

NO. A07-784

State of Minnesota
 In Supreme Court

In re Continental Casualty Company and
 Continental Insurance Company,

Appellants,

Continental Casualty Company, et al.,

Appellants,

vs.

3M Company,

Respondent,

ACE Bermuda Insurance, Ltd., et al.,

Defendants,

Transamerica Premier Insurance Company,
 n/k/a Fairmont Premier Insurance,

Respondent.

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INTRODUCTION

The legal issue on which lower courts and practitioners need guidance, and which Continental presented for review, is the scope of this Court's Order in *In Re Asbestos*. The district court erroneously concluded that commercial contract disputes, such as this one involving insurance coverage for a wide variety of toxic torts, are subject to the Asbestos Order. This case raises complex questions of contract interpretation under hundreds of insurance policies issued over nearly fifty years. There will be little, if any, overlap of issues or parties with asbestos personal injury and property damage claims. Moreover, the case involves coverage for five separate toxic torts—only one of which is asbestos. Assigning this sprawling case to the asbestos judge will impede, rather than promote, the efficient handling of asbestos personal injury cases this Court intended under the Asbestos Order. The district court's decision to transfer venue from Hennepin County on the ground that this case falls within the Asbestos Order was contrary to law.

3M wisely does not even attempt to defend this legal conclusion, asserting instead that the district court merely exercised its discretion when transferring venue. To the contrary, however, the district court *expressly* undertook a legal analysis of this Court's Asbestos Order and erroneously concluded that it required transfer.

Moreover, 3M's reliance on the district court's discretionary application of Minn. Stat. § 542.11(4) is misplaced. The court based its "ends of justice" analysis on its erroneous interpretation of the Asbestos Order. The district court applied the wrong legal standard to a barren factual record when it concluded that Ramsey County is "at least as

convenient” for the witnesses despite a record that is entirely devoid of *any evidence whatsoever* regarding the convenience of the witnesses.

The district court’s decision creates a dangerous precedent. If permitted to stand, it would burden the asbestos court with myriad commercial disputes only tangentially involving asbestos. The efficiencies this Court intended to create by assigning all asbestos-related personal injury and property damage cases to one court would be defeated. To ensure that asbestos claims brought by injured individuals continue to be resolved in a timely manner, this Court should reverse the district court’s decision and hold that this case does not fall within the scope of the Asbestos Order.

ARGUMENT

I. THE ISSUE OF WHETHER THIS CASE FALLS WITHIN THE ASBESTOS ORDER IS SQUARELY BEFORE THIS COURT.

Contrary to 3M’s representations that the district court¹ did not decide that the asbestos order mandates this particular change of venue, R. Br. 15, 21, the district court made an express legal determination—specifically denominated a “Conclusion of Law”—that this case falls within the Asbestos Order and “*therefore*” venue should be transferred to Ramsey County. (App. 8, ¶ 17 (emphasis supplied).)²

¹ Judge Blaeser.

²Continental refers to the Appendix of Appellants’ opening brief as “App”; to the Appendix of Respondent’s brief as “R. App”; and to Appellants’ Reply Appendix attached hereto as “A. R. App.” Continental refers to Appellants’ opening brief as “A. Br.” and to Respondent’s brief as “R. Br.”

Continental sought review of the district court's legal conclusion that this case falls within the Asbestos Order in its Petition for Writ of Mandamus to the Court of Appeals. (App. 152.) Continental then specifically raised this issue in its Petition for Further Review:

Legal Issues and Resolution by the Court of Appeals:

1. Does *In Re Asbestos* apply to cases other than those alleging personal injury, death or property damage arising from asbestos? If so, does it apply to a commercial insurance coverage action in which asbestos claims are just one of five liabilities at issue? *The Court of Appeals erroneously concluded that district courts may apply In Re Asbestos to large complicated insurance contract actions only tangentially related to asbestos.*

(A. R. App. 3.)

When a Petition for Further Review of the Decision of the Court of Appeals is granted, this Court reviews the issues raised in the Petition, unless the Order accepting review provides otherwise. *Nw. Racquet Swim and Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 613 n.1 (Minn. 1995) (addressing single issue raised in petition and declining to address issues not included in petition); Eric J. Magnuson and David F. Herr, *Minnesota Practice Series, Appellate Rules Annotated* § 117.8 (2007). This Court did not limit the issues it accepted for review in this case. (App. 167-168.)

By seeking a Writ of Mandamus and then by petitioning for further review, Continental properly preserved the legal issue of whether this case falls within the Asbestos Order. *George v. Estate of Baker*, 724 N.W.2d 1, 7 (Minn. 2006); *Ebenezer Soc'y v. Minn. State Bd. of Health*, 301 Minn. 188, 193, 223 N.W.2d 385, 388 (1974).

Consequently, Continental was not required to seek further review of Judge Finley's Order to preserve the issue.

Whether this case falls within the Asbestos Order has been properly preserved for appeal and has been accepted for review. Thus the issue is squarely before this Court.

II. THE DISTRICT COURT'S DECISION IS SUBJECT TO *DE NOVO* REVIEW.

3M does not even attempt to argue that the Asbestos Order *requires* transfer of this action to Ramsey County. Instead, it attempts to cloak the district court's decision in discretionary review. *See* R. Br. 21. A review of the structure and language of the district court's order, however, plainly demonstrates that the court based its decision to transfer venue on its application of the language of the Asbestos Order to the facts of this case. Application of the law to a particular set of facts is a question of law which this Court reviews *de novo*. *State Farm Mut. Auto Ins. Co. v. Great West Cas. Co.*, 623 N.W.2d 894 (Minn. 2001).

At the outset of its Conclusions of Law, the district court notes that this Court's Asbestos Order assigns "all asbestos litigation in Minnesota state courts to a single judge" in order to create a "consistent, efficient and economical system." (App. 7, ¶ 2.) Next, the district court reviewed the history of the Order, specifically noting that in 2004 the asbestos judge directed "that venue of asbestos cases be transferred to Ramsey County." (App. 7, ¶¶ 2-6.) The district court then turned its attention to the scope of the Order, examining whether it applied to the facts of this case—an insurance coverage declaratory action that is not limited to asbestos. (App. 7-8.)

After reviewing the terms and history of the Asbestos Order and examining the application of that Order to the facts of this case, the district court specifically stated that it was “following the Supreme Court’s assignment orders,” (App. 8, ¶ 16), and made an express conclusion of law that this case falls “*within . . . the terms*” of the Asbestos Order and “*should therefore*” be transferred:

Conclusions of Law

* * *

17. This case is within both the terms and the purposes of the Supreme Court’s assignment orders, which presently assign asbestos cases to Ramsey County District Court Judges John T. Finley and Dale B. Lindman. This case should therefore be transferred to Ramsey County.

(App. 8, ¶ 17.) 3M’s assertions that “the District Court did not conclude that the asbestos order compelled the change of venue,” R. Br. 15, 21, is plainly wrong.

When an otherwise discretionary decision, such as a change of venue, is based on an error of law the standard of review is *de novo*. See *Navarre v. South Washington County Schools*, 633 N.W.2d 40, 49 (Minn. Ct. App. 2001) (“Ordinarily, the decision to grant or deny a new trial lies within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion; however, when the decision to grant or deny a new trial is based on an error of law, the standard of review is *de novo*”). The district court’s decision to transfer this matter to Ramsey County was based on its erroneous interpretation of the Asbestos Order, which this Court should review *de novo*.

The Asbestos Order is an exercise of this Court’s exclusive power to manage the state judiciary. 3M’s argument that the application of the Asbestos Order is a matter of

discretion would result in a *de facto* transfer of this Court's authority to the district courts. The Asbestos Order, which was designed to assure a consistent and uniform handling of asbestos-related tort actions, would be subject to a patchwork of different interpretations by lower courts, to whom this Court would owe deference under an "abuse of discretion" standard of review.

