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RECENT TOXIC TORT CASES OF INTEREST

EDITOR: C. VICTOR HALEY
Contributions made by J. Keith Stanley

Fairchild, Price, Haley & Smith, L.L.P.
1801 North Street
P.O. Box 631668
Nacogdoches, Texas 75963-1668
Telephone: (936) 569-2327
Telecopier: (936) 569-7932
E-Mail: vhaley@fairchildlawfirm.com

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INTRODUCTION

This edition of the ENVIRONMENTAL/TOXIC TORT NEWSLETTER contains decisions from the Texas Courts of Appeals and the Texas Supreme Court.

This paper attempts to analyze and/or provide pertinent excerpts from cases which address issues relevant to the environmental/toxic tort area of legal practice. Due to space limitations, every issue, fact or argument cannot be included and, consequently, this paper contains some of the most precedential, defining and/or reinterpreted issues currently at hand. Obviously, many of the decisions may be subject to rehearing, further appeal, or *en banc* consideration and should therefore be used "with caution" in the future. The following are excerpts from opinions which have addressed issues relevant to this topic. Quotation marks have been omitted but the following consists of quotes from the opinions in the form of a summary.

SUMMARY

Since the advent of Chapter 90 of the Texas Civil Practice & Remedies Code, environmental litigation in Texas has sharply declined. Judge Mark Davidson, the presiding pre-trial judge of the Asbestos Multi-District Litigation, and Judge Tracy Christopher, the presiding pre-trial judge of the Silica Multi-District Litigation, have each performed yeoman's work in implementing uniform and efficient procedural frameworks in which to process the multitude of cases initially presented in each area of law. In addition to these frameworks, each judge has set uniform thresholds regarding rulings on evidentiary, substantive and procedural matters presented. Their efforts have provided a degree of certainty, expectation and understanding for both plaintiff and defense counsel in determining what evidence is relevant and sufficient in pursuing claims in each court and in determining which cases will likely meet the legislatively and judicially established evidentiary requirements for prosecution of such claims.

In conjunction with the legislative and pre-trial court measures, the issuance of the Texas Supreme Court opinion in *Borg-Warner v. Flores* in June 2007, and its progeny in other Texas courts of appeals, has greatly streamlined the toxic tort docket in Texas. These opinions have heightened and accentuated the evidentiary requirements for prosecution of such claims and have provided counsel across the state with very specific guidelines as to prosecution of toxic tort claims.

Moreover, silica litigation remains at a standstill at present. Primarily, this condition results from the effects of the terse ruling by Federal Judge Janis Jack of the Southern District of Texas in 2007 in which she found improper and potentially illegal the efforts of silica plaintiff's attorneys and medical experts in prosecuting thousands of questionable silica exposure claims. At present, the United States Attorney for the Southern District of New York remains investigating these allegations.

As a result of these events, toxic tort litigation in Texas is now only a shell of its former self. Many plaintiff firms are now choosing to pursue toxic tort litigation in other states with less stringent evidentiary requirements such as California, Michigan and Delaware and are, in fact, opening offices in these other states.

One impending decision from late 2007, *In Re Global Santa Fe*, 2006 WL 3716495, may result in a modification to the current states of asbestos and silica litigation. *In Re Global Santa Fe* involves the issue of whether the Federal *Jones Act* (governing injury claims occurring at sea) preempts Chapter 90 of the Texas Civil Practice & Remedies Code. MDL Judge Christopher ruled that federal preemption does indeed preempt Texas tort reform. The defendants immediately appealed to the Texas Supreme Court where the case remains. Although originally rendered in the MDL in mid-2007, the Supreme Court has yet to issue its ruling. If the Texas Supreme Court upholds Judge Christopher, Plaintiffs will be able to circumvent Chapter 90 of the Texas Civil Practice & Remedies Code in cases to which the *Jones Act* applies and proceed with litigation under the pre-Chapter 90 procedures.

