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ETHEL V. STONE

RICE: May it please the court, counsel. We are here today because of the failure of the TC to exercise its discretion in implementing rule 174 as to 22 cases, which it has consolidated for trial. What we are requesting is that this court order the TC to order separate trials of these cases, and to require compliance with rule 174 by examining each of these cases to determine whether or not consolidation is proper within the rules of 174, and as the cases have interpreted that rule.

PHILLIPS: The Harris county DC have been trying asbestos cases for 7 years maybe?

RICE: I suspect that they have. I don't know exactly how long.

PHILLIPS: Do you have some parameters of how many plaintiffs have been grouped before?

RICE: I know that counsel for plaintiffs have presented that in their brief. It is ranged anywhere they say from I think the high was the Chatam case of 289 plaintiffs. I don't know what the lower end of that is. Sometimes it is my understanding that the courts have, remember these are products cases of course, they have consolidated cases in the neighborhood of 20 cases. Many times when you get to trial because of settlements there are many fewer cases that actually go to trial. Anywhere from 5 to 12, and of course I am sure there are others that are more than that.

PHILLIPS: How far away were these 22 from going to trial?

RICE: Are you talking about if we were to proceed to trial? I do not foresee at this time that any of these cases would be settled prior to trial.

CORNYN: Are you taking the position that 2 or more cases should never be consolidated, or that it would be appropriate to consolidate the cases under some set of circumstances?

RICE: My position your honor is that these are negligence cases. It is going to be difficult, certainly more difficult than it is for products cases to be consolidated. Because for instance, here we're dealing with 4 different defendants that are involved in these cases, we are dealing with 4 different types of work sites. We have a steel mill...

CORNYN: I understand that. As far as your over arching argument you take the position there should never be consolidation?

RICE: I would like to take that position, but realistically I don't feel that in this day in time that is going to happen. I think that in certain circumstances certainly there are going to have to be some consolidations.

OWEN: Well what are the parameters that you think would be appropriate for those consolidations in these types of cases, these asbestos premises cases?

RICE: We have in our briefing pointed out the Malcolm factors, or Maryland factors whatever you want to call them. I think that certainly some of those factors that are more important perhaps than others. I think the question of the common work site to make sure that in these types of cases at least each plaintiff who goes to trial has a claim against each defendant so that defendant doesn't have to sit there and be involved in a case in which he's really not a defendant. The question of common types of cancer, or common types of disease, the courts that have reviewed that issue have found it particularly troublesome where different types of diseases have been consolidated.

OWEN: But as a practical matter how many cases could you actually consolidate if the court were to adopt and apply those factors? We've got apparently plaintiffs who worked in a number of different sites for a number of years who have varying injuries. How many of those different cases could you consolidate where the factor would be common?

RICE: If I understand what your honor is saying. As to these 22, there is actually only one plaintiff who worked at 4 different work sites among the 5 trial defendants involved in the case. So as to these 22 for instance you could only consolidate on the issue of a common work site one of those plaintiffs. There are a number of different cancers alleged here, a number of different diseases. As I recall there are 5 different diseases alleged here from mesothelioma down to plural cases.

OWEN: I think Judge Owen is asking about a broader question, which is if a court were to adopt the Malcolm factor, is there some finite number larger than which you shouldn't try the cases together even if they meet all those criterias?

RICE: Yes your honor I believe that there is. As Mr. Rafkin said in his own experience once you get above in any case basically 4, 5 or 6 plaintiffs, you're really having a problem with the jury making a decision separately as to those plaintiffs. So my position would be once you get above that number that you are really stretching the ability of a jury to perform its duty.

OWEN: Going back to my question though. Let's say you first focus on the work site and you've got a group of plaintiffs who had all worked at the same 2, 3 or 4 sites, then you look at the type of injury. But they all have different cancers, or maybe some don't have cancer but they have some other disease. So that would break up the group. It seems that if you take each of these factors and try to apply them to any one group you are going to end up fracturing the group so that you have very few if any consolidations.

RICE: I appreciate the court's concern there. I think that foremost in my mind is the issue of not trying the different types of diseases together. And I think that that was recognized in many of the cases that have been litigated where you were joining cancer cases and noncancer cases. They have found particularly trouble in basically what the jury is able to do insofar as attribution. Particularly

they have found that future damages in those cases, the jury has awarded tremendous amount of future damages because they see the specter of a cancer case before them and think that because a lesser case is involved there, that that person was also going to get cancer.

