

TADC PRODUCTS LIABILITY NEWSLETTER

*Selected Case Summaries
Prepared Fall 2010*

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I. Summary

1. Tex. Civ. Prac. & Rem. Code Chapter 149's limits on companies' successor liability for asbestos claims violate the Texas Constitution if their application retroactively impairs a plaintiff's vested rights in pending wrongful death and representative claims.

Robinson v. Crown Cork & Seal Co., 54 TEX. SUP. CT. