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RECENT TOXIC TORT CASES OF INTEREST

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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, as well as general information concerning toxic tort practice.

This paper attempts to analyze and/or provide pertinent excerpts from recent Texas activity and 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

At the risk of repetitive reporting, the effects of Chapter 90 of the *Texas Civil Practice & Remedies Code* continue to maintain a stranglehold on environmental litigation in Texas.

The asbestos docket, while not defunct, continues its slow pace. The overall number of new case filings continues to be low while Plaintiffs' firms continue to file suits in other, more plaintiff-friendly states.

The most significant ruling this year occurred in *Georgia-Pacific v. Bostic*. As discussed herein, the Supreme Court applied the *Flores* causation standard to mesothelioma cases.

Texas courts are not the only ones narrowing the exposure analysis. Federal courts have continued a similar approach. Judge Eduardo Robreno of the asbestos MDL, applying maritime law, recently issued an order granting summary judgment in a case brought by a former U.S. Navy sailor who testified to exposure to original asbestos-containing gaskets and packing used with two pumps found on a ship. Judge Robreno determined this to be "mere minimal exposure." Also, an Oklahoma federal court recently dismissed asbestos claims asserted against an employer in a take-home exposure suit, concluding that the employee's contact with asbestos was so intermittent that the risk of harm to his wife was not foreseeable.

Additionally, a recently released study purports to link exposure to the mineral erionite to diagnoses of lung cancer and mesothelioma. Specifically, scientists at the Universidad Nacional Autonoma de Mexico say men in the village of Tierra Blanca, where the mineral is prevalent, have a mesothelioma rate of 2.48 – compared to a rate of about 1.75 among men in the U.S. This study coincides with similar findings in Turkey. The study can be found at http://survivingmesothelioma.com/soil-mineral-linked-to-mesothelioma-deaths-in-mexico/.

In Texas, and elsewhere, toxic tort litigation continues to dwindle.

Bostic v. Georgia-Pacific Corp., 2014 Tex. LEXIS 578

Supreme Court of Texas

September 9, 2013, Argued; July 11, 2014, Opinion Delivered

NO. 10-0775

FACTS: Plaintiff's decedent was diagnosed at the age of 40 and died of the disease in 2003. Bostic's relatives sued Georgia-Pacific and 39 other defendants, alleging that the defendants' products exposed Bostic to asbestos and caused his disease. Plaintiffs claimed that as a child and teenager he had been exposed to asbestos while using Georgia-Pacific drywall joint compound. The case went to trial in 2006 where the jury found Georgia-Pacific liable under negligence and marketing defect theories, and was asked to allocate causation among numerous entities. The jury assessed 25% of the causation to Knox Glass Company, a former employer who had settled, and 75% to Georgia-Pacific. The trial court signed an amended judgment awarding Plaintiffs approximately $6.8 million in compensatory damages and approximately $4.8 million in punitive damages. The court of appeals concluded that the evidence of causation was legally insufficient and rendered a take-nothing judgment.

HOLDING: The Supreme Court held that the standard of substantial factor causation recognized in *Flores* applies to mesothelioma cases. The Court further held that the plaintiffs were not required to prove that but for Bostic's exposure to Defendant Georgia-Pacific Corporation's asbestos-containing joint compound, Bostic would not have contracted mesothelioma. In this regard, the Court disagreed with language in the court of appeals' decision. However, the Court agreed with that court that the plaintiffs failed to offer legally sufficient evidence of causation, and accordingly affirmed the court of appeals' judgment.

ANALYSIS: The Court recognized its earlier recognition of a possible distinction between causation in asbestosis cases and malignancy cases. Notwithstanding that distinction, the Court declined to adopt that recognition and instead focused on the framework of the causation analysis set forth in *Flores*. In particular, the Court held that even in mesothelioma cases proof of "some exposure" or "any exposure" alone will not suffice to establish causation.

Union Carbide Corp. v. Synatzske, 2014 Tex. LEXIS 565

Supreme Court of Texas

October 10, 2013, Argued; July 3, 2014, Opinion Delivered

NO. 12-0617

FACTS: Joseph Emmite worked as an insulator at Union Carbide for nearly forty years before he began receiving disability in 1979. He died in June 2005. He had a significant medical history including asbestosis. X-rays, an ultra-sound, and a computerized tomography performed during his final hospitalization showed lung calcifications that were most likely due to asbestos exposure. In June 2007, the representatives of his estate and his surviving children filed a wrongful death suit against Union Carbide and thirty-seven other defendants. As to Union Carbide the Emmites alleged that Joseph was exposed to asbestos throughout his work life there and the long-term exposure caused him to develop asbestosis, which in turn was a cause of his death.

Chapter 90 was law before he died, although it did not apply to suits filed during the more than two months between his death and September 1, 2005. The Emmites did not file suit until 2007 making Chapter 90 applicable to their claims. In order to meet Chapter 90's requirements, the Emmites attached a report by Dr. Richard Kradin to their original petition. Union Carbide responded with a motion to dismiss in which it asserted that the report did not meet Chapter 90's requirements. The Emmites, in turn, served Union Carbide with a report authored by Dr. J.D. Britton.

In September 2007, the MDL pretrial court held a hearing on Union Carbide's motion to dismiss. At the hearing Union Carbide argued that the Emmites' claims should be dismissed because neither Dr. Kradin's report nor Dr. Britton's report complied with Chapter 90, primarily because neither report referenced pulmonary function testing showing that Joseph suffered functional pulmonary impairment. The trial court denied the motion. Union Carbide moved for reconsideration and the trial court conducted a hearing on that motion. In its motion and at the hearing, Union Carbide reiterated its position that the suit should be dismissed because Chapter 90 required pulmonary function testing and testing was neither performed on Joseph nor mentioned in a physician's report. The Emmites informed the court that they were seeking an amended death certificate showing asbestosis as a cause of death. In light of the Emmites' representations, the trial court left the record open for six weeks and indicated that Union Carbide's motion would be granted if the death certificate was not amended during that time to reflect asbestosis as a cause of death.

Six weeks later, the Emmites again served Union Carbide with Dr. Britton's report and asserted for the first time that the report complied with section 90.010(f)(1)—the "safety valve" provision of Chapter 90 which provides an alternative from the report standards in section 90.003—even though the Emmites had declined to rely upon that section at the November hearing. The trial court held another hearing in January 2008. At that hearing the Emmites informed the court they were still awaiting the amended death certificate, but they had learned in

discovery that Joseph had pulmonary function tests performed during his employment with Union Carbide and, using those pulmonary function testing results in conjunction with Dr. Britton's report, they were now proceeding under the safety valve provision in section 90.010(f)(1). They also requested a full evidentiary hearing as required by section 90.010(g) for claimants proceeding under the safety valve provision. The court granted the Emmites' request for an evidentiary hearing and also granted Union Carbide's request to depose Dr. Suzanne McClure, the doctor who signed Joseph's death certificate. The evidentiary hearing was deferred until after the deposition.

Dr. McClure was injured in an automobile accident and Union Carbide was unable to depose her until September 2009. After taking her deposition, Union Carbide renewed its motion to dismiss. The Emmites responded by arguing that the renewed motion was untimely and Union Carbide waived its right to seek dismissal by engaging in discovery after the previous hearing. They also attached a report dated October 28, 2009, from Dr. Joseph Prince, a pulmonologist who treated Joseph just before he died. The Emmites asserted that Dr. Prince's report complied with the safety valve requirements.

The trial court held a fourth hearing in November 2009 to address the renewed motion to dismiss. Following that hearing, but before the court ruled, the Emmites filed an amended version of Dr. Prince's report. In the amended report Dr. Prince explained that he served as Joseph's treating physician immediately before his death, he had reviewed Joseph's medical records and occupational and exposure histories, and he opined that (1) Joseph had pulmonary asbestosis, (2) Joseph's debilitated state would have made pulmonary function testing difficult, and (3) Joseph had asbestos-related impairment comparable to the criteria in Chapter 90. In December 2009, the trial court held a fifth hearing, following which it signed an order denying Union Carbide's motion to dismiss.

Union Carbide filed an interlocutory appeal from the denial of its motion to dismiss. On appeal it asserted that the trial court abused its discretion by considering reports and evidence other than the initial reports of Drs. Kradin and Britton because the Emmites neither moved for nor showed good cause for an extension of time to file additional reports. It also contended that even if the trial court properly considered the later-filed report of Dr. Prince, that report failed to comply with the safety valve requirements because Joseph's pulmonary function test results did not show that he had pulmonary function impairment, Dr. Prince testified that the tests were normal, and Dr. Prince did not utilize the test results in reaching his conclusion that Joseph demonstrated pulmonary impairment. The Emmites argued that the court of appeals did not err in considering all of the evidence presented throughout the pretrial process, that Dr. Prince's report was fully compliant with the requirements of section 90.010(f)(1), and if that section imposed a requirement of pulmonary function testing demonstrating pulmonary impairment, it violated the Texas Constitution's prohibition against retroactive laws as it applied to them.