ABBOTT: What would be wrong with regard to the type of injury with having one single dividing line and that would be those with cancer and those with noncancerous complaints?

RICE: That would certainly be a possibility. Basically there would be a dividing line there. There are I guess 3 different types of cancers. Basically there is mesothelioma, lung cancer, and then there are other cancers that some people say that are attributable to asbestos exposure. And then if you make that dividing line to the other side of that there would be pulmonary asbestosis, and plural cases. The only problem I see, or the basic problem I see is that certainly lung cancer you are going to have many more factors involved in the cause of those cancers, that is smoking primarily. Most of these people were smokers. Mesothelioma is not as at least at this time thought to be related to smoking. The other problem is even as to plural cases basically is a benign finding, that is either plaque. There is no pulmonary fibrosis and just because you have a plaque on your lungs does not mean that that is going to progress in pulmonary fibrosis, which is the pulmonary asbestosis cases. So I see a problem enjoining those types of cases together.

OWEN: If we take these in order it seems like if you have a plaintiff that sued several different defendants because that plaintiff had worked overtime in all of those places, I wouldn't think you would want to split up, divide that plaintiff's case into different trials among those defendants would you?

RICE: I mean I would certainly think that a plaintiff's case is going to be tried only once. If that was the court's inquiry.

OWEN: So then what would you look for next: other plaintiffs who had the same type of injury who had the identical work places?

RICE: To the extent that you could do that. I'm not suggesting that you're going to be able to do that in each case. But I think as far as you...the further you can narrow that, then you're going to be more appropriate in your consolidation.

OWEN: I'm just trying to get back to practicalities. You recognize that some consolidation would be appropriate in the real world of asbestos litigation particularly the premises cases how do you apply those factors?

RICE: Again going back I think that the most important issue probably is the issue of the different types of diseases not being grouped together. And then from there you just have to take a weighting factor. I think that the common work sites is an important issue as well.

As I was mentioning in the opening remarks I think it is important in these cases to realize that these are not products' liability suits that are against these defendants. They are negligence actions and therefore insofar as the evidence that is going to come out, the focus is necessarily going to be on the conduct of the parties and not on a product itself. So you're not going to have common issues or common evidence insofar as a defective product is concerned, whether or not there is a defective design of a product, whether or not there was an improper or failure to warn. And I think this affects the amount of common evidence that is going to be admissible in these cases.

BAKER: Are they all premises liability based theories?

RICE: Yes your honor.

BAKER: If I understand that theory is that _____ and dangerous position that they knew about and failed to warn their employees or such contractors and so forth?

RICE: Yes these are not employee cases.

BAKER: Is that one common theory of legal liability that pervades in every one regardless of the disease that results?

RICE: That is correct your honor.

BAKER: And the argument made by the respondent is that rule 174a requires only a common factor, or a common question of law. Isn't that met under the facts of these cases?

RICE: I was served with that supplemental brief so I have not had an opportunity to explore it further. But I read through it once. I found it quite frankly surprising that an argument would be made that one single fact can make these cases consolidatable without consideration of anything else. I do not think that that is what the courts have said, what the SC has said. Basically what the courts I believe have said is that you have to look all the facts and circumstances in order to determine whether or not a commonality exists. But once even you find that commonality exists, you've got to go further - you've got to determine whether or not prejudice to the defendant or to the plaintiff is going to result in the consolidation, or if jury confusion is going to result as a result of that consolidation.

I think it is important to note that the plaintiffs in these cases are making much of an allegation of judicial efficiency requiring consolidation of these cases. And yet the plaintiffs are maintaining 2 separate law suits in the courts of Harris county for the same injury. That is that each of these 22 plaintiffs and all of the other 365 plaintiffs that plaintiffs' counsel represents against these defendants have separate product liability suits against the product manufactures of Harris county that they are maintaining at the same time that they are maintaining these other separate law suits against the premises liability defendants.

So in one hand they cry about judicial efficiency being necessary, or consolidation being necessary for judicial efficiency, but on the other hand, they lack judicial efficiency when they file 2 law suits.

ABBOTT: Do you think maybe they did that to avoid the argument that that was an inappropriate consolidation when you have a products case and a negligence case and this seems to make the presentation of facts to the jury simpler?

RICE: But if it's an indivisible injury I think under the Texas law the number of defendants that are responsible can be allocated regardless of whether they are mixed products or negligence cases.

ABBOTT: By your argument are you saying that they did wrong by filing those separate cases? In other words are you saying that perhaps we should consolidate those cases then with your cases?

