S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

GRAND TRUNK WESTERN RAILROAD, INC., Plaintiff, v 37TH CIRCUIT COURT JUDGE, Defendant.	UNPUBLISHED September 11, 2008 No. 273411 Calhoun Circuit Court LC No. 04-004370-NO

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

This matter is on remand from the Michigan Supreme Court "for reinstatement and consideration of the complaint for superintending control." *Grand Trunk W R, Inc v 37th Circuit Court Judge,* 477 Mich 925, 926; 722 NW2d 897 (2006). We are "directed to decide plaintiff's claim that the trial court has violated [the Supreme Court's] Administrative Order 2006-6 concerning the 'bundling' of asbestos-related cases for trial." *Id.* We deny the Railroad's complaint for a writ of superintending control.

I. Factual and Procedural History

This matter is before us as a complaint for superintending control. MCR 3.302(E)(1). It arises from the trial court's denial of the Railroad's motion for reconsideration regarding the trial court's decision to hold simultaneous trials in two cases brought by former employees of the Railroad alleging injuries related to asbestos exposure. Specifically, the trial court scheduled for trial *Kemperman v Canadian Nat'l R, d/b/a Grand Trunk W R, Inc* (Lower Court No. 04-4370-NO), brought pursuant to the Federal Employers' Liability Act, 45 US Code 51, *et seq.* The estate representative, alleged that Gerald Kemperman, employed by the Railroad as a brakeman from 1956 through 1988, was negligently exposed to asbestos and other toxic substances, which resulted in damage to his respiratory and nervous systems, lung cancer and his ultimate demise. Trial in this matter was scheduled to proceed simultaneously with *O'Connell v Canadian Nat'l R, d/b/a Grand Trunk W R, Inc* (Lower Court No. 04-4372-NO), which involved the alleged exposure of Albert O'Connell to asbestos through his employment with the Railroad as a mechanic from 1973 to 1997. O'Connell was diagnosed with lung cancer and died in 2004.

The trial court determined that it would try the two cases simultaneously with two separate juries. The Railroad argued that trying the cases simultaneously violated Supreme Court AO 2006-6, prohibiting the "bundling" of asbestos-related cases. The Railroad asserted

that trying the cases together constituted a consolidation and that the dissimilar facts presented a danger of undue prejudice and negatively impacted the Railroad's constitutional right to due process and a fair trial. On October 2, 2006, the trial court reiterated its decision to try the cases together using separate juries, stating:

> I still intend to try two cases simultaneously. We'll have seven jurors in the top row in one case; seven jurors in the bottom row in the other case. And I will move jurors in and out as need be during the trial. I am aware of the recent Supreme Court order about bundling these kind of cases. I don't view this as bundling. We got several filings at once, and they were all assigned to me, and I'm not going to let these things drift. I will try them two at a time simultaneously to two juries.

On October 10, 2006, the trial court further explained its reasoning, stating:

> Now, I say all of this simply as an explanation as to why I felt that the only reasonable way to proceed in these cases, given the clots of them in terms of filing, would be to try the two cases simultaneously. I respect the order of the Supreme Court as I must. And [sic] but in my view I am not bundling these cases. I have two separate juries. I can take them in and out of the courtroom to focus on the case that they are to decide. I already told the jurors repeatedly that they have the responsibility for the case on which they were drawn.

As an alternative, the trial court offered to conduct a summary jury trial, which would "allow one of the cases to go to the fullest extent, tried before a jury, and then have the remaining untried railroad asbestos cases go to a summary jury trial pursuant to that administrative order and have the decision of the jury be binding."

The trial court denied the Railroad's motion for reconsideration, but failed to enter a written order memorializing its ruling. The Railroad initially filed a complaint for writ of superintending control in this Court and for a stay of proceedings, which was denied. The Railroad filed an application for leave to appeal to our Supreme Court, which was granted. Inexplicably, rather than interpret its own administrative order, our Supreme Court has remanded the matter back to this Court to interpret its intent. On remand, we are now charged with interpreting AO 2006-6 and must specifically ascertain the meaning of the term "bundling" and its procedural application in the context of simultaneous trials in asbestos litigation.

