

**IN THE SUPREME COURT OF MISSISSIPPI**

**3M COMPANY,**

**APPELLANT-DEFENDANT,**

**VS.**

**NO. 2002-CA-1651**

**SIMEON JOHNSON, ET AL.,**

**APPELLEES-PLAINTIFFS**

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**APPEAL FROM THE CIRCUIT COURT OF  
HOLMES COUNTY, MISSISSIPPI  
HONORABLE JANNIE M. LEWIS, CIRCUIT JUDGE**

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AS *AMICUS CURIAE* IN SUPPORT OF  
APPELLANT 3M COMPANY**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that, in addition to those listed in the brief of Appellant 3M Company, the following listed persons have an interest in the outcome of the case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Washington Legal Foundation, *amicus curiae* in support of 3M Company
2. Balch & Bingham, LLP counsel for *amicus curiae*
3. R. Pepper Crutcher, Jr., counsel for *amicus curiae*
4. Daniel J. Popeo, counsel for *amicus curiae*
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APPELLANT 3M COMPANY**

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**INTERESTS OF *AMICUS CURIAE***

The interests of *amicus curiae* Washington Legal Foundation (WLF) are more fully set forth in the accompanying motion for leave to file this brief. WLF is a public interest law and policy center with supporters in all 50 States, including many in Mississippi. WLF devotes a significant portion of its resources to tort reform efforts, and to ensuring that every litigant is afforded a fair and complete opportunity to present its case to the trier of fact. WLF is concerned that Appellant 3M Company was denied such an opportunity in this case; 3M was unfairly prejudiced by the consolidation of claims against it involving numerous dissimilar plaintiffs, and by the consolidation of those claims with claims against other defendants not similarly situated to 3M.

**STATEMENT OF ISSUES**

WLF addresses the following issue only:

Did the trial court err in allowing the trial of six unrelated personal injury claims against multiple defendants, thereby violating 3M's right to due process under the Federal and State Constitutions?

WLF does not address the other six issues raised by 3M in its opening brief.

**STATEMENT OF THE CASE**

WLF hereby incorporates by reference the Statement of the Case contained in the brief of Appellant 3M Company.

In brief, the Plaintiffs are six individuals (out of an initial group of 154 plaintiffs) who claim to have been injured due to their exposure to asbestos at some point during the past 30-40 years. Their claims against seven Defendants went to trial in 2001. They alleged that six

of the seven Defendants (ACandS, Inc.; Dresser Industries, Inc.; General Refractories; Quigley Company; New Harbison-Walker; and Guard-Line) had manufactured asbestos-containing products to which they had been exposed at a wide variety of work sites. Four of the six Plaintiffs (James Curry, Simeon Johnson, Bobby Joe Lawrence, and Philip Pate) also claimed that they had worn products manufactured by the seventh Defendant, 3M (either a 3M dust mask or a 3M respirator), for some period of time during their working careers. Those four claimed that 3M was partly responsible for their injuries because the 3M products had failed to prevent the injuries. None of the six Plaintiffs claimed to be suffering from mesothelioma or other forms of cancer; rather, their claimed injuries (*e.g.*, shortness of breath, pleural thickening) were sufficiently mild that Dr. Obie McNair (a doctor hired by Plaintiffs' lawyers to examine each of the Plaintiffs for 30 minutes and who concluded that each suffered from an asbestos-related medical condition) did not place any restrictions on their activities.

Before the start of trial, the trial court denied Defendants' motion for a separate trial for each Plaintiff. *See* 3M Brief at 3. Much of the expert testimony proffered by the Plaintiffs highlighted the health dangers of asbestos; both that testimony and the closing arguments of Plaintiffs' attorneys focused heavily on allegations that manufacturers continued to use asbestos in their products despite knowledge that their actions risked serious injuries to those exposed to asbestos-containing products. That testimony/argument had little relevance to the claims against 3M, of course, because 3M's products did not contain asbestos.

The Plaintiffs' claims ultimately went to the jury against three defendants: 3M, ACandS, and Dresser. In October 2001, the jury returned verdicts totalling \$150 million (\$25

million for each Plaintiff), apportioned in precisely the manner (including the percentage of fault attributed to each Defendant) that Plaintiffs' counsel had directed in closing arguments. 3M's portion of the verdicts was \$22.5 million -- 25% of the awards to Mr. Johnson and Mr. Pate, and 20% of the awards to Mr. Curry and Mr. Lawrence.