Notwithstanding the downward turn in activity in traditional toxic tort litigation, other the impact of Federal and other jurisdictional activities. First, while welding rod litigation remains essentially dormant in Texas, recent activity in other states and the Federal Multi-District Litigation may serve as a precursor for an increase in Texas litigation. Specifically, in 2006, the Illinois Supreme Court upheld a million dollar verdict in *Elam v. Lincoln Electric Company, et al.* Secondly, Plaintiffs achieved a multi-million dollar verdict in the Federal Multi-District Welding Rod Litigation in 2007. Historically, injuries from welding rod exposure has been more difficult for plaintiffs to establish than asbestos and silica, primarily due to the discreet testing available to the typical medical conditions associated with such exposure. These cases indicate that plaintiffs' attorneys may be reaching a level at which such claims can survive medical challenges sufficiently to reach juries.

OWENS & MINOR, INC. AND OWENS & MINOR MEDICAL, INC., APPELLANTS, v. ANSELL HEALTHCARE PRODUCTS, INC. AND BECTON, DICKINSON AND COMPANY, APPELLEES

NO. 06-0322

SUPREME COURT OF TEXAS

251 S.W.3d 481; 2008 Tex. LEXIS 236; 51 Tex. Sup. J. 643; CCH Prod. Liab. Rep. P17,967

October 19, 2006, Argued
March 28, 2008, Opinion Delivered

ISSUE: *Owens* resulted from a certified question from the United States Court of Appeal for the Fifth Circuit to the Texas Supreme Court. Specifically, when a distributor sued in a products liability action seeks indemnification from less than all of the manufacturers implicated in the case, does a manufacturer fulfill its obligation under Texas Civil Practice and Remedies § 82.002 by offering indemnification and defense for only the portion of the distributor's defense concerning the sale or alleged sale of that specific manufacturer's product, or must the manufacturer indemnify and defend the distributor against all claims and then seek contribution from the remaining manufacturers?

FACTS: Owens & Minor, Inc. and Owens & Minor Medical, Inc. distributed latex gloves manufactured by other companies. In January 2000, Kathy Burden and members of her family filed a products liability action in Texas state court. The plaintiffs alleged that Burden had developed a Type I systemic allergy from defective latex gloves manufactured and sold by Owens, Ansell Healthcare Products, Inc., Becton, Dickinson and Company, and more than thirty other manufacturers and sellers of latex gloves. Owens was an innocent seller in the chain of distribution of these products and that Ansell and Becton manufacture latex gloves. Owens rejected offers of defense and indemnity from both Ansell and Becton and chose instead to hire outside counsel. In March 2000, Owens requested that Ansell, Becton, and eleven other latex glove manufacturers defend it pursuant to Section 82.002 of the Texas Civil Practice and Remedies Code. Ansell responded with an offer to defend Owens. The offer limited Ansell's defense only to gloves it manufactured and Becton had made a similar offer to defend Owens in a latex glove case in July 1995. Owens rejected these and similar subsequent offers.

On May 3, 2000, the underlying case was removed to the United States District Court for the Southern District of Texas, which transferred the case to the United States District Court for the Eastern District of Pennsylvania as part of a broader multi-district litigation process. Because the plaintiffs were unable to show that Owens sold any of the latex gloves that allegedly injured Burden, they nonsuited their claims against Owens. The case was then returned to the original federal district court in Texas, and thereafter the plaintiffs voluntarily dismissed the case against all defendants for the same or similar reasons. No court found any party acted negligently or

caused Burden's alleged injuries. Owens filed cross-claims for indemnity against Ansell, Becton, Johnson & Johnson Medical, Inc., and Smith & Nephew, Inc. Owens eventually settled with Johnson & Johnson and Smith & Newphew, but it did not settle with Ansell or Becton. Ansell and Becton moved for summary judgment on the adequacy of their offers to defend and indemnify Owens. The district court granted the motion and terminated the case, holding that Ansell and Becton had satisfied the Section 82.002 requirements when they offered to defend Owens against all claims involving their own products. *Burden v. Johnson & Johnson Med., Inc.,* 332 F. Supp. 2d 1023, 1029 (S.D. Tex. 2004). Owens appealed to the United States Court of Appeals for the Fifth Circuit, which in turn certified this question.