II. AO 2006-6

On August 9, 2006, the Supreme Court issued AO 2006-6, which provided, in relevant part:

> The Court has determined that trial courts should be precluded from "bundling" asbestos-related cases for settlement or trial. It is the opinion of the Court that each case should be decided on its own merits, and not in conjunction with other cases. Thus, no asbestos-related disease personal injury action shall be joined with any other such case for settlement or for any other purpose, with the exception of discovery. This order in no way precludes or diminishes the ability

> of a court to consolidate asbestos-related disease personal injury actions for discovery purposes only.

"[A]sbestos-related disease personal injury actions" was defined to "include all cases in which it is alleged that a party has suffered personal injury caused by exposure to asbestos, regardless of the theory of recovery." Unfortunately, the Court failed to provide a definition of the term "bundling" to assist trial courts in discerning precisely what procedures are to be prohibited.

The Staff Comment, which accompanied the order, provides limited guidance indicating that the practice of "bundling," as used to "maximize the number of cases settled" is prohibited. Further:

> The purpose of this order is to ensure that cases filed by plaintiffs who exhibit physical symptoms as a result of exposure to asbestos are settled or tried on the merits of that case alone. Bundling can result in seriously ill patients receiving less for their claim in settlement than they might otherwise have received if their case was not joined with another case or other cases.
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> The order is designed to preclude both the practice of settling cases in which plaintiffs with symptoms and plaintiffs without symptoms are settled together, as well as the practice of settling cases in which the plaintiffs are similarly situated (either with or without symptoms allegedly related to asbestos exposure.)

In his concurrence to the order, Justice Markman provides some insight into the intent underlying the generation of AO 2006-6, but does not define the term "bundling":

> [T]his administrative order will, in my judgment help to restore traditional principles of due process in asbestos cases by ensuring that they are resolved on the basis of their individual merit, and that they do not serve merely as "leverage" for the resolution of other cases . . . . [T]his administrative order will, I believe, advance the interests of the most seriously ill asbestos plaintiffs whose interests have not always been well served by the present system, where available funds for compensation have been diminished or exhausted by payments for claims made by less seriously ill claimants[.]

Justice Weaver's dissent defines "bundling" as "the trial court procedure of grouping asbestos cases together for trial and settlement purposes, using stronger cases as leverage to settle cases grouped together." Justice Weaver's concern regarding the preclusion of "bundling" centered on the necessity for increased judicial or court resources to handle the asbestos caseload. Justice Kelly also dissented, describing the Court's decision to "outlaw the bundling of asbestos-diseases cases" as "both ill-advised and indefensible," and expressing concern regarding the resultant delays many litigants will face before seeing their case resolved or brought to trial. Justice Kelly appeared to equate "bundling" with her description of how the existing system functioned, which involved:

> A judge groups asbestos-diseases cases on the basis of a commonality among them . . . . The judge then tries one claim that is representative of the group. The

> results of the trial are extrapolated to the rest of the claimants. The extrapolation provides a remedy for all deserving claimants in the group, not just the most seriously ill. The effect is that almost all claims in the group are settled without the time and expenses engendered if each were to receive a full trial. It efficiently allows the court to resolve large numbers of cases in a short time. Claimants obtain a recovery more quickly than traditionally, and defendants save the expense of numerous trials.

III. "Bundling"

The initial difficulty encountered is in determining the meaning of the term "bundling," due to the failure of the Supreme Court to define the parameters of usage. It is not a term found in the Michigan Rules of Court or contained in any relevant statute. Rather, the term "bundling" has more traditionally been used in the context of coercive marketing techniques and not trial court procedure. By way of example, Black's Law Dictionary (8th ed) defines "bundling," in the context of the computer industry, as "the practice of charging a single price for a combination of hardware, software, or services." The term "bundling" is used in a similar manner, in other contexts, such as within the Small Business Act, where the term is applied to contract requirements and involves "consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract." 15 USC 632(o)(2). In other commercial contexts, "bundling" has been defined as "the business practice of selling two or more distinct goods *only* as a 'bundle,' or a package, with a single price charged for the entire bundle." *Virgin Atlantic Airways Ltd v British Airways PLC*, 257 F3d 256, 269 (CA 2, 2001) (emphasis in original). In the legislative context, the term "bundling" is used to define "internal logrolling," which involves "the legislative practice of bundling several unrelated issues, none of which could be passed singly, and securing passage by a combination of the legislative factions who favor separate pieces of the legislation." *Lake Country Racquet and Athletic Club, Inc v Morgan*, 289 Wis 2d 498, 510; 710 NW2d 701 (2006).

A discussion of the term "bundling" has arisen in the context of asbestos litigation to describe compensatory issues involved in combining symptomatic and asymptomatic plaintiffs. Specifically, in *In re G-I Holdings, Inc*, 323 BR 583, 587 (2005), the United States Bankruptcy Court evaluated different proposed "methodologies for estimating asbestos personal injury claims pursuant to § 502(c) of the Bankruptcy Code." In discussing procedural methods to obtain valuations, the Court summarized the arguments of G-I Holdings, stating in relevant part:

> [T]he reliance upon solely federal claims figures in the liquidation of asbestos personal injury claims is because "federal court asbestos litigation, unlike state court litigation, has not permitted the massive filing and bundling of asbestos claims (sick with non-sick claims) and the associated *in terrorem* effect of multiple punitive damages awards.
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> [R]elying on federal tort claims amounts avoids the problem described by G-I Holdings as "bundling," whereby an asbestos defendant "is compelled to agree to payments to unsick claimants as a condition to settling claims of persons with

malignant diseases, including mesothelioma." [*Id.* at 595-596 (internal citations omitted, emphasis in original).]

At the outset of the proliferation of asbestos-related cases, many courts attempted to manage their dockets by aggregating or consolidating large numbers of cases. Faced with long delays:

> [S]ome courts dealt with the enormous pressure on their dockets by joining dissimilar claims, either in mass consolidations or in clusters. Former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr. described how trial judges inundated with asbestos claims might feel compelled to adopt such procedural short-cuts:
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> > Think about a county circuit judge who has dropped on her 5,000 cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder. [Behrens & Goldberg, *The Asbestos Litigation Crisis: The Tide Appears To Be Turning*, 12 Conn Ins L J 477, 485 (2005-2006) (alteration in original).]

This is consistent with concerns historically expressed pertaining to the management of mass tort litigation dockets and efforts to identify and adopt efficient procedural mechanisms to address the problems inherent in handling the sheer volume of cases presented. As discussed in the American Journal of Trial Advocacy:

> Courts have also taken steps to allow claims to be determined on their individual merits, which diminishes the incentive for personal injury lawyers to recruit high volumes of unimpaired clients and reduces inappropriate settlement pressure on defendants. For example, some courts have stopped mass trial consolidations, which were used by some judges to clear their asbestos dockets. In addition to fundamental fairness and due process problems, trial consolidations that aggregate the claims of the sick and non-sick turned out to be a bit like using a lawn mower to cut down weeds-the practice may have provided a temporary fix, but in the long run it created more problems than is solved. [Schwartz, Kalish & Goldberg, *A Letter to the Nation's Trial Judges: Serious Asbestos Cases-How To Protect Cancer Claimants And Wisely Manage Assets,* 30 Am J Trial Advoc 295, 298-299 (2006).]

Hence, in its most exact and narrow meaning, the term "bundling" is to be construed as a means of aggregating large numbers of cases or plaintiffs, regardless of the level of similarity in claims or injury, for purposes of leverage to force settlement or terminate litigation. The concerns that evolved from the use of such aggregating procedures by the courts is aptly described in *G-I Holdings, supra* at 596 n 22:

> Prior to the commencement of its Chapter 11 case, G-I [Holdings] and other asbestos defendants settled most claims. Those settlements were driven largely by two factors. First plaintiffs' attorneys refused to settle claims for mesothelioma victims unless G-I [Holdings] agreed to pay material amounts for claimants who were much less sick or not physically impaired at all. This way, G-I [Holdings] had to pay more for the bulk of the claims than it would have paid on the merits. Second, the volume of claims and the cost of having any claim dismissed (no matter how unmeritorious) created a dynamic under which G-I [Holdings] was economically motivated and compelled to settle each claim for less than its defense expense. [Internal quotation marks omitted and alterations in original.]

Clearly, construing the language of the Supreme Court's administrative order in conjunction with the historical use and contexts in which the term "bundling" has been applied, leads to an interpretation of the intended meaning or application of the term to preclude coercive methods involving an aggregation of cases and plaintiffs in order to force settlement. Primarily, the concern for precluding the use of "bundling" procedures is to promote fairness to all litigants by not using large numbers of plaintiffs for purposes of leverage, which results in settlements that are not reflective of the merits of individual claims. While this is a legitimate concern, we find that it is distinguishable, both in terms of intent and procedure, from the methodology elucidated by the trial court for litigation of the two cases in this current dispute.