In February 2002, 3M filed a motion for judgment notwithstanding the verdict, for new trial, to alter or amend the judgment, or for remittitur. The motion argued, inter alia, that the joinder of unrelated claims by multiple plaintiffs against multiple defendants did not meet the requirements of Miss.R.Civ.P. 20(a) and violated 3M's due process rights. On August 21, 2002, the trial court issued an Order denying the motion without specifically addressing the joinder issue. 3M subsequently appealed to this Court.

#### **SUMMARY OF ARGUMENT**

This case proceeded to trial with multiple plaintiffs and multiple defendants, despite a plea from the Defendants that claims of each Plaintiff should be tried separately. There can be little doubt that the trial court's denial of that motion was an abuse of discretion. The only trait that the six Plaintiffs share is their claim to have suffered asbestos-related injuries. But those alleged injuries were incurred under markedly different circumstances. For example, the defendants did not work together, they claimed to have been exposed to different types of asbestos-related products, and the duration of their exposures varied considerably. Moreover, the claims they assert against 3M differ markedly from the claims they assert against other Defendants, all of whom have manufactured asbestos-containing products. 3M is alleged to have manufactured defective dust masks and respirators; Plaintiffs allege that they were injured as a result of those defects. Under those circumstances, each claim against 3M cannot

be said to “arise out of the same transaction, occurrence, or series of transactions or occurrences” as the other claims against 3M and the claims against the other Defendants -- and thus the claims are not properly joined under Miss.R.Civ.P. 20(a).

Moreover, 3M was severely prejudiced by the improper joinder. A jury that was asked to consider 3M's separate, detailed defense was also provided with a large quantity of evidence regarding the careless marketing of asbestos-containing products and the heart-wrenching human suffering caused thereby. Although none of that latter evidence was directly related to 3M, the danger was overwhelming that the jury would be unable to consider 3M's culpability separately from that of the other Defendants. Indeed, the jury's actions (particularly the identical \$25 million verdicts returned on behalf of all six Plaintiffs) strongly suggest that the jury was, in fact, unable to digest the morass of evidence and independently evaluate each party's culpability. Moreover, the prejudice suffered by 3M implicates its constitutional right to a fair trial. At a minimum, that prejudice requires that the judgment below be reversed and 3M be granted a new, separate trial.

## **ARGUMENT**

### **I. The Trial Court's Joinder of Claims Involving Multiple Plaintiffs and Defendants Was Improper Because the Plaintiffs Do Not Meet the Rule 20(a) Standards**

Rule 20(a) of the Mississippi Rules of Civil Procedure provides that all persons may join in one action as plaintiffs, or may be joined in one action as defendants, only if two requirements are met. First, they all must assert (or have asserted against them) a right to relief "arising out of the same transaction, occurrence, or series of transactions or occurrences." Second, a question of law or fact common to all such persons will arise in the action.

In its Order denying post-trial relief to 3M, the trial court did not address 3M's arguments regarding joinder. Had it done so, it would have been forced to conclude that the requirements of Rule 20(a) were not met. The *only* trait that the six Plaintiffs share is their claim to have suffered asbestos-related injuries. But in all other respects, their claims are wildly disparate: they worked for different employers in widely different locations, they claimed to have been exposed to different types of asbestos-related products, and the length of alleged exposure ranged from six years to more than three decades.

More importantly from 3M's perspective, each Plaintiff's claim against 3M bears virtually no relation to that Plaintiff's claims against the other Defendants, or to the other Plaintiffs' claims against 3M. Two of the Plaintiffs said that they never used a 3M mask or respirator, and thus raised no claims against 3M. The other four Plaintiffs alleged that they used 3M products for widely varying lengths of time. Mr. Curry testified that he wore what may have been a 3M mask only in the period during which he worked as a welder; Mr. Johnson testified that he wore what may have been a 3M mask only during the one year he worked at Superior Coach; Mr. Lawrence testified that he wore a mask or respirator only during the short period he worked at Ingalls Shipbuilding and Halter Marine; Mr. Pate testified that he wore a mask or respirator only during the six years he worked at Medart Lockers and Colonial Mobile Homes. Most importantly, the years during which the Plaintiffs claimed to have been working at jobs that entailed their intermittent wearing of 3M products constituted only a small minority of the years during which they allegedly were exposed to asbestos-containing products. Accordingly, all the evidence at trial regarding the Plaintiffs' alleged exposure to asbestos while not wearing 3M masks or respirators -- which constituted

the great majority of the Plaintiffs' work history -- was absolutely irrelevant to all claims against 3M.