Moreover, if the application of the Asbestos Order is left to the *ad hoc* discretion of each trial judge, confusion and inefficiency will result. Because the Asbestos Order was not drawn to guide discretionary venue decisions in commercial cases, different courts likely would reach different results in similar cases.³ Faced with conflicting interpretations of the Asbestos Order, claimants will be unsure where to bring a declaratory action, and defendants, dissatisfied with the plaintiff's choice of venue, will inevitably demand a change. Protracted battles over venue, such as this one, will continue unabated.

In order to effectuate the "consistent, efficient and economical" handling of asbestos personal injury claims originally intended, this Court should hold that application of the Asbestos Order is not subject to the lower court's discretion but is a question of law subject to *de novo* review.

³ Indeed, in at least one instance different courts already have reached different conclusions in the *same* case, passing it back and forth like a hot potato. (*See* R. App. 46-47.)

III. THIS COMPLEX CONTRACT DISPUTE, INVOLVING INSURANCE COVERAGE FOR FIVE SEPARATE TOXIC TORTS, DOES NOT BELONG BEFORE THE ASBESTOS JUDGE.

The district court's conclusion that "this case is within the terms and purposes" of the Asbestos Order cannot withstand proper *de novo* review; indeed, 3M does not even contend that it can do so.

The stated purpose of this Court's Asbestos Order was to establish a system that could efficiently administer the surge of asbestos related personal injury and property damage cases in Minnesota courts. By consolidating such cases in one court, this Court expected they would be handled more efficiently than if randomly assigned throughout the state. Because the injury cases would repeatedly raise the same issues and involve the same parties, the asbestos judge would be able to adopt uniform procedures and gain special expertise that would promote prompt resolution.

This complex insurance coverage action, involving a wide variety of toxic torts, only one of which is asbestos, does not involve factual or legal issues similar to asbestos personal injury and property damage cases. Moreover, assigning this massive case to the asbestos judge will severely impede, rather than facilitate, the efficient handling of those claims.

A. This Insurance Coverage Action, Involving Five Separate Toxic Torts, Does Not Involve Questions Of Law or Fact Similar To Those Raised In Asbestos Personal Injury Or Property Damage Actions.

The district court's conclusion that common issues of fact between this insurance coverage dispute and the underlying personal injury actions necessitate transfer of this case to the asbestos judge was erroneous. Examination of the issues the trial court will be

called on to resolve in this coverage case demonstrates there will be scant overlap with the issues raised in the underlying personal injury actions.

At the outset, the trial court will be called upon to resolve myriad insurance coverage questions involving contractual interpretation that may preclude coverage altogether. These issues include, among others, voluntary payment and timely demand provisions, lack of notice and late notice, non-disclosure, failure to cooperate, and policy exclusions such as those precluding pollution claims and punitive or exemplary damages. The court will have to decide each issue under several hundred separate policies which will contain at least several different terms pertaining to each issue. Moreover, several of these coverage issues may have to be separately addressed for each kind of toxic tort claim at issue in this case. None of these issues has anything to do with the asbestos personal injury or property damage cases assigned to the asbestos judge.

Only if the trial court determines there is coverage for some of the claims under the policies will it even reach issues of trigger and allocation of insurance. Should the court reach trigger and allocation, however, it will then be required to make at least five separate trigger determinations based upon the different toxins involved in the underlying claims, including PFCs, silica, coal dust and benzene, in addition to asbestos. Each determination will be predicated upon its own unique facts. Thus, in addition to trying the “trigger” for asbestos, the court will separately try “trigger” for PFCs, benzene, coal dust and silica.

Neither the issues that will be addressed in the coverage phase of this declaratory judgment action, nor those that will be addressed if trigger and allocation are reached, will overlap with the issues raised in the asbestos personal injury suits.

3M's assertion that the application of defenses such as the known loss doctrine during the coverage phase of this case may overlap with issues in the underlying personal injury actions is unsupported by the record. 3M maintains that Continental's allegations regarding 3M's knowledge of the dangers of its masks in its declaratory complaint "essentially incorporate" allegations "typically made by plaintiffs in the underlying cases when they accuse the asbestos defendants of tortious conduct." R. Br. 27. 3M, however, has provided no evidence whatsoever that these claims have actually been asserted against 3M in a *Minnesota* asbestos personal injury case. In the absence of any evidence that the Minnesota asbestos judge will be called on to decide these issues in the underlying actions against 3M, 3M's argument that such overlap exists and warrants consolidation under the Asbestos Order is unfounded.