In an en banc decision on rehearing, the court of appeals held that the MDL court properly considered all of the Emmites' physician reports, section 90.010(f)(1) requires pulmonary function testing to have been performed on the person allegedly injured, and the testing must have been relevant to the physician's diagnosis of functional pulmonary impairment. After noting that Dr. Prince testified that he did not use Joseph's pulmonary testing results in reaching

his diagnosis, the appeals court concluded that his report did not satisfy the requirements of section 90.010(f)(1)(B)(ii). *Id*. at 297. Then, referencing *Robinson v. Crown Cork & Seal Co*., 335 S.W.3d 126 (Tex. 2010), the court held that as applied to the Emmites' claims, section 90.010(f)(1)(B)(ii) violated the Texas Constitution's prohibition against retroactive laws.

HOLDING: The Court held that wrongful-death claimants who invoked Tex. Civ. Prac. & Rem. Code Ann. § 90.010(f) while a motion to dismiss was pending could introduce additional evidence and reports in their **asbestos**-related injury suit. Further, although pulmonary function testing had been performed on the decedent many years earlier, the testing did not satisfy § 90.010(f)(1)(B)(ii) because it did not show functional pulmonary impairment, thus rendering inadequate the report of a physician who later diagnosed functional pulmonary impairment without relying upon the testing. Finally, in light of the compelling public interest in ensuring fair compensation for asbestos-related injuries while precluding claims by unimpaired persons, the pulmonary function testing requirement was not unconstitutionally retroactive under Tex. Const. art. I, § 16, although it became effective after the decedent's death. The Court reversed and rendered.

ANALYSIS: The Court focused its decision primarily on the legislative intent of Chapter 90. Specifically, the Court relied on the specific intent to address the massive pending asbestos litigation as well as the detailed framework for presenting the preliminary medical findings. As to retroactivity, the Court engaged in a balancing analysis between the harm to the plaintiffs and the legislative intent of curtailing asbestos litigation and concluded that the greater good was served by excluding plaintiffs' claims.

Warren v. BP Prods. N. Am., Inc., 2014 Tex. App. LEXIS 9603

Court of Appeals of Texas, Fourteenth District, Houston

August 28, 2014, Memorandum Opinion Filed

NO. 14-13-00564-CV

FACTS: Appellants, Reginald Warren, Reginald Rowe and Fred Bulpitt (collectively "Warren"), appealed a final judgment enforcing a settlement agreement and dismissing claims signed in favor of Appellees, BP Products North America Inc. a/k/a BP Texas City and BP Corporation North America, Inc. ("BP"). Warren filed suit alleging they were exposed to and sustained injuries resulting from a release of hydrogen sulfide at BP's Texas City Plant in October 2007. Joining them in the suit were four other plaintiffs, who are not parties to this appeal. To resolve the dispute, the parties were ordered to mediation. Prior to the December 2011 mediation, Warren and BP agreed in principle to a settlement. As part of the negotiations, BP's counsel forwarded to Warren's attorney a letter agreement which set forth terms of the settlement, including that Warren would sign a full and final release of any and all claims against BP as of the date of the settlement. Immediately upon receiving the proposed agreement, Warren's counsel called counsel for BP explaining he could not sign the agreement as worded because his clients had other claims against BP which they wanted to preserve. Those claims arose as a result of an April 2010 benzene release and a release of dimethyl disulfide sometime in the November-December 2011 timeframe. Warren's counsel did not represent Warren (and the other plaintiffs) in the additional claims.

BP's counsel responded he would relay this information to BP, and he did. Later that same day, it was determined that all claims as of November 30, 2011, would be released by the settlement agreement. The parties dispute who first proposed the date—there is, however, no dispute that counsel for Warren advised BP that his clients would agree to that date *only* if it would not preclude them from asserting claims against BP for other releases in addition to and separate from claims asserted in connection with the October 2007 release which was the subject of the letter agreement.