Under those circumstances, each claim against 3M cannot be said to “arise out of the same transaction, occurrence, or series of transactions or occurrences” as the other claims against 3M and the claims against the other Defendants. In *Illinois Central Railroad Co. v. Travis*, 808 So.2d 928 (Miss. 2002), this Court considered the propriety of the joinder of numerous asbestos personal injury cases. *Travis* makes clear that Rule 20(a) does not permit the joinder of all of the Plaintiffs' claims. Although it affirmed the trial court's denial of a Rule 20(a) motion to dismiss in that case, the Court relied heavily on the fact that all claims were filed against a single defendant (by employees of that defendant) and that all claims arose from the defendant's alleged “policy of not warning or protecting its workers from the hazards of asbestos exposure, and breaching its non-delegable duty to provide a reasonably safe place to work.” *Travis*, 808 So.2d at 935-36. In contrast, the claims at issue here are against numerous defendants, none of whom are alleged to have acted in concert with 3M. Those claims involve numerous actions by numerous unrelated parties over the course of several decades. Even in those few instances in which the Plaintiffs may have used a 3M product, the claims involved at least two unrelated 3M products; any claims against 3M based on injuries allegedly arising from defects in one 3M product cannot be said to arise from the same series of transactions or occurrences as claims against 3M based on injuries allegedly arising from defects in a second 3M product.<sup>1</sup>

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<sup>1</sup> Moreover, the Court in *Travis* did *not* hold that it would be proper to try the claims of all the employees jointly in a single trial. Rather, the Court held merely that the complaint was not subject to dismissal for failure to comply with Rule 20(a). The Court made clear that

*Travis* cited approvingly a federal district court decision that found joinder inappropriate in a case involving four different plaintiffs suing a railroad over four separate railroad crossing accidents. *Id.* at 934 (citing *Demboski v. CSX Transp., Inc.*, 157 F.R.D. 28 (S.D. Miss. 1994)). *Travis* agreed with the federal court that where “the complaint involved ‘different plaintiffs, separate accidents, different crossings, different train crews, different dates and times, different driver conduct, different vehicles, different injuries, different damages, different defensive postures, and different physical facts which relate to federal preemption, . . . common sense dictates that the evidence in other instances as to each specific incident will be so dissimilar that it would be very difficult to manage a consolidated trial,’” even though the plaintiffs “‘may develop some evidence indicating negligence on the part of Defendant that will be common to all claims.’” *Travis* at 934 (quoting *Demboski*, 157 F.R.D. at 29-30). By citing *Demboski* with seeming approval, the Court indicated its disapproval of joinder of claims where, as here, the only common thread is that every plaintiff claims to have been injured in roughly the same manner -- albeit in totally unrelated incidents. Such claims cannot be said to arise out of the same transaction or series of transactions.

Nor have Plaintiffs met the second requirement of Rule 20(a): demonstrating an overlap of factual and legal issues among all claims raised in the case. Even if one looks solely at the claims against 3M, there is virtually no overlap. For example, to prevail against 3M, each Plaintiff was required to show, *inter alia*, that he used a 3M product, that he did so for the purpose of protecting against asbestos exposure and in reliance on 3M claims that the

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on remand the trial court was free, for example, to order separate trials under Rule 20(b) if it felt that such an order was appropriate to prevent delay or prejudice.

product would provide such protection, that while using a 3M mask or respirator he was exposed to asbestos and was injured by such exposure, and that the injury was caused by a defect in the 3M product. Those factual issues are quite obviously unique for each Plaintiff. Moreover, those factual issues are wholly separate from the factual issues surrounding the potential liability of the other Defendants -- all of whom were sued based on their manufacture of asbestos-containing products to which the Plaintiffs allegedly were exposed.

The U.S. Court of Appeals for the Second Circuit has established criteria for determining whether asbestos claims against asbestos manufacturers are sufficiently similar to warrant their consolidation in a single action. These criteria include: "(1) common worksite; (2) similar occupation; (3) similar time of exposure; [and] (4) type of disease. . ." *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990). Those criteria would militate against joinder of the Plaintiffs' claims, even if they were brought only against manufacturers of asbestos-containing products. The Plaintiffs never worked for the same companies, they had dissimilar occupations, their years of alleged exposure to asbestos varied widely, and their diagnoses were dissimilar. Given the added consideration that the Plaintiffs' complaint also included claims against a company (3M) that has never manufactured an asbestos-containing product (which claims, of necessity, raise an entirely new set of factual and legal issues), there can be little doubt that Plaintiffs have failed to meet the Rule 20(a) requirements.