The district court's conclusion that the issues involved in trigger and allocation will overlap with asbestos personal injury actions is similarly unfounded. The district court failed to appreciate the different issues involved in trigger and allocation in an insurance coverage action and the determination of cause and liability in a personal-injury tort case. Minnesota has adopted the "actual injury rule" to determine what policies are "triggered," *i.e.* what policies must respond to a loss. *N. States Power Co. v. Fidelity and Cas. Co.*, 523 N.W.2d 657, 663 (Minn. 1994). Under this theory, policies in effect when the claimant was actually injured are triggered. If more than one policy is triggered, the

question then arises how the loss should be allocated, *i.e.* spread among the triggered policies. Minnesota law holds that unless the loss is the result of a discrete identifiable event, damages will be allocated across triggered policies “pro rata by time on the risk.” *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283 (Minn. 2006). Thus, to determine trigger and allocation in an insurance coverage action, the court must determine *when* the claimant was injured.

The medical issues the district court referred to when concluding there would be factual overlap between this coverage action and the underlying asbestos personal injury actions, however, do not involve *when* the claimant was injured. The district court referred to this Court’s decision in *Minnesota Personal Injury Asbestos Cases v. Keene*, 481 N.W.2d 24 (Minn. 1992), in determining whether there would be factual overlap between this coverage action and the underlying asbestos personal injury actions. (App. 8, ¶ 12.) There, this Court noted that the following common medical issues arise in bodily injury cases: “the connection between exposure to asbestos and disease; the varieties of diseases that occur subsequent to asbestos exposure; [and] the amount of asbestos exposure that provokes disease. . . .” *Keene*, 481 N.W.2d at 26. The district court summarily concluded that these three issues “relate to trigger and allocation” and therefore this case has “numerous issues” in common with the underlying asbestos bodily injury cases. (App. 8, ¶ 13.) Notably absent from the common medical issues identified in *Keene*, however, is *when* injury occurred. Thus, although both the coverage and underlying actions may address the plaintiff’s disease, the focus of the two inquiries is separate and the issues do not overlap.

Thus it is unsurprising that the very trigger and allocation decisions on which 3M relies come from jurisdictions—Illinois and the Second Circuit—that *do not* consolidate insurance coverage actions with personal injury dockets. *Compare* R. Br. at 28 n. 15 with A. Br. at 17-18 (demonstrating that Illinois does not consolidate trigger and allocation cases (*e.g.*, *John Crane*, *see* A. App. 258) with personal injury docket and that federal courts consolidated asbestos injury actions in Third Circuit four years before the Second Circuit decided trigger and allocation in *Stonewall*).

This complicated insurance coverage action involving hundreds of policies issued by hundreds of insurers over nearly fifty years, and raising numerous contract interpretation issues that will have to be resolved for each of five separate toxic torts, will have few, if any, legal or factual issues in common with the underlying asbestos personal injury and property damage cases. The district court's conclusion that the potential overlap brings this case within the Asbestos Order lacks a factual basis and is contrary to law.

B. A Contract Dispute Regarding Insurance Coverage For Silica, Coal Dust, Benzene, PFCs and Asbestos Is Not A "Phase" of Asbestos Litigation Subject To The Asbestos Order.

Both the language of the Asbestos Order, and plain common sense, demonstrate that this case is not a "phase" of asbestos-related tort claims subject to the asbestos judge's authority to manage "all phases" of this litigation. (R. App. 39.)

In the first "whereas" clause of the Asbestos Order, this Court recognized that a large number of asbestos-related claims are being brought in Minnesota state courts as *personal injury or death claims and as damage to property actions*. In the fourth

“whereas” clause, the Court notes it is necessary that a “consistent, efficient and economical system be fashioned to manage all phases of *this litigation*. . . .” Plainly, the “litigation” referred to in clause four is the personal injury and property damage actions described in the first clause. *Id.*

A “phase” is defined as “an aspect; a part.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). Thus, a “phase” of a personal injury or property damage action, refers to a *part of that case, i.e.*, “pleading, discovery, motions, settlement and trial.” The fact that “pleading, discovery, motions, settlement and trial” of an asbestos tort claim are the “phases” referred to in “whereas” clause four is evidenced by the Court’s later reference to “phases” in paragraph two of the Asbestos Order. There, the Court specifies that case management orders for “all phases of pleading, discovery, motions, settlement and trial” be prepared. (R.A. 39.) Thus, an independent declaratory judgment action concerning insurance coverage is not a “phase” of an asbestos personal injury claim under the Asbestos Order.

Moreover, if insurance coverage actions for asbestos have been prevalent since the 1980s, as 3M contends, then this Court was aware of them when it issued the Asbestos Order. Under the well-established maxim of *expressio unius est exclusio alterius*, the express inclusion of one thing implies the exclusion of another. *See In re Common Sch. Dist. No. 1317 v. Johnson*, 263 Minn. 573, 575, 117 N.W.2d 390, 391 (1962) (invoking “[e]xpressio unius est exclusio alterius”); *Anderson v. Twin City Rapid Transit Co.*, 250 Minn. 167, 175, 84 N.W.2d 593, 599 (1957) (same). The Court’s express reference to “phases” as including “pleading, discovery, motions, settlement and trial” without any

reference to insurance coverage actions, demonstrates that insurance coverage actions are not a “phase” of asbestos personal injury and property damage actions subject to the Asbestos Order.

The language of the Order and canons of construction aside, however, simple common sense dictates that this insurance coverage action is not a “phase” of asbestos tort litigation. Minnesota is not a direct-action state—a plaintiff cannot bring a direct claim against the at-fault party’s insurer and the insurer generally has no right to intervene as a party in a personal injury or property damage claim brought against its insured. Consequently, a declaratory judgment action to resolve a contractual dispute between an insurer and its policyholder is not a part of a personal injury or property damage suit—it is a separate, independent action.

This distinction is clear in the *Scheid Plumbing* decision, on which 3M relies. (*See* R. App. 41-47.) In that action, the insurers brought suit against both the tort claimants and the policyholder, contesting *both* the tort concept of product identification as to the claimants, (*Id.* at 74 ¶ 19) as well as their insurance indemnity obligations to the policyholder. The Mower County Court conditionally transferred the case to Ramsey County based on “an open question regarding exposure to asbestos or asbestos-containing products,” *i.e.*, the classic tort liability issue of product identification. (*Id.* at 47.) The court expressly held, however—in language 3M fails to note—that “[s]hould the parties wish to maintain a declaratory judgment action solely on the issue of indemnity, *they may do so in Mower County.*” (*Id.* (emphasis supplied).)

Finally, this case cannot be considered a “phase” of an asbestos personal injury or property damage suit is because it involves *much more* than asbestos—it involves coverage for silica, coal dust, benzene and PFCs. Whether there is coverage for these toxic torts, of course, has absolutely nothing to do with asbestos personal injury or property damage claims.

In the Asbestos Order, this Court grants the asbestos judge broad managerial authority over all phases of asbestos-related personal injury and property damage actions. It did not mandate transfer of insurance contract disputes involving multiple separate toxic torts in addition to coverage for asbestos.

C. Assigning This Complicated Insurance Coverage Action To The Asbestos Judge Will Not Promote The Efficient Handling Of Asbestos Claims.

Assigning this massive insurance coverage litigation case to the asbestos court would do nothing to promote the efficient handling of asbestos personal injury and property damage claims the Asbestos Order was intended to effectuate. To the contrary, it would add to the 1500 injury cases currently before that court a sprawling dispute presenting myriad complex questions of insurance coverage on which the asbestos judge has no special expertise. Moreover, because this case involves coverage for five separate types of toxic tort claims, the asbestos judge will be obligated to learn about the disease processes caused by silica, coal dust, benzene and perflouronated chemicals—again, none of which has anything to do with asbestos. Finally, even if 3M’s efficiency argument had a factual basis, it would prove very little. The judge’s familiarity with asbestos would at most promote the handling of one small part of this coverage action. The Asbestos Order,

however, is intended to facilitate the resolution of asbestos personal injury actions—not the handling of one part of one insurance coverage dispute.

This case does not fall within the language or intent of the Asbestos Order. It is not an asbestos personal injury or property action. Moreover, these cases will involve few, if any, of the same issues or parties as the asbestos tort actions. Assigning this massive case to the asbestos judge will necessarily divert huge amounts of his time to issues of insurance coverage and the timing of toxic torts having nothing to do with asbestos. The district court’s conclusion that this case falls within the Asbestos Order necessitating transfer of venue was erroneous and should be reversed.

IV. THERE IS NO FACTUAL OR LEGAL BASIS TO SUPPORT TRANSFER OF VENUE UNDER 542.11(4).

The district court characterized its decision to transfer of venue as promoting “the convenience of the witnesses and the ends of justice.” *See* Minn. Stat. § 542.11(4).⁴ To transfer venue under this statute, 3M bore the burden of establishing that *both* “convenience of witnesses *and* the ends of justice would be promoted by the change.” Minn. Stat. § 542.11(4) (emphasis added). 3M offered no evidence whatsoever as to these factors; the only basis for the court’s decision was its erroneous interpretation of the Asbestos Order. Hence, 3M failed to meet its burden as to either factor.

⁴ 3M concedes the propriety of venue in Hennepin County under Minn. Stat. § 542.09 “is not the issue before this Court.” R. Br. at 19.

A. The District Court's Analysis Of The "Ends Of Justice " Was Based On An Erroneous Conclusion Of Law.

As previously set forth, *supra* p. 4-6, the district court's erroneous application of law to the facts of a case is a legal determination, not an exercise of judicial discretion. *State Farm Mut. Auto Ins. Co. v. Great West Cas. Co.*, 623 N.W.2d 894 (Minn. 2001). The district court did not exercise its discretion when transferring this case to Ramsey County. Rather, the district court's conclusion that transfer would "promote the ends of justice" was based on its erroneous interpretation of the Asbestos Order.

Moreover, even if the district court had merely read the Asbestos Order to suggest that handling the asbestos injury docket would provide helpful experience in resolving issues that might comprise a small part of this matter, such a conclusion would not support a discretionary change of venue. In almost every case, it could be said that some judge in another county has experience that would be helpful in some respect in resolving the case. Another judge might have handled a similar issue, or might have experience with one of the parties. Neither 3M nor the district court cites any authority supporting discretionary transfer on such a thin and commonplace ground. Sustaining the district court's order would open the door to frequent transfers that would produce negligible judicial benefit, except perhaps to the docket of the transferor court.

B. In The Absence Of Any Evidence Regarding The Convenience Of The Witnesses, Transferring This Case From Hennepin County To Ramsey County Was An Abuse Of Discretion.

3M baldly asserts that the district court "decided on a substantial record" that the statutory criteria for venue transfer under §542.11(4) were met in this case. Yet 3M

wholly fails to identify *any* evidence in the record as to the convenience of the witnesses. Absent any such evidence the district court's decision to transfer this matter to Ramsey County was an abuse of discretion and should be reversed.

1. There Is No Evidence In the Record Regarding The Convenience Of The Witnesses.

In reviewing whether reasonable evidence exists to support a district court's findings, this Court "looks to what evidence was presented in the record." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). Findings must be reversed if they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Id.* (quoting *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999); *see also Putz v. Putz*, 645 N.W.2d 343, 353 (Minn. 2002) (abuse of discretion occurs when a court reaches a clearly erroneous decision against logic and the facts on record). A district court's determination must be overturned for abuse of discretion when the record lacks any factual basis upon which the court could have based its decision. *Uselman v. Uselman*, 464 N.W.2d 130, 141 (Minn. 1990) (abuse of discretion exists when no evidence in the record supports the district court's determination).

