

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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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

DIAMLER CHRYSLER 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.

O'CONNELL, J. (*dissenting*).

The sole issue in this case is whether the testimony of plaintiff's<sup>1</sup> expert, Dr. Lemen, is admissible under the landmark case of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993),<sup>2</sup> and its progeny, *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004), *General Electric Co v Joiner*, 522 US 136; 118 S Ct 512; 139 L Ed 2d 508 (1997), and *Kumho Tire Co, Ltd v Carmichael*, 526 US 137; 119 S Ct 1167; 143 L Ed 2d 238 (1999).

According to *Daubert, supra* at 593, expert testimony only qualifies as admissible "scientific knowledge" if empirical testing supports the theory or technique on which the expert relies. Stated another way, plaintiff's expert testimony is only relevant and admissible under *Daubert* if plaintiff can establish, with the aid of empirical studies, that plaintiff's work as a brake mechanic caused him to contract mesothelioma.<sup>3</sup>

In the present case, both plaintiff's expert and defendants' expert testified that no less than 15 epidemiological studies have been conducted to determine if there is an empirically verifiable correlation between brake grinding and mesothelioma. Both experts testified that these studies were conducted properly in accordance with established scientific principles, and that none of these studies established a causal connection between brake grinding and mesothelioma.<sup>4</sup> Dr. Lemen further testified that epidemiological studies are the best evidence for

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<sup>1</sup> Even though plaintiff Phillip R. Chapin is joined in this suit by his wife, Bernie Mae Chapin, for the sake of clarity, I refer to Phillip Chapin as the singular plaintiff throughout this opinion.

<sup>2</sup> Both the lead opinion and the concurring opinion initially acknowledge that the strictures set forth in *Daubert* should control this case, but eventually both opinions revert back to the primary elements found in the later-amended *Davis/Frye* test and fail to consider the implications of *Daubert*. See *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

<sup>3</sup> Originally there were 26 other defendants in this lawsuit. Plaintiff admits that he developed mesothelioma as a result of being exposed to a variety of asbestos-containing products while working at a number of different jobs from 1956 to 2002. Plaintiff has settled with the 26 other defendants. The limited issue before this Court involves the existence of any scientific studies that establish a correlation between automobile brake mechanics and an increased risk of contracting mesothelioma. The record reflects that scientific studies have found a direct correlation between the exposure to asbestos common in plaintiff's other jobs and an increased risk of contracting mesothelioma. However, plaintiff fails to point to any scientific studies that demonstrate a correlation between mesothelioma and grinding brakes.

<sup>4</sup> This dearth of supporting empirical data is accentuated by two other glaring deficiencies in plaintiff's proofs. First, causation in asbestos cases necessarily relates to the inhalation of minute particles, so unlike many tort cases, there will never be eyewitness testimony of causation, and the plaintiffs are forced to establish the legal element of proximate cause through expert testimony. Yet Dr. Lemen never refuted the testimony of defendants' expert, who  
(continued...)

causation, and Dr. Goodman testified that epidemiological studies are the only way to establish causation.<sup>5</sup> Under *Daubert*, plaintiff bears the initial responsibility of establishing that scientific studies support his expert's anticipated testimony. Simply put, other than Dr. Lemen's *ipse dixit* testimony opining that such a causal relationship existed, the record lacks any scientific evidence suggesting that there is a correlation between brake grinding and mesothelioma. Therefore, under *Daubert*, Dr. Lemen's testimony is inadmissible. See also *Kumho Tire Co, supra* at 151 (Breyer, J.), and 158-159 (Scalia, J., concurring).

I would reverse the decision of the trial court.

/s/ Peter D. O'Connell

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(...continued)

provided evidence that the brake-grinding process essentially prevents harmful asbestos fibers from being discharged into the air that a brake grinder inhales. Second, the irrefutable evidence indicates that plaintiff's later occupations exposed him to an atmosphere certainly containing the harmful asbestos fibers that, when inhaled in sufficient quantities, lead to the contraction of mesothelioma. Therefore, this is not a case in which two or more equally culpable and probable causes combine to injure a single plaintiff, but is instead an attempt to hold as many "pockets" liable as possible, no matter how attenuated their probable relationship to the injury may be.

<sup>5</sup> It bears repeating that this is not a case where there are no epidemiological studies available. Both experts testified that there are numerous epidemiological studies available, and that none of them substantiates plaintiff's claims. I respectfully disagree with the concurring opinion's exclusive reliance on the trial judge's expertise. The record demonstrates that the trial judge was not suggesting that empirical data had already established the necessary causation in other cases, but instead merely noted that other parties in other cases had taken the correlation between brake grinding and mesothelioma for granted. Any reliance on such a presumption in this case amounts to the application of a rogue mutation of *res judicata* and forecloses the courts' ability to adapt to scientific innovation and new discoveries. Accordingly, I respectfully conclude that bare reliance on a judge's experience, without further justification, contravenes the purposes of *Daubert* and spoils the entire analysis.