## **II. The Trial Court Was Required to Grant the Motion to Sever**

As demonstrated above, the trial court erred in allowing the Plaintiffs to join all of their claims in a single case despite the failure to meet the Rule 20(a) requirements. But quite

apart from that error, the trial court compounded its error by denying the Defendants' motion for separate trials. Because that denial severely prejudiced 3M, the judgment must be reversed.

WLF recognizes that the Rule 20(a) joinder requirements are to be liberally construed and that a trial court's decision to permit joinder should not be overturned except for abuse of discretion. But it is an altogether different question whether a trial court, having permitted the joinder of claims at the pleadings stage, should permit those claims to be tried in a single proceeding. Even when joinder is permissible under Rule 20(a), Rule 20(b) permits a trial judge to “order separate trials or make other orders to prevent delay or prejudice.”

Miss.R.Civ.P. 42(a) is even broader; it authorizes a trial court, “in furtherance of convenience or to avoid prejudice,” to “order a separate trial of any claim, . . . or of any separate issue or of any number of claims . . .”

This Court has regularly recognized the propriety of severing claims to avoid prejudice to a defendant. For example, in *Burnham v. Stevens*, 734 So.2d 256 (Miss. 1999), the plaintiffs (the parents of a school girl) brought an action against two school officials. The complaint alleged that: (1) a school principal had administered excessive corporal punishment to their daughter; and (2) when the state's Department of Human Services (DHS) began looking into the issue, the superintendent of schools wrote to DHS to report (falsely) that the girl was being abused by her own father. The Court affirmed the trial court's decision to sever the two claims in order to avoid prejudice to one or both of the defendants. *Id.* at 265. The Court agreed that each defendant could potentially be prejudiced by being associated with the actions of the other defendant, and that the facts giving rise to the two causes of action

were not closely related. *Id.* The Court agreed that any inefficiencies created by requiring separate trials were outweighed by the need to avoid the possibility of prejudice. *Id.*

The prejudice suffered by 3M as a result of having all six Plaintiffs' claims tried together is readily apparent. A jury that was asked to consider 3M's detailed defense (*e.g.*, that its dust masks were never intended to protect against asbestos inhalation, that the Plaintiffs did not use 3M's products in order to protect against asbestos inhalation, that the Plaintiffs failed to demonstrate that their injuries were caused by defects in 3M's products) was also provided with a large quantity of evidence regarding the careless marketing of asbestos-containing products and the heart-wrenching human suffering caused thereby. Although none of that latter evidence was directly related to 3M -- which never manufactured any asbestos-containing products -- the danger was overwhelming that the jury would be unable to consider 3M's culpability separately from that of the other Defendants. The danger was particularly grave because the jury was presented tales of woe from six different plaintiffs. Moreover, the sheer volume of evidence in this multi-party trial made it a virtual impossibility that the jury would be able to focus on the details of 3M's defense -- a defense that was applicable to no other Defendant.

Indeed, the jury's actions strongly suggest that the jury was, in fact, unable to digest the morass of evidence and independently evaluate each party's culpability. As 3M points out, the jury returned identical \$25 million verdicts on behalf of each Plaintiff, despite their widely varying circumstances. Moreover, the jury allocated fault among the Defendants in the *precise* percentages suggested by Plaintiffs' counsel during closing arguments. That result is a strong indication of juror confusion. The Second Circuit pointed to similar evidence in an

asbestos trial as indicative of juror confusion; it overturned a jury verdict in favor of the plaintiff because the trial court's failure to grant a severance had contributed to the confusion.

*Malcolm v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993). The appeals court explained:

Plaintiff contends that even if the consolidation was not warranted, the decision below should nevertheless be affirmed because Keene can show no prejudice arising from it. We disagree. At trial, Keene did not dispute that Lewis was exposed to a wide array of asbestos-containing products; rather, Keene disputed exposure to its products. Also, Keene readily conceded that it was known early on that massive, prolonged, and direct exposure to pure asbestos dust was dangerous; but Keene vehemently disputed that bystander exposure, such as that suffered by Mr. Lewis, was known to be dangerous when Lewis was allegedly exposed to Keene's products.

We are concerned that the jury's ability to focus on this distinction may have been compromised in this case. While the evidence regarding Lewis's exposure to Keene's products was vague, minimal, and heavily circumstantial when compared to the extensive evidence regarding the products of defendant Owens-Corning Fiberglas, the jury apportioned an equal 9% liability to each defendant. This is hard to explain. We conclude that under the unique circumstances of this case, *there is an unacceptably strong chance that the equal apportionment of liability amounted to the jury throwing up its hands in the face of a torrent of evidence.*

*Id.* at 352 (emphasis added). Similarly, the jury in this case -- by returning identical \$25 million verdicts for each plaintiff, allocating fault among the Defendants in a remarkably similar fashion in all six cases, and doing so in the precise manner suggested by Plaintiffs' counsel -- exhibited all the symptoms of a jury that was unable to digest the detailed evidence that widely differentiated the positions of each of the parties. In light of the prejudice suffered by 3M due to the trial court's denial of the motion for separate trials, the denial of that motion constituted an abuse of discretion and mandates reversal of the judgment entered against 3M.

Moreover, the prejudice suffered by 3M implicates its constitutional right to a fair trial. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an

opportunity to present every available defense." ). Consolidating numerous asbestos liability claims in a single trial undoubtedly serves a docket-clearing function for judges who feel inundated by the huge number of pending asbestos cases. But as this Court has cautioned, "considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *American Bankers Ins. Co. of Florida v. Alexander*, 818 So.2d 1073, 1080 (Miss. 2001). "The benefits of efficiency can never be purchased at the cost of fairness." *Malcolm*, 995 F.2d at 350.

### **III. Liberal Joinder of Claims at Trial Is Appropriate Only When Individual Claims Are Too Small To Make It Worthwhile to Bring Those Claims Separately**

Perhaps because Mississippi does not authorize class actions, this Court has on occasion gone to great lengths to allow separate claims to be tried jointly in those instances in which few if any claims would be pursued if they could only be pursued separately. But such solicitude for the rights of small claimants is out of place in the context of asbestos lawsuits, in which individual claimants have no difficulty retaining contingency-fee legal representation.

The Court's interest in protecting the rights of small claimants is well illustrated by its decision in *American Bankers*. The case involved consolidated appeals from five proceedings involving 1,371 plaintiffs who had entered into contracts with an insurance company. The plaintiffs alleged that the defendants conspired to defraud insurance customers by forcing those customers to buy insurance at inflated rates. On interlocutory appeal, the Court affirmed the trial court's denial of the defendants' motion to dismiss for failure to meet the requirements of Rule 20(a). In the course of determining that the plaintiffs' claims arose "out of the same transaction or series of transactions," the Court noted that each plaintiff's claim was sufficiently small that many or most would not file suit if forced to do so on an individual

basis. *American Bankers*, 818 So.2d at 1077. The Court concluded that Rule 20 should be expanded in such instances to ensure that all those interested in pressing legal claims are in a position to do so. The Court explained:

This Court has, in the past, taken notice of the unavailability of class actions and has liberalized the rules of civil procedure at times in order to better accommodate the parties who are consequently shut out of the legal system.

*Id.*

But the rationale underlying the Court's decision to permit numerous low-dollar fraud claims to be consolidated in a trial involving a single defendant is wholly inapplicable to this case, in which each of the six Plaintiffs seeks multi-million dollar recoveries from multiple defendants. If the Court rules that the trial court erred in denying the motion for separate trials, there is absolutely no danger that any of the Plaintiffs will be shut out of the legal system. Rather, the prospect of multi-million dollar judgments is sufficient to ensure that the Plaintiffs and their lawyers will continue to pursue their claims even if each of the Plaintiff must proceed separately. Accordingly, there is every reason to insist that the Plaintiffs proceed separately when, as here, 3M has presented overwhelming evidence that its right to a fair trial was compromised by a proceeding with multiple parties and in which 3M's unique status -- as the only Defendant that did not manufacture asbestos-containing products -- was blurred by the mass of evidence regarding unrelated claims.

**CONCLUSION**

*Amicus curiae* Washington Legal Foundation respectfully requests that the judgment of the trial court be reversed.

THIS, the 6th day of February, 2004.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Richard A. Samp, do hereby certify that a true and correct copy of the above and foregoing brief of *amicus curiae* Washington Legal Foundation was this the 6th day of February, 2004, served by U.S. Mail, first class, postage pre-paid, upon the following:

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