3M offered no evidence whatsoever regarding witnesses or their convenience. Thus, the district court's determination that transfer of venue would promote the convenience of the witnesses is "not reasonably supported by the evidence" and must be overturned.

3M's reliance on *In re LaSalle Bank/Twin Cities Avanti Stores Liquidation*, 654 N.W.2d 103 (Minn. 2002), is misplaced. *In re LaSalle Bank* is easily distinguishable from the instant case and provides no support for 3M's argument that district courts may make decisions to transfer venue without an evidentiary basis. First, *In re LaSalle Bank* did not involve a request to transfer venue under Minn. Stat. § 542.11(4). Rather, the bank, which had initiated seventeen different actions in six different districts against the same defendants, petitioned this Court directly for consolidation of all cases before one judge pursuant to Minn. R. Gen. Prac. 113.03. *In re LaSalle Bank*, 654 N.W.2d at 103. This Court concluded under that rule that that the parties and judiciary would benefit from consolidation. A single judge in Hennepin County was appointed to preside over all cases. *Id.* Although this Court mentioned that transfer would benefit witness convenience, this was because the witnesses would only have to go to one place to try all consolidated matters. The Court did not undertake an analysis of whether any one of the six venues involved was more convenient than another for the witnesses. Second, LaSalle Bank had no need to present evidence in support of its petition, as consolidation was unopposed by the defendants. *Id.* Thus, *In re LaSalle Bank* does not hold that a district court may transfer venue under 542.11(4) when there is no evidence in the record concerning witnesses.

3M also erroneously asserts that *Schultz v. Land O'Lakes Creameries, Inc.*, 238 Minn. 554, 54 N.W.2d 781 (1952), does not stand for the proposition that venue transfers must be supported by affidavit testimony. In *Schultz*, this Court noted that, while it is not necessary for a party to expose *all* his evidence in the affidavit supporting his motion to

change venue by stating in detail what each witness will testify, an affidavit in support of a requested to transfer venue which contained only hearsay statements was “insufficient to support the motion.” *Schultz*, 238 Minn. at 555, 54 N.W.2d at 782. 3M’s affidavits, which presented *no evidence whatsoever* about the convenience of witnesses, provides a similarly insufficient basis for a change of venue under 542.11(4).

3M’s attempt to minimize the holding of *Chellico*, 227 Minn. 74, 34 N.W.2d 155 (1948), is similarly ineffective. 3M claims that *Chellico* merely upheld the trial court’s discretionary determination not to change venue to a forum thirty miles closer to witnesses. 3M implies that under different circumstances a court might be within its discretion to transfer venue to another court that is thirty miles or less apart. While in theory a hypothetical witness residing in St. Paul, such as a disabled person, might truly be inconvenienced if required to travel to Minneapolis, the complete absence of evidence concerning the actual circumstances of witnesses that may testify in this case makes such an assessment impossible. Thus, *de minimus* changes in distance for witness travel is insufficient to warrant setting aside a plaintiff’s choice of venue because such a “difference in mileage, time lost, and expenses involved . . . would effect a saving that is obviously negligible.” *Id.* at 76; 34 N.W. 2d at 156.

2. The Fact That Two Defendants Have Their Principal Place Of Business In St. Paul Is Not Evidence Regarding The Convenience Of The Witnesses.

The allegations in the Complaint regarding the fact that two defendants have their principal place of business in St. Paul do not support the district court’s conclusion that transfer of venue to Ramsey County would promote the convenience of the witnesses.

The fact that two of the sixty-seven presently-named parties⁵ may have a business location in Ramsey County is, of course, not determinative of whether venue in Hennepin is inconvenient for those two parties' witnesses. Nor does it indicate that the balance of the numerous parties' witnesses would find Ramsey more convenient than Hennepin.

3. The Fact That Another Action Was Previously Venued In Ramsey County Is Not Evidence That Ramsey County Would Be More Convenient For Witnesses In This Case.

First State (also referred to as *In re Silicone*) does not prove that Ramsey County is a more convenient forum than Hennepin for witnesses in this case. *First State* was initiated in Ramsey County and, as 3M's own brief acknowledges, "convenience of witnesses was never an issue in that case." R. Br. 18. Tellingly, however, after *First State* was initiated in Ramsey County by an insurer, 3M started a separate action against its insurers in Texas. *See Minnesota Mining & Mfg. Co. v. Abeille Reassurances, et al.*, CA No. 2:95 CV 00005 (E.D. Texas) (filed Jan. 19, 1995). 3M then argued (unsuccessfully) that the Ramsey County matter should be dismissed on *forum non conveniens* grounds, and the insurance coverage litigation should be handled by a court in Texas. *Id.* 3M fails to explain why a courthouse less than ten miles from St. Paul is inconvenient to its witnesses, but a court over a thousand miles away from St. Paul was not.

⁵ Eventually there will be up to 167 parties to this suit once this matter proceeds, as 3M has recently disclosed the more complete list of its insurers and so the ultimate number of parties will be at least twice the number presently in this case.

4. The Party Opposing Transfer Has No Burden To Prove Prejudice Or Inconvenience.

3M's assertion that transfer must be upheld because Continental does not allege that Ramsey is an inconvenient forum or that it would be prejudiced by the transfer is of no avail. Plaintiffs who properly venue an action in one county are not required to prove that different counties are inconvenient forums in order to avoid transfer. Rather, as the moving party, 3M bears the burden to prove a different forum is more convenient for the witnesses as a whole and that the ends of justice support that change. *State ex rel. Austin Mut. Ins. Co. v. Dist. Court of Brown County*, 194 Minn. 595, 598, 261 N.W. 701, 702 (1935). Similarly, plaintiffs need not show that they would be prejudiced in order to sustain venue in a proper county of origin.

5. The District Court Used The Wrong Legal Standard In Addressing Convenience Of The Witnesses.

Finally, the district court utilized an erroneous legal standard. In order to transfer venue under §542.11(4), the district court must find that the convenience of witnesses would be promoted by the change. The district court in this case, however, found that: "For purposes of the convenience of witnesses Ramsey County is more convenient *and in any event at least as convenient* as Hennepin County under Minnesota Statutes section 542.11(4)." (App. 9, ¶ 18) (emphasis supplied.) Minnesota Stat. §542.11(4) requires that a change of venue would "promote" the convenience of witnesses, not that a different venue would merely be "as convenient as" the current venue. Thus, even if 3M had made a factual record that could support the court's transfer, this error alone would require reversal. *See Dyrdal v. Golden Nuggets, Inc.*, 672 N.W.2d 578, 589 (Minn. Ct. App.

2003) (citing *Barrett v. Tallon*, 30 F.3d 1296, 1301 (10th Cir. 1994) (abuse of discretion shown when district court's ruling based on erroneous view of law). For this reason alone, reversal of transfer based upon Minn. Stat. § 542.11(4) is required.

In the absence of any evidence in the record regarding the convenience of the witnesses, and in light of the district court's erroneous application of the Asbestos Order to the facts of this case, transfer of venue under Minn. Stat. § 542.11(4) was an abuse of discretion and should be reversed.

CONCLUSION

The district court based its decision to transfer this case entirely on an incorrect legal interpretation of this Court's Asbestos Order, and no factual basis for the court's decision exists apart from the Asbestos Order. The tangential relationship of this commercial insurance action to the personal injury docket does not support a transfer decision that could ultimately burden the asbestos judges with every commercial dispute that relates in any way to asbestos. This Court should protect the efficiency of the asbestos docket by reversing the decision of the district court.

Respectfully submitted,

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Dated: October 22, 2007

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CERTIFICATE

Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the foregoing brief in Times New Roman, proportional 13-point font, on 8-1/2 by 11 inch paper with written matter not exceeding 6-1/2 and 9-1/2 inches. The resulting principal brief contains 6,024 words, as determined by employing the word counter of the word-processing software, Microsoft Word XP, used to prepare it.

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