RICE: I've taken the position before the lower court that in fact that those cases are cases that should be together because there is only one indivisible injury here.

ABBOTT: So we should consolidate them with you?

RICE: The problem is of course those are individual cases. In other words they have chosen there to file those as separate plaintiffs' lawsuits. Here they filed as many as 700 plaintiffs in one lawsuit. So it is difficult to go back and separate that all out now. But I think that what should happen is that there should be single filings of cases in which all defendants both products and negligence defendants are consolidated in the same case.

PHILLIPS: Are all those cases pending for pretrial in the...is there a pretrial court?

RICE: There is no pretrial court on the premises cases. The plaintiffs' counsel did make a point in their brief that there was an asbestos docket. That is true. That does not apply to the premises cases.

PHILLIPS: So these are cases that just happen to land in Judge Stone's court?

RICE: That is correct. There was another group of cases of 700 or so that previously was in Judge Brister's court. As I've said there are roughly 365 additional claims that the Williams Bailey firm has against the premises defendants at this time.

PHILLIPS: Would you move to the harm aspect here and why it would be appropriate for this court to intervene at this time even if we felt that perhaps the TC had erred?

RICE: First on the position of error. Our position is that here basically what the court did was rubberstamp what the plaintiff's counsel wanted by selecting 22 plaintiff cases, the only criteria being that those cases had been disposed of in their products cases. There was no effort by the court, the court below, to comply with Rule 174, which requires I believe that the court look at each case for questions of commonality, and once that is done then you also have to determine whether prejudice is going to result to the defendants or to the plaintiffs, and whether or not jury confusion is going to result.

So moving to the question then of whether or not mandamus should apply here, we feel that there was a clear as set in Walker v. Packer there was a clear failure of the TC to analyze or apply the law correctly, that will constitute an abuse of discretion. What we're saying here is that the courts' failure to analyze the cases individually and determine if they were consolidatable constitutes the clear abuse of discretion.

Moving to the question of whether or not there is an adequate remedy at law. I think the court should look at the CSR v. Link case where the court recognized that the large number of potential lawsuits, and of course that was in an asbestos context as well, the court found that the large number of potential lawsuits is significant to the determination that appeal is not an adequate remedy. That is certainly the situation in our case. We have 365 plaintiffs waiting in the wings as to the Williams Bailey firm alone, but that's not the end of it. In Beaumont the Walter Humphrey Wayne Rio firms are very active in this. There are over 2600 plaintiffs among those 2 firms making claims against some or all of these defendants. The Barron Pearlman firm out of Dallas has another 1900 cases that they have filed that also are cases involving some or all of these 4 defendants. So all total we have at this time pending against some or all of these very defendants. Over 4800 plaintiffs cases. These are not cases that are obviously going to go away. These are being filed daily. So that was one of the questions I believe that the court addressed in the CSR v. Link. The number of cases is significant in terms of determining whether an adequate remedy at law exists.

ABBOTT: Which particular client do you represent in this case?

RICE: I represent Ethel Corporation.

ABBOTT: Let's say that some of these plaintiffs worked out at the Ethel Corporation site, worked there 1 year, and during that year they were exposed to asbestos. And then they went over to Todd Shipyards and worked there for a 20 years during which time they were exposed to asbestos. If the plaintiffs sued your company claiming that because they were exposed to asbestos at your particular work site they should be entitled to recover damages from you, wouldn't you want to be bringing a third party action to bring in Todd Shipyards to make sure that the jury would say hey, most of their exposure was when they worked for Todd Shipyards instead of when they worked at Ethel?

RICE: I'm certainly either going to bring a third party action, of course the plaintiffs are

solving that for us by bringing them in as well, but I am either going to file a third party action or at trial I am going to be pointing to the empty chair. In fact what we find in these cases is that there are a multitude of work sites where these defendants worked where the plaintiffs have chosen not to sue them. We will certainly be pointing to that.

ABBOTT: Why does that not undermine your argument that cases should be based upon a common work site?

RICE: Well I think that common work site is one of the elements. I do not pretend to say that it is the only element. But I think that the court should examine the number of work sites in making a decision and in making a recommendation. It is just one of the factors I feel that needs to be taken into consideration.

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RESPONDENT

COUNTESS: Before the court takes complete control of my argument I want to say 3 things. First Judge Marshall's not involved in this case, this is not a breast implant case, and I am not sponsoring Mr. Rafkin as an expert witness.

CORNYN: In that connection Mr. Countess should there be a different standard in asbestos cases from breast implant cases?

COUNTESS: Well you always get into that kind of problem when you get into these situations. I don't know. I know what works in asbestos cases. And what you're really I think ultimately going to ask me, what standards if any do I think should be applied here? So let me just go straight to that. I want to say a few works about the mandamus concept itself in this context if I get the chance. Let me just go to the factors and let's talk about those a minute. Now in the supplemental brief that I filed and yes it was just filed yesterday, and I should have filed it sooner, and I apologize, but I think basically what I was trying to do there was to write the argument that I hope to make and probably won't get to. So I would ask the court to look at it because there is information in there that I think will be helpful particularly the opinion from the 2nd Circuit discussing, explaining and analyzing the so called Maryland factors. It was a subsequent opinion of the 2nd circuit that I've quoted extensively in my brief.

HECHT: And I take it you agree with that since you quoted it extensively?

COUNTESS: I agree with the overall impact of it, yes. I am sure there are sentences in there that I would have to say no I don't think that's correct.

HECHT: But the concept is that there needs to be standards that can't be fixed; there has to be some flexibility, but there can be prejudice and we've got to kind of work this out is how I read

the opinion?

COUNTESS: Yes your honor. I can't argue with that just based on the reality of the court _____. But let me say two things about it. If you say these standards must be met, period, end of sentence, you are going to create an unworkable situation. Because no set of standards you formulate is going to fit all of the mirid kinds of group cases we are going to get in Texas that we have now or that we are going to get in the future. I think the most this court can do is say here are some factors for the court to consider. Second, I think it would be an error for the court to put any numerical designation on the factors to say well you can consolidate if there is a satisfaction of a majority of those factors. My view is that the most the court can do is say here are some things for the TC to consider when consolidating. Now my argument about the wording of the rules I stand by it because it says a common factor.

HECHT: Is there an indication in this case that the TC considered any factors? In the last case, the parties are suggesting to us fairly strongly that there was no consideration of any factor ever. And in this case the record is not too much different. There is some consideration but not very much.

COUNTESS: Let me ask you first, please look at the transcript of those hearings. You don't have an arbitrary judge just saying do this and do that. You've got a judge that's thoughtful. She's trying to work through this and trying to figure out a way to bring these cases together so they can get disposed of. Now she doesn't say okay here I'm considering this, and this, and this. In fact what she does she tells Mr. Cloud who is the trial counsel and the opposing counsel to see if they can go work out a group. Well that doesn't work and I suppose as he certainly has a right to do counsel was afraid he would waive his complaint about consolidation. But what Mr. Cloud does is come up with a group that is a mixture of various kinds of cases, all of their products cases have been settled, so you don't have that issue involved in the case that's going to go off in another direction. And they can be tried together because they are all premises based liability cases.

HECHT: In the sanctions area, we suggested that findings would be helpful to us because it would give us insight into why the judge was imposing the sanction. Would that same process be helpful here for an appellate court to know why the trial judge felt it was important to pick these 22 cases, or 5, or 8, or 40, or however many?

COUNTESS: I really don't have any problem with that. Based on my own experience. I know that it is always helpful to have some idea of what a trial judge is thinking when a particular decision is reached. You may or may not agree with that, or you may or may not think those factors are important. But I have no problem with that. I think it might be a good thing to do.

GONZALEZ: Help me understand with regards to commonality. The allegation is that the only thing the plaintiffs have in common in these cases are that you have the same law firm, and that the plaintiffs claim asbestos injuries, and that's all. If you track down the other factors that the courts

have articulated, they don't meet any of those factors, they do not have common work histories, common occupations, length of exposure, or damages, or diseases, or smoking histories. Is that their statement, and if it's not, identify for me what these cases have in common other than what I have articulated here?

COUNTESS: I do not agree with that statement. Let's talk about the occupations. It is true that we have a group of people who did different things. But with one exception all of them are what we call industrial craftsmen. All of these men were industrial craftsmen. They work out of the building trades union, they work with their hands, they constructed, they repaired, they tore down. They were the repairmen and the contractors, the builders who went in and out of these various plants. They all did something approaching the same kind of work, which means they were exposed under the same conditions, same circumstances. That's a similarity. And one of my pleas to this court is don't make any standards you set out too specific because again if you do you get into the problem of handicapping the TC so they can't put together a reasonable group. Now if you want to look at occupations from a more precise approach certainly it depends on how specific you get. But on occupations a division by for instance petro chemical workers, by industrial craftsmen, by office workers, by school teachers, that kind of division is okay as a workable division. And this happens to be the industrial craftsmen group. There is nothing difficult about a jury understanding that. Now the status of discovery, the same counsel, no question that those are the same.