HOLDING: The court answered the certified question, holding that manufacturers needed to offer indemnification and defense only for the portion of the distributor's defense concerning the sale or alleged sale of those manufacturers' products.

Section 82.002 does not require a manufacturer to indemnify a distributor against claims involving products other manufacturers released into the stream of commerce. Therefore, a manufacturer that offers to defend or indemnify a distributor for claims relating only to the sale or alleged sale of that specific manufacturer's product fulfills its obligation under Section 82.002.

ZURICH AMERICAN INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, AND NATIONAL UNION FIRE INSURANCE COMPANY, PETITIONERS, v. NOKIA, INCORPORATED, RESPONDENT

NO. 06-1030

SUPREME COURT OF TEXAS

2008 Tex. LEXIS 766; 51 Tex. Sup. J. 1340

February 6, 2008, Argued
August 29, 2008, Opinion Delivered

ISSUE: Petitioner insurers brought an action against respondent manufacturer of wireless telephones seeking a declaration that the insurers had no duty to defend the manufacturer in class actions alleging that radiation from the manufacturer's telephones caused injury. Upon the grant of a petition for review, the insurers appealed the judgment of the Court of Appeals for the Fifth District of Texas which held that the insurers had a duty to defend.

FACTS: Plaintiffs in the underlying actions alleged that the manufacturer's telephones emitted radio frequency radiation which caused biological harm on the cellular level. The insurers contended that the alleged harm did not constitute bodily injury as covered by the policies, and that the underlying claims sought nonradiating headsets rather than damages for personal injury.

Nokia, Incorporated, and other wireless telephone manufacturers were sued in a number of putative class action cases filed in various courts across the country. The consumer-plaintiffs in those cases alleged that radio frequency radiation (RFR) from wireless phones causes "biological injury." Nokia tendered the defense of one of these cases to Zurich American Insurance Company, from which it had purchased several commercial general liability (CGL) insurance policies covering the years 1985-89 and 1995-2000. Zurich agreed to defend Nokia but reserved its right to later contest its obligation to defend or indemnify. Nokia's other insurers, National Union Fire Insurance Company [1] and Federal Insurance Company, followed suit. Seeking to resolve the coverage issue, Zurich sued Nokia, National Union, and Federal in Dallas County and sought a declaration that Zurich had no duty to defend or indemnify Nokia and that Zurich was not responsible for defense or indemnity payments made by National Union or Federal. Zurich also sought contribution and subrogation against all defendants. National Union and Federal cross-claimed against Nokia asserting, among other things, that they had no duty to defend or indemnify Nokia. The trial court granted the insurers' motion for summary judgment. After Nokia tendered new and amended complaints in the underlying actions, Zurich filed an amended motion for summary judgment. The trial court granted Zurich's amended motion for

summary judgment and signed a judgment declaring, in pertinent part, that Zurich, National Union, and Federal had no duty to defend or indemnify Nokia. Nokia appealed.

The court of appeals reversed as to the MDL cases, holding that, because (1) the complaints alleged claims for "bodily injury" and sought "damages because of bodily injury"; and (2) the "business risk" exclusions did not apply, the insurers had a duty to defend *Nokia*, 202 S.W.3d 384, 392. As to a non-MDL case, in which the plaintiffs had explicitly disclaimed personal injuries and sought only economic and related equitable relief, the court of appeals affirmed the trial court's judgment and held that the insurers had no duty to defend Nokia. *Id.* at 392-93. Finally, the court of appeals held that, in light of its determination that the insurers had a duty to defend the MDL cases, the trial court's ruling that there was no duty to indemnify Nokia in those cases was premature. *Id.* at 393. Thus, the court of appeals reversed and remanded that portion of the trial court's judgment. [5] *Id.*

HOLDING: The Supreme Court of Texas held, however, that the insurers had a duty to defend the manufacturer in the underlying actions, except for one action in which monetary damages for personal injury were expressly disclaimed. The alleged injury at the cellular level was sufficient to allege a bodily injury and, while the underlying plaintffs sought the headsets, they also sought damages based on their physical exposure to radiation. Further, claims based on intentional torts which were not within policy coverage did not eliminate the insurers' duty to defend, since the claims for damages for bodily injury required the insurers' defense of the entirety of the actions. Also, underlying briefs which indicated that claims were only for economic damages were irrelevant in view of the plain language of the complaints. The judgment holding that the insurers had a duty to defend the manufacturer was modified to exclude one underlying action and, as modified, the judgment was affirmed.

FORD MOTOR COMPANY, Appellant v. GLENN MILLER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF CAROLYN MILLER, DECEASED, SHAWN LEANN DEAN, JOHN ROLAND, AND ALMA ROLAND, Appellees

NO. 14-05-00026-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

2008 Tex. App. LEXIS 4165

June 10, 2008, Judgment Rendered
June 10, 2008, Opinion Filed

ISSUE: Appellant company challenged a ruling of a Texas trial court, which entered a verdict against it in favor of appellees, a worker, individually and as personal representative of his stepdaughter's estate, and the stepdaughter's family, in connection with their action for damages for asbestos exposure. The court granted the company's motion to certify a question to the Michigan Supreme Court, which found no duty by the company to the stepdaughter.

FACTS: The worked was employed by an independent contractor at the company for years and was exposed to asbestos during that time. His stepdaughter washed his clothes and was also exposed to asbestos. She died from mesothelioma, often caused by asbestos exposure, but the employee only had pleural plaques, which was benign. A jury awarded them damages, but the court reversed on appeal and rendered judgment in the company's favor. The company had certified a question to the Michigan Supreme Court, as Michigan law governed this case, which question asked whether the company owed a duty to the stepdaughter, who had never been on or near company property, to protect her from exposure to asbestos carried home by the worker.

HOLDING: The court reversed and rendered judgment in favor of the company. The Michigan Supreme Court answered in the negative, specifically that a company owes no duty to protected from household exposure to asbestos. The trial court erred in awarding damages to the worker. He had pleural plaques only, which was benign and asymptomatic, and which increased his chances for developing lung cancer in the future, but did not guarantee that he would develop it. The evidence showed only that the worker might get cancer, which was insufficient to support recovery. A mere physical change that is not detrimental does not constitute a harm. Many courts around the country have analyzed the issue of benign, asymptomatic pleural plaques in asbestos cases and have determined that pleural plaques itself is not a compensable injury.

EXXON MOBIL CORPORATION, Appellant v. LOUISE ALTIMORE, Appellee

NO. 14-04-01133-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

256 S.W.3d 415; 2008 Tex. App. LEXIS 2389

April 3, 2008, Judgment Rendered
April 3, 2008, Opinion Filed

ISSUE: Appellant employer challenged a judgment of the 405th District Court, Galveston County, Texas, awarding appellee employee's wife exemplary damages of $ 992,001 in her personal injury action.

FACTS: The wife alleged that she contracted mesothelioma as a result of exposure to asbestos dust brought home on her husband's clothes. The deceased husband was employed at Exxon's Baytown refinery from 1942 until he retired in 1977. He was a machinist until 1972, when he was promoted to a supervisory position and worked in an air-conditioned tool room at the polyolefins unit. Appellee sued Exxon and sixty-nine other defendants alleging, inter alia, negligence and gross negligence in connection with injuries claimed as a result of exposure to asbestos dust brought home on her husband's clothes. Before trial, appellee settled or dismissed her claims against all defendants except Exxon. Following presentation of the evidence and arguments of counsel, the jury awarded actual damages totaling $ 992,001. The jury also assessed the same amount in exemplary damages. After allocating settlement credits, the trial court rendered judgment based solely on the jury's assessment of exemplary damages.