First, and most importantly, the methodology proposed by the trial court cannot be construed as a consolidation and, therefore, does not involve the same concerns or risks that have led to the criticisms inherent in mass tort litigation or that our Supreme Court is seeking to avoid. In accordance with Black's Law Dictionary (8th ed), in the context of civil procedure, a consolidation is defined as "[t]he court-ordered unification of two or more actions, involving the same parties and issues, into a single action resulting in a single judgment or, sometimes, in separate judgments." Clearly, the cases involved in this dispute do not meet the requirements of this definition. The concerns expressed by the Supreme Court in its order precluding "bundling" in seeking to assure "that each case should be decided on its own merits" is addressed by the methodology of using separate juries in simultaneous trials as proposed by the trial court. Further, based on previous rulings in the context of a criminal proceeding,[1] which specifically

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[1] *People v Brooks*, 92 Mich App 393, 397; 285 NW2d 307 (1979). By way of further example, regarding the use of dual juries in the context of criminal procedure, we note this Court's discussion in *People v Greenberg*, 176 Mich App 296, 304; 439 NW2d 336 (1989), which recognized:

> Defendants['] . . . trial would have been a long and complex proceeding involving numerous witnesses and substantially identical evidence. To hold two trials on these substantially identical cases would have been unnecessarily duplicative and excessive. The interests of justice, judicial economy and orderly administration clearly called for a joint trial. Furthermore, the court held that the case against each defendant would have been tried in one trial by two separate juries and that

(continued…)

"approv[ed] the dual jury procedure," we must assume that restricting the use of separate juries was not within the intent or contemplation of the Court in the issuance its administrative order.

Second, we are not dealing with either a large number of cases or an aggregation of claims. In this instance, the trial court will be dealing with only two plaintiffs and one defendant. The simultaneous trial of these two cases, using separate juries, is procedurally distinguishable from the large case consolidations, which occurred in the earlier phases of mass tort litigation and utilized a single jury. The same problems or concerns are not evident. Notably, even when the procedural safeguard of using separate juries as proposed by the trial court in this matter have not been implemented, consolidations involving smaller numbers of plaintiffs have been found to be not only efficient, but also effective.

> Generally speaking, it seems that the federal courts have met with success in trying five or fewer claims at a time, but that larger numbers of claims in a single trial have presented problems[.]
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> The Second Circuit had previously approved the consolidated trial of the claims of two asbestos plaintiffs against three defendants. Similarly, the Eleventh Circuit upheld the consolidation of the claims of four workers whose claims were very similar.
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> More recently, the Second Circuit found no abuse of discretion in a consolidated trial of somewhat more diverse claims. Although the injuries to or the deaths of only four workers were at issue and all of them suffered from mesothelioma, the suit was against numerous manufacturers of asbestos products. There were dissimilarities in worksites, occupations, and times of exposure, and two of the four workers had died. Even though some of the . . . factors weighed against consolidation, the Second Circuit emphasized that use of those factors was a tool, not a substitute, for addressing the ultimate question regarding consolidation. That question was "whether the consolidation caused such confusion or prejudice as to render the jury incapable of finding the facts on the basis of the evidence." [*In re Ethyl Corp*, 975 SW2d 606, 612; 41 Tex Sup Ct J 1201 (1998) (internal citations omitted).]

In this instance, the use of separate juries, with the strict restriction of evidence and testimony solely to that which is relevant to each respective jury, renders the Railroad's assertion regarding the potential for confusion unlikely to occur and an unrealistic concern.

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> either jury would be excused when appropriate so as to prevent prejudice due to potentially antagonistic defenses.

The use of separate juries fulfills Justice Markman's requirement that "anti-bundling" serves "to restore traditional principles of due process in asbestos cases by ensuring that they are resolved on the basis of their individual merit, and that they do not serve merely as 'leverage' for the resolution of other cases." The use of separate juries also avoids potential disparities resulting from the compensation for less serious injuries impacting monetary recoveries for more seriously ill litigants. As noted in *In re Certified Question*, 479 Mich 498, 521 n 19; 740 NW2d 206 (2007), an important purpose of the Supreme Court's administrative order "was to ensure that asbestos litigants are subject to traditional legal standards." We find there is no more "traditional legal standard" than that afforded by the use of separate juries for the individual litigants.