The other area though where I think there can be a real problem has to do with the diseases itself. And this is one place where there's a major difference with breast implant cases. We don't have 50 different diseases running around out here with no history, no lack of understanding, or no strong dispute in most cases about their nature or their existence. You have a 20-30 year proven record, longer than that actually about 50 years proven record of the effect of asbestos on the human body. It goes in, about 10% of it stays forever, it never leaves, ultimately plural plaques develop in the lungs, the progression from there is to asbestosis, and from there is to one of the cancers. And it's a straight line progression. Once you make the asbestosis list you've got a greater than 50% chance of contracting an asbestos induced cancer. Straight line right down the line. So there is no danger of either prejudice or jury confusion in combining ___ plural plaques and cancers. Here's why. First the diseases themselves as I just said are well known. Second, if you're trying all plural plaques together which are always your weakest cases because these guys and ladies don't usually have any serious handicaps, but they do have the plaques and the prospect of other problems. If that's all you're trying, you're trying all those together, you still show the entire history of the disease, because you are entitled to future damages. You talk about asbestosis, you put on evidence of lung cancer, you put on evidence of ___mezo, you put it all on. The jury gets the same picture...

HECHT: But you say those are weaker cases, why?

COUNTESS: They are weaker in the sense that the affect of the disease on the human body is not as great as asbestosis or as the cancers. They are still serious cases. And the danger obviously is the progression much more than just the plaques themselves. Although they do cause according

to most of the medical testimony some impairment of breathing, and stamina.

OWEN: How can it be a straight line if some of them cause mesothelioma and others cause lung cancers?

COUNTESS: It is a straight line progression from plaques to asbestosis to some form of cancer, not necessarily the same cancers, and the asbestos related cancers.

CORNYN: In what percentage of cases?

COUNTESS: If you get asbestosis...

CORNYN: I mean if you have plural thickening, what percentage progressed as asbestosis or some form of cancer?

COUNTESS: I do not have that percentage before me. I can find out and I will. I know that once you get to asbestosis the medical testimony from our people at least is that there is a greater than 50% chance of probability greater than 50% chance of developing one of the asbestos related cancers.

CORNYN: Is your point that in a plural thickening case that you're going to be putting on evidence of the probability of its progression to asbestosis and cancer?

COUNTESS: Yes, that's correct.

HECHT: It seems that that evidence would appear differently if that plaintiff with only plural thickening was sitting beside the widow of somebody who died of cancer, or someone else who had progressed along. In other words this may happen to me is not as strong of argument as here's a guy that it happened to.

COUNTESS: I think that's correct in the sense that a jury when it starts to evaluate those cases is going to consider that. There's no question that they are going to look at the guy with the plural plaque and they are going to say you're not nearly as sick as this guy over here. And so that's going to make a different. I put some affidavits from John Eddy Williamson and the other people that have tried a lot of these cases with my material. I can get obviously as many as the court is willing to read. But what they show is that in all of these cases the juries make a rational division between these various kinds of diseases. There is no history on a consistent basis. You may have a random weird case, but there is no history on a consistent basis of a jury awarding a crazy amount of money for a plaque just because somebody sitting next to a cancer. There's just no evidence.

OWEN: But what about causation? Isn't that at issue in the plural plaque cases much more so than the mesothelioma or the asbestosis cases?

COUNTESS: That the asbestos causes the plaques, or that this person's asbestos caused the plaque?

OWEN: Well both, that the asbestos caused the plaque or that the plaque will inevitably turn into something more serious. Don't you have a harder fight on the causation issue in the plural plaque cases than you do in others?

COUNTESS: I think it's probably somewhat and I'm not as clear on this probably as I should be. The probability of moving from plural plaque to asbestosis probably is not quite as great as the probability of moving from asbestosis to lung cancer. But as far as the basic causation, that is either one, was this defendant's product the cause of these plural plaques, or did asbestos cause these plural plaques? I don't think that proof level is any harder for plaques than it is for the others. You've got to have some kind of causation testimony both cause and fact and the foreseeability. You've got to have some doctor who is respectable and meets all the tests, who can say this is probably an asbestos induced disease. You've got move all through those.

OWEN: Is there a possibility or a likelihood, how do we analyze this for a juror to say well here are 10 plaintiffs who do in fact have cancer, here are 10 with plural thickening and just by the fact that there are so many people with the more serious diseases I just assume that all of these 10 with plural thickening are some day going to end up where these other 10 are.

COUNTESS: Well that's not the way our evidence is going to go. But whether the cancers are setting there or not we are going to be presenting basically the same evidence, which is that once you reach the asbestosis stage at least there's a greater than 50% chance that you're going to have one of the cancers. That's going to be true every time because we have the right to recover future damages.

OWEN: I'm talking about the plural thickening.

COUNTESS: I'm sorry. I should be better prepared on the move from plural thickening to asbestosis. That's just an area I have not paid that much attention to. But the doctors are going to testify that that is a progression. I don't have a percentage I can give you. I'm sorry. But they are going to testify that that's the normal progression of the disease.

HECHT: Do you think there is a maximum number of plaintiffs that can be tried together?

COUNTESS: Our experience has been anywhere from 10 to 20, or 22 to 23. In the 20s is the manageable group from everybody's standpoint on a general across-the-board basis.

HECHT: Do you have any sense of how many cases in Texas multi-party asbestos cases have been tried to a verdict final on appeal without a settlement along the way in this area?

COUNTESS: I have no idea but I could find out.

HECHT: I think there is only one that I know of in which there has been appeal. That's out of a Texarkana court some years ago; 5 plaintiffs were tried together and no question in that case about consolidation. It's curious to me that we don't seem to see many of these on appeal.

COUNTESS: Well the consolidation issue is not generally a matter of contention. Most of the time what happens is just what Judge Stone wanted to do here: the parties get their heads together and they say okay let's try this group or this group. Even if they are unable to agree on which ones to try there is usually not any contest if it's in the 10-25 range, the people just go on and try them. I think as a practical matter most defendants and defense counsel recognize that that's a workable group, that in the long run they are better off, just as the plaintiffs are better off to try them in these groups and get the cases disposed of.

Now I was intimately involved in the infamous Chaddock(?) case, 289 plaintiffs, the trial judge, all of the trial counsel, and everyone else I know who had anything to do with that case say they will never try that many together again. Not because of jury confusion, but just because of the shear burden of doing the job you have to do as either plaintiff or defense counsel to put on a good case. And they put on good cases. See you have so many management devices available to you today to make good presentations that when we start talking about numbers we are really talking about something superfluous. In Harris county they have well developed juror notebooks. And with those notebooks the jurors can keep track of everything that's going on.

HECHT: Your argument only works up to a point. All of those tools wouldn't work at 289.

COUNTESS: There is a maximum number. Who knows what that number is. And that's part of the problem with laying down absolute standards. It's a shifting number. It depends on the case; it depends on the facts of the case; it depends on the kind of injury; it depends on the attorneys; are your attorneys skillful and seasoned at presenting this, or are they a bunch of amateurs that don't know what they are doing; it depends on the trial judge. So many of these cases are well tried if you have a good trial judge. Badly tried if you have a bad trial judge. So it's a shifting group of factors.

ENOCH: Talking about this shifting group of factors. I know this is _____ difficult. The rule talks about a common issue of law or common issue of the fact and obviously we are having to wrestle with that. Is there a distinction...let me start over. My understanding of most of the asbestos cases is you've got the manufacturer...it's a product's case. You have a manufacturer and the real issue...it seems that it has been decided by whoever decides these sorts of things that asbestos does cause cancer. There is some statistical significance to the incidences of cancer among those who were exposed to asbestos. So that issue is kind of out of it and the only issue that's really left is did I manufacture asbestos? And that seemed to be a problem because we didn't know who manufactured the asbestos 4 years ago. So we put all these defendants together and let that kind of sort itself out. On a premises liability issue it seems to me the common issue asbestos or causing

cancer is really not the issue that's being developed here. The issue in premises liability is did I have asbestos at a place on the premises where this person was exposed. So it seems to me that you bring in this plaintiff, this plaintiff's issue is not going to be that asbestos caused my cancer, that's really not what we're going to be arguing about. What we are going to be arguing about is Bill Smith, or Jane Doe was not at that place in my premises that exposed them to a significant enough exposure of asbestos. So it seems to me you would have...the significant issue in this case is not what is common to the cases. The significant issue to this case is what is really uncommon to these cases and that is at Ethel Corporation this plaintiff was not at the same place that caused significant exposure and for Todd Shipyards our plaintiff was not at that place. M point is it's the significant issue that's not in common. It seems to be in a premises liability issue as opposed to a product's liability issue for asbestos.