Exxon's post-trial motions for new trial, remittitur and to modify the judgment were overruled by operation of law. On appeal, Exxon raises the following issues: (1) Exxon does not owe appellee a legal duty, (2) appellee did not present legally or factually sufficient evidence to support a jury finding of proximate cause, (3) appellee did not present legally or factually sufficient evidence to support exemplary damages, (4) exemplary damages against Exxon are unconstitutional, (5) the trial court reversibly erred by submitting a negligent activity jury question, (6) the trial court reversibly erred by admitting evidence of rulings by a different court that pertained to an unrelated case, (7) the trial court reversibly erred by denying Exxon's request for a mistrial after appellee's counsel informed the jury that the testimony of Exxon's expert was rejected by a jury in another case, (8) the trial court erred by limiting allocation of settlement credits to compensatory damages.

The appellate court previously concluded that Exxon did not breach a cognizable legal duty because the risk of harm to appellee was not foreseeable. In a subsequent opinion that involved asbestos exposure with a similar fact pattern, our sister court in Dallas reached the same conclusion. *Alcoa Inc. v. Behringer,* 235 S.W.3d 456, 458 (Tex. App.--Dallas 2007, pet. filed).

However, the Texas Supreme Court has not, heretofore, determined whether an employer has a legal duty (owed to the spouse of an employee) to warn or prevent the employee from transporting toxic dust to premises occupied by the spouse.

HOLDING: The judgment was reversed and judgment was rendered that the wife take nothing. The court held that because the evidence was legally insufficient to support the first prong of the test for a finding of malice, the wife was not entitled to exemplary damages. The record showed that: (1) during the relevant period of time there was a consensus among scientists that there was a safe level of exposure to asbestos in the workplace; (2) the wife did not present a medical report or epidemiological study in which researchers concluded that family members of refinery employees were exposed to an extreme degree of risk; (3) the wife failed to produce any evidence that she was exposed to an extreme risk given the dosage or amount of asbestos on the employee's clothes; (4) none of the wife's experts opined that the employer exposed her to an extreme degree or risk of harm during the relevant period of time; and (5) there was no evidence that any family member of a refinery employee developed mesothelioma during the relevant time period.

K-2, INC., Appellant v. FRESH COAT, INC., Appellee

NO. 09-06-251-CV

COURT OF APPEALS OF TEXAS, NINTH DISTRICT, BEAUMONT

253 S.W.3d 386; 2008 Tex. App. LEXIS 2767

October 11, 2007, Submitted
April 17, 2008, Opinion Delivered

ISSUE: The 221st District Court, Montgomery County, Texas, signed a judgment based on a jury verdict in favor of appellee installer against appellant manufacturer under the Products Liability Act, Tex. Civ. Prac. & Rem. Code Ann. §§ 82.001-.008 (2005 & Supp. 2007). The installer obtained a judgment requiring indemnification of its loss by the manufacturer. The manufacturer appealed.

OVERVIEW: The manufacturer argued that it was not obligated to indemnify the installer because the statutory indemnity provision in Tex. Civ. Prac. & Rem. Code Ann. ch. 82 did not apply. The appellate court found that the manufacturer's synthetic stucco cladding (EIFS) was a product as it was tangible personal property placed by the manufacturer for commercial purposes in the stream of commerce for use. The installer was a seller.

OUTCOME: The judgment was modified and the portion of the award and interest attributable to the contractual payment was deleted; the installer was entitled to recover $1,763,328.46 as its loss, with prejudgment interest on that amount. The provisions of Tex. Civ. Prac. & Rem. Code Ann. § 82.002 did not provide a seller with a right of indemnity--under the circumstances in the record presented--against a product manufacturer for that seller's independent liability under a contract. The manufacturer had no duty to indemnify the installer for the installer's payment to the builder. The manufacturer's failure to object to the aggregate submission of the attorney fees, expenses, and costs, as a "loss" arising out of the products liability suit, and its failure to present the trial court with a requested written question regarding that segregation, waived the statutory exception to the responsibility to indemnify the installer for costs. The installer was entitled to prejudgment interest.