On the day of the mediation of three other plaintiffs' claims, counsel for BP delivered a Rule 11 letter agreement to Warren's counsel, which counsel signed. The Rule 11 letter agreement contained the November 30 date. During mediation, Warren's counsel learned additional information concerning the dimethyl-disulfide release. Counsel for Warren learned it had occurred mid-November through November 26 or 27; therefore, the November 30 date would need to be moved back to November 1 in order to preserve Warren's additional claims which were not to be covered by the settlement agreement of claims resulting from the October 2007 release. Warren advised BP of this information and the request to change the date to November 1. The plaintiffs whose cases were being mediated entered into settlements including a release date of November 1. However, as to Warren, BP forwarded settlement documents containing the November 30 date. Warren refused to sign them.

BP then filed its motion to enforce the settlement agreements. The motion states, "Plaintiffs have failed and refused to proceed with the settlement agreement." On the same day, BP amended its answer asserting "by way of affirmative defense" that the parties entered into a settlement agreement and " . . . all claims have been compromised, settled and resolved. Should any Plaintiff not agree, Defendants seek specific performance."

BP also filed its notice of submission on its motion to enforce scheduling the matter for oral hearing on April 30, 2012. Subsequently, the court sent the parties a notice changing the hearing on BP's motion to enforce settlement agreements to May 31, 2012. Warren filed a verified response to the motion, urging the release exceeds the scope of the Rule 11 letter agreement, the letter is ambiguous, the release exceeds the scope of counsel's authority, mutual mistake, and fraud.

On May 31, 2012, the trial court held a "hearing" on BP's motion to enforce the settlement agreements. In support of its motion, BP offered the December Rule 11 letter agreement and it offered for *in camera* inspection only the unsigned settlement agreements. At the conclusion of the hearing, the trial court granted BP's motion to enforce the settlement agreements.
In June 2012, Warren moved for non-suit, which the trial court granted. In response, BP filed a motion to set aside the order of non-suit, urging the order granting its motion to enforce was affirmative relief which precluded the non-suit. The trial court granted BP's motion to set aside the non-suit. Warren filed a motion to reconsider the orders granting the motion to enforce and denying the motion for non-suit. The trial court denied the motion to reconsider both motions.

In September 2012, BP filed a counterclaim alleging breach of contract. In March 2013, BP filed a "notice of submission for entry of final judgment." Warren objected to the proposed judgment, incorporating their responses to BP's motion to enforce and Warren's motion to reconsider, and lodging other objections.

In April 2013, the trial court rendered judgment for BP, enforcing the settlement agreements as drafted with the November 30 date, disposing of all claims, and dismissing all remaining issues. The judgment does not refer to BP's pleading of specific performance or breach of contract. Instead, the final judgment states, "The terms and conditions of the Rule 11 settlement agreement between Plaintiffs Reginald Warren, Reginald Rowe and Fred Bulpitt and the BP Defendants is incorporated by reference herein as if set out *verbatim*," although it was not an exhibit at the hearing.

Warren filed a motion for new trial, again asserting, among other contentions, that there was no agreement to the November 30 date; therefore, no consent to the settlement agreements as written. Additionally, Warren challenged the procedure by which the trial court granted BP's motion to enforce the settlement agreements, specifically objecting there was no proper pleading and proof allowing enforcement of the settlement agreements. The motion was overruled by operation of law.

Adopting BP's proposed findings and conclusions, the trial court signed findings of fact and conclusions of law. The findings of fact state, *inter alia*, "[t]he BP Defendants' Motion to

Enforce Settlement Agreements included claims for affirmative relief and requested specific performance of the settlement agreements between the BP Defendants and these Plaintiffs." Further, the findings of fact state, "The BP Defendants' Motion to Enforce Settlement Agreements constituted notice to these Plaintiffs of the BP Defendants' claims for affirmative relief and for specific performance of the settlement agreements." However, as noted above, specific performance was not mentioned in BP's motion to enforce, was not set for hearing, and was not mentioned at the "hearing."

HOLDING: The Court reversed and remanded.

ANALYSIS: The individual communicated withdrawal of consent to the settlement agreement, as he refused to sign the settlement documents, and his response to the motion to enforce the agreement verified facts about the mistaken dates of the release agreed upon in the agreement and the refusal to consent to release claims in accordance with the agreement. The court did not need to determine whether the company's motion to enforce constituted a proper pleading because there was insufficient proof to support the judgment, as the company pointed to no evidence of breach and the record revealed that no witnesses testified and no other exhibits were admitted. There were no agreed facts that would obviate the necessity of proof in this case. As there was insufficient evidence to support the judgment enforcing the agreement, the court reversed and remanded for a new trial.