COUNTESS: Yes. And I understand what you're saying. I think certainly the method of putting these cases together and proving them is going to be somewhat different. Let me say that as far as I know all of them, and I may be wrong on this, but I don't think, there's really not going to be anybody who can dispute the plaintiff's testimony as to where he was when. The plaintiff knows and is going to testify about it. Most of the defendants probably all of them don't have any evidence to the contrary. So the average plaintiff is going to get on the stand and say well I worked 6 months here, then I took this job over here at this other place and name the places that he or she worked. That's not going to be hard for a jury to keep up with especially if they have notebooks. On the other hand proving what a situation was at those various plants if we've got 4 defendants or 5 here we would simply put on our evidence of what asbestos each of these 5 places had and where it was. And then relate that to where these various plaintiffs worked.

ENOCH: So what's being fought about in these cases?

COUNTESS: Well there will be a fight over causation in the sense that they will I'm sure have some medical testimony, in many of the cases they have medical testimony where they have doctors that say no we didn't find plaques, or we didn't find something else, that's going to be a fight. There will be fights I'm sure over state of the knowledge since these are negligent cases and I'm sure without looking at the evidence, and I haven't, it's going to be something to the effect we didn't know when he was working here that these were problems. Something like that.

ENOCH: Are those significant issues in this premises...are those the same that would be significant issues in a product's case, a state of the art, and that sort of thing?

COUNTESS: They can be, yes. Let me say one thing about mandamus. Please give us some guidelines. I don't know where I am when a mandamus hits my desk except that I am probably going to be down here as a representative of a real party not too long from now. But we have no guidelines to know when a mandamus should or should not be granted. You have said a lot of things, but then you will take a specific case that doesn't seem to fit those guidelines. If it's going to be tough problems, then just say any tough problem that needs attention we are going to take a look at. If it's going to be abuse of discretion, if it's going to be no adequate remedy by law. The

adequate remedy by law issue is not satisfied here. First of all we are not talking about that many cases. Second, the best determination of whether there is either prejudice or confusion in this group of cases is to look at the trial record, you look at the evidence, you look at the jury's findings, and you talk to the jurors.

PHILLIPS: What about the link argument, which is really the only argument that relator made I think about why this is a special case. By the time we took this up through the regular appeal there might be another 4800 cases that have been erroneously disposed of.

COUNTESS: I can't answer that. I only know what we have on file now, that's speculation, just as their expert's affidavit is speculation. I don't know. I have no knowledge of the people I represent that they plan to do anything like that. But I can't speak for anybody else.

HECHT: Anything like that, do you mean file cases? How many of these same type of cases are there? The number opposing counsel said was 4800.

COUNTESS: I don't know. I am not aware of that. We don't have anything like that so I don't know what the others have. But even so no matter how many there are, even so you've got have some test of whether or not they are entitled to relief and your court has said, all courts have said: show us prejudice, show us confusion. How do you determine prejudice or confusion? You don't determine either one by their experts' affidavit if you look at that. You determine it by looking at the trial record. I've got affidavits from trial lawyers in these cases that outline what happens and you see a logical division no matter how many cases are tried, you see a logical division by the jury among the various diseases and the greatest problems. You find people _____ out because the jury didn't like the causation testimony and so on.

OWEN: The other side seems to stress difference in diseases and indeed they say in their brief that the medical testimony on lung cancer and mesothelioma differ quite a bit. They said the state of knowledge, the state of the art at varying times is pretty distinct. Do you have a response to that?

COUNTESS: I don't agree first of all with their characterization of what the state of knowledge was. In any event there is not a record before this court to satisfy that. But the division by disease is an artificial division that has no meaning for a lot of the reasons that I was talking about. You show the same thing regardless of whether you are trying plurals or cancers. The other thing that I think is going to happen and I am looking at a lot of these cases, I think what's going to happen in the long run if it's divided that way is that it's going to result in larger verdicts, not smaller ones. You group 5 cancer cases together and try them, 5 people that have that asbestos induced cancer, and with all of the liability evidence we have, you can make a jury very, very angry, and they can put a whole lot of money in those _____.

OWEN: Then why aren't y'all consolidating them that way that affects that case? I mean

why aren't the plaintiffs lawyers petitioning to do that?

