented by the trial court in this case. The trial court's opinion was lengthy and comprehensive and epitomized a proper exercise of discretion.

The court began its analysis by stating its history concerning asbestos-related cases:

> This [c]ourt has been the asbestos judge in Wayne County Circuit Court since January 1992. It has dealt with a significant number of cases involving [p]laintiffs exposed to asbestos while doing brake work. Until this case, no [d]efendant ever suggested that the science was not there to support a claim that auto mechanics grinding brake lines cannot [sic] get mesothelioma from asbestos in brakes. In fact, when this issue has been raised in other jurisdictions, it has been recognized to be a question of fact for the jury.

The court later discussed numerous reliable publications indicating that there was a risk of disease from low exposure to asbestos during brake work, and it emphasized the scientific background of Dr. Lemen. The court stated:

> The opinions given by Dr. Lemen have been the opinion of the government since the mid 1970s. Certainly the government including the National Institute for Occupational Safety and Health (NIOSH), the Occupational Safety and Health Administration, the Environmental Protection Agency, and the Public Health Department and the Surgeon General are made up of individuals or are individuals who are knowledgeable in the field of study and gainfully employed applying this knowledge. This was particularly true of Dr. Lemen when he held his position as the Deputy Director of NIOSH and . . . [was an] Assistant Surgeon General. Moreover, asbestos cases involving brake mechanics have been pursued for at least the last 20 years and have been on my docket for at least the last 11 plus years. The opinions of the government from the 1970s have never been retracted or vacated and are still in effect today.

The court then stated that "[t]he [d]efendants tend to argue that epidemiological studies involving brake workers is [sic] the end all and the be all. . . . However, MCL 600.2955 does not talk in terms of epidemiological studies." The court also enumerated specific problems with the epidemiological studies relied on by defendants, and it noted that "the methodology and opinion of [Dr.] Lemen is relied on by experts outside of litigation." In the end, the court held that "the opinion of Dr. Lemen is reliable and will assist the trier of fact."

As noted by Judge Davis, we review for an abuse of discretion a trial court's decision to admit evidence. *Craig v Oakwood Hosp,* 471 Mich 67, 76; 684 NW2d 296 (2004). In my view, the opinion by the trial court here is a prime example of how a trial court *should* exercise its discretion in a case such as this. The court considered and weighed the relevant factors and arrived at a reasoned conclusion that accords with the information presented below.

While it is true that the available epidemiological studies introduced below failed to demonstrate that automotive brake work causes mesothelioma, the parties agreed that the only known cause of mesothelioma is asbestos exposure and that grinding brake linings produces asbestos. Moreover, Dr. Lemen explained that a consideration of the factors in the "Sir Bradford Hill methodology"[1] mandated the conclusion that asbestos-bearing brake products cause mesothelioma and that the epidemiological studies, especially with their limitations, did not provide any reason to change that conclusion. Dr. Lemen agreed that properly conducted epidemiological studies can determine what causes and what does not cause disease but that they could only evaluate causation in general, not causation in specific cases. He noted that asbestos was such a "clearly established risk factor" for mesothelioma, and mesothelioma was so rare, that formal epidemiological studies were unnecessary to link mesothelioma to the type of exposure at issue in the present case. Dr. Lemen's qualifications to offer an expert opinion in this case were extensive, and his conclusion was based on sound reasoning and scientific literature. His conclusion also accorded with government publications discussing risks posed to automotive brake workers.

The trial court recognized these pertinent factors and reached a sound conclusion in deciding to admit the testimony in question. The court carefully considered each of the factors set forth in MCL 600.2955(1) and made reasoned findings with respect to each factor.[2] Even if it could be said that the conclusion is debatable, "[a] decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Moreover, "[a] trial court error in admitting or excluding evidence will not merit reversal unless a substantial right of a party is affected . . . and it affirmatively appears that

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[1] I do not conclude today that the "Sir Bradford Hill methodology" would automatically qualify, in every case, as a "reliable" methodology for purposes of admitting expert testimony. However, I believe that Dr. Lemen's use of the methodology was a *factor* here—along with the identified limitations of the epidemiological studies, the government publications, and other factors—that could properly be considered by the trial court during its analysis of the proposed testimony.

[2] The dissenting judge suggests that I am relying exclusively on the trial court's recognition that in similar cases, no party had disputed the correlation between brake grinding and mesothelioma. The dissent also suggests that I am ignoring the import of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). The dissenting judge is mistaken. I mention the trial court's history of presiding over brake-grinding cases as a way of providing background information concerning the trial court's experience with asbestos cases. Nowhere in this opinion do I suggest that this history, alone, supports the trial court's ultimate decision in this case. Second, my opinion explicitly indicates that I am relying on the trial court's analysis of the factors in MCL 600.2955(1), and these factors are based on *Daubert*. See *Greathouse v Rhodes*, 242 Mich App 221, 238; 618 NW2d 106 (2000), rev'd on other grounds 465 Mich 885 (2001). I believe that the trial court properly analyzed these factors and arrived at a reasoned conclusion that did not amount to an abuse of discretion. The dissenting judge also states that "Dr. Lemen never refuted the testimony of defendants' expert, who provided evidence that the brake-grinding process essentially prevents harmful asbestos fibers from being discharged into the air that a brake grinder inhales." *Post* at ___ n 4. In response, I note that I agree with the analysis provided in footnote 4 of the lead opinion.

failure to grant relief is inconsistent with substantial justice." *Id*. Dr. Lemen's opinion is, on balance, sufficiently reliable to be admissible, and defendants are, of course, free to argue their contrary position in any trial. The failure to grant relief here is not "inconsistent with substantial justice." *Id*.

I concur.

/s/ Patrick M. Meter