Notably, the parties alleging asbestos-related injuries apparently have no problem with the method or procedure proposed for use by the trial court in the litigation of their claims. Rather, it is the Railroad that is suggesting the potential for bias and violation of due process. However, the Railroad's arguments are not persuasive. The Railroad implies that the mere knowledge by both juries obtained through the venire process and their simultaneous presence for certain testimony or evidence is inherently prejudicial because it indicates the existence of multiple causes of action, which may improperly influence their decision-making or fact finding. This is disingenuous given the trial court's expressed willingness to separate the juries to the full extent desired by counsel in an effort to restrict either jury hearing information that is unrelated to their specific case. Once again, in the criminal context, where this issue more typically arises, our Supreme Court has acknowledged the beneficial use of dual juries because "[e]ach jury is concerned only with the culpability of one defendant . . . . The chance for prejudice is therefore significantly lessened." *People v Hana*, 447 Mich 325, 360; 524 NW2d 682 (1994). "[R]eversible prejudice exists when one of the defendant's 'substantive rights,' such as the 'opportunity to present an individual defense,' is violated." *Id.*, quoting *United States v Tootick,* 952 F2d 1078, 1082 (CA 9, 1991). Using the reasoning of the *Hana* Court, it is difficult, if not impossible to conceive, how the use of separate juries would serve to restrict the presentation of a defense or would expose either jury to evidence "that would have been barred." *Hana*, *supra* at 360. Consequently, we deem the Railroad's assertions regarding the potential for violation of due process or prejudice to be "much ado about nothing" and find the trial court's scheduling of simultaneous trials with separate juries does not violate AO 2006-6.

Finally, we find it necessary to respond to the dissent accompanying this opinion. Although the staff comments accompanying the administrative order are not deemed to be dispositive of its meaning, *People v Austin*, 209 Mich App 564, 568; 531 NW2d 811 (1995), rev'd on other grounds 455 Mich 439 (1997), we find this to be unfortunate given the greater clarity of the comments and their ability to provide guidance when compared to the actual wording of AO 2006-6. Despite the limitation on their use, the staff comments are clearly consistent with the expressed concern within the order regarding the historic, and understood meaning, of the term "bundling." We note that the term "joined" does not appear in the administrative order until the third sentence, following use of the term "bundling." Contrary to the dissent's position, use of the term "joined" in conjunction with the term "bundling," while comprising an inarticulate use of verbiage, does not serve to either expand or restrict the meaning or use of the term "bundling" in the context of mass tort or asbestos litigation. By equating the term "joined" with "bundling," we effectively preclude the trial court from having any discretion in the efficient management of its docket despite adhering to the constrictions of the

administrative order. The Court failed to define these terms or use them consistent with their commonly understood meaning in the context of trial court procedure. However, the Court was clear that the express intent of the order was to prevent litigants from being pressured into settlements and to preclude the use of other cases as leverage in an effort to assure a determination of each claim based on its own merits. This is accomplished through the methodology proposed by the trial court.

Our interpretation of AO 2006-6 should not be construed as an endorsement of the trial court's proposed procedure for trial of these cases. Based on the inherent complexity of such litigation, we are not convinced that simultaneous trials with separate juries will, in actuality, be efficient or limit the potential for error. However, our role is simply to interpret whether the methodology proposed by the trial court constitutes "bundling" in accordance with AO 2006-6. That is the sole issue to be determined, and we find that the use of separate juries for simultaneous trials does not constitute "bundling."

We deny the Railroad's request for a writ of superintending control and remand to the lower court for trial to proceed. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael J. Talbot

STATE OF MICHIGAN

COURT OF APPEALS

GRAND TRUNK WESTERN RAILROAD, INC., Plaintiff, v 37TH CIRCUIT COURT JUDGE, Defendant.	UNPUBLISHED September 11, 2008 No. 273411 Calhoun Circuit Court LC No. 04-004370-NO

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

MURRAY, P.J. (*dissenting*).

Although I agree with the majority that the trial court's decision to hold joint trials in these two asbestos cases is not the type of "bundling" that occurred prior to the promulgation of Administrative Order 2006-6, I respectfully dissent from the majority's conclusion that the trial courts joining of these two cases for purposes of trial was permissible under AO 2006-6.

As the administrative order makes clear, in 2006 the Supreme Court "determined that trial courts should be precluded from 'bundling' asbestos-related cases for settlement or trial." The administrative order provides that bundling should be precluded because "each case should be decided on its own merits, and not in conjunction with other cases." Hence, as the majority recognizes, the *purpose* of the administrative order was to preclude "bundling" and ensure that each case is decided on its own merits, rather than settled based upon the outcome of other cases. See 476 Mich xlv, opinion of Markman, J. (concurring). The trial court in this case has attempted to comply with this purpose by impaneling two juries to decide the cases of two individual plaintiffs who have filed separate suits against Grand Trunk Western Railroad, Inc. There is also no suggestion that resolution of these two cases will be used as leverage to settle other asbestos cases with Grand Trunk.

Court rules are to be interpreted like statutes, and because this administrative order is promulgated by the Supreme Court, as are the court rules, similar rules of construction should apply. *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999). In accordance with these principles, we cannot speculate as to the intent of the Supreme Court beyond the words employed in this administrative order. *In re Schnell*, 214 Mich App 304, 310; 543 NW2d 11 (1995). This is because we must always apply the plain and unambiguous language of the rule or order, since such language "speaks for itself." *Id*., quoting *National Expedition Co v Detroit*, 169 Mich App 25, 29; 425 NW2d 497 (1988).

Although the trial court's action is consistent with the purpose of the administrative order, it is nevertheless still in violation of the order. That is because AO 2006-6 establishes the exclusive means for accomplishing the anti-bundling purpose. In particular, the administrative order provides that "no asbestos-related disease personal injury action *shall be joined* with any other such case for settlement or *for any other purpose*, with the exception of discovery." (Emphasis added.) Thus, according to the order, to ensure that each case is decided on its own merits, no asbestos-related case can be joined with any other such case for any purpose except discovery. The final sentence of the administrative order confirms this fact, as it provides that the order "in no way precludes or diminishes the ability of a court to consolidate asbestos-related disease personal injury actions *for discovery purposes only*." (Emphasis added.) Again, the order clearly indicates that the only joining or consolidation that can occur in asbestos-related personal injury actions can be for discovery purposes.

In my view, AO 2006-6 precludes trial courts from joining or consolidating two or more asbestos-related personal injury actions for any purpose other than discovery. That straightforward rule is the means by which the Supreme Court has decided the anti-bundling purpose can best be accomplished. Here, the trial court has "joined" two asbestos-related personal injury actions for purposes of trial.[1] Although the trial court's purpose in doing so was not to "bundle" these cases for settlement or other purposes, the "joining" of these two asbestos cases for trial nevertheless violated the plain language of the order.

Stated differently, "bundling" under the order occurs when two or more asbestos related personal injury cases are joined (or consolidated) together for any purpose other than discovery, as the only joining that can be done under the order is for discovery purposes. Any order that joins two such cases together is thus "bundling" the cases in violation of the order.

Application of these straightforward words is not easy in this case because, as noted already, I have no doubt that the esteemed and busy trial court judge was not trying these cases together for any of the purposes detailed in Justice Markman's concurring opinion, which was joined in by a majority of the Court. See 476 Mich xlv. But, as noted, my conclusion is that the Supreme Court has outlined how to avoid any bundling concerns in these cases, and that is by not allowing any such cases to be "joined" for any purpose other than discovery.

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[1] The administrative order uses both "joined" and "consolidate" in the last two sentences of the second paragraph. As the Supreme Court remand order makes clear, the trial court never entered an order regarding plaintiffs' motion to consolidate, let alone one of consolidation under MCR 2.505 (or any other court rule), and never stated on the record that the cases were "consolidated." Thus, the trial court did not consolidate these two asbestos cases. This was also not a case involving the joinder of a party into an ongoing lawsuit, and the administrative order does not utilize "joined" in the sense of joinder of parties as provided in the court rules. See MCR 2.205 and 2.206. Nonetheless, the trial court has joined these cases together to the extent they are being tried together before separate juries.

I would therefore grant the complaint.

/s/ Christopher M. Murray