COUNTESS: We think it's easier to put our proof together with an entire group that has a broad cross section.

OWEN: Why is it easier?

COUNTESS: Because you're talking about all of these things anyway so why not have some of all of them in the trial itself, plus you can group more together. If you're going to try cancers, it's going to be hard to try 20 cancers at one time. The medical testimony alone when you've got a cancer is harder. It's more difficult, it's more complex. If you've got a range you can try more cases. You can structure your evidence in such a way that it's easier for the jury to understand what you're dealing with.

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REBUTTAL

RICE: To address one comment that was made your honor concerning the question of the propriety of mandamus relief, and that the CSR was the only thing we mentioned, I did want to point out to the court that we have certainly pointed out the problem in terms of rule 327b, that is that we cannot go behind the jury deliberations. And that was pointed out in the Dalbrier v. Basquet(?) case. So I think that that is certainly one of the two bases from which we say that mandamus relief should be proper here.

CORNYN: Your point is you would never be able to prove harm?

RICE: Exactly your honor. And that is if you look at the analysis that was done in the Dalbrier case, that is exactly what the court said: is you will never be able to go behind the jury and determine why they made their decision.

CORNYN: So all we have to rely on is sort of our intuition about what juries do?

RICE: That, and I think we can also look in this same aspect look at the Cain v. Armstrong case where you had a trial judge who did try 13 cases together, and he said after that that obviously it was error he recognized after the trial. And found that he had basically committed error I suppose on consolidating that many cases. It just didn't work and it basically overwhelmed the jury with evidence is what he found.

HECHT: Is part of the motive here to set a lot of cases with the thought that a large percentage of them will settle?

RICE: Certainly a large percentage of them do settle. No question about it.

HECHT: Is there any indication that they settle because the prospect of going to trial with a whole lot of other people changes the settlement _____?

RICE: I think that that was recognized in fact in the CSR v. Link that these mass tort cases where there are a lot of consolidations do put a lot of pressure on the defendants to settle. And so it is a very real problem that we face. No question about it.

PHILLIPS: If there were individual trials given the legislature's feeling that the judiciary is adequately staffed, I mean they've added very few judges in the last 10 years, none in the urban counties, if they were tried one at a time the pressure on defendants to settle would be pretty minimal wouldn't it? You could be number 21,000 in line and feel pretty good about it.

RICE: Remember that eventually not all of these cases are going to be settled. Whether you consolidate 5 cases, or whether or not you use 1 case, eventually the plaintiffs and the defendants are going to sort this out as to whether or not Ethel is going to be liable on a negligence action. In most cases, those cases are eventually going to I think foster settlement.

PHILLIPS: How many of these negligent cases have been tried so far?

RICE: I'm only aware of one your honor, and that is the Rita Mae Schmidt case over in Beaumont. Hershel Hobson was plaintiff's counsel and it was a combination of the products and the premises defendants present, and the premises defendant was found not liable in that case.

PHILLIPS: So it is your contention that this is more of an immature tort at this stage?

RICE: Well it certainly is not mature as is the products liability cases.

ENOCH: It seems to me you want to make a distinction that this is a premises liability case as opposed to products case. I have quizzed Mr. Countess about what's at issue in a premises liability verses products. Essentially his response is that the distinction is insignificant. You're really not going to be having massive trial over whether or not these individuals were on your premises and were in a place to be exposed to asbestos. You're defense is really going to be as the defense is in a products liability is that the asbestos didn't cause their cancer or whatever they're ailing from. Is that correct? Is that what's really going to be fought in these premises cases?

RICE: Not entirely. In other words we certainly take advantage of whatever the state of the art evidence is. No question about that. But you will always have to remember that in applying negligence standards, the question is whether or not we used ordinary care as it relates to that plaintiff on our premises at that particular point in time. The whole concept of duty as recognized in Exxon v. Tidwell and some of the other cases is at the forefront of these negligence cases. Whether or not a particular plaintiff was exposed in the same manner at a shipyard as he was at a steel mill, that's Todd v. USX, is entirely different. You also have the different concepts of duty as

it relates to the plaintiff's employer. Because for instance after OSHA specifically statutorily the duty is on the employer to protect that employee and the court has recognized in other cases in the not too distant past that you really have to look at the employer's responsibility, the contractor's responsibility, the owner's responsibility, and the plaintiff's responsibility and knowledge all at the time that plaintiff was out there. So you can't just take the product defect in a vacuum as you can in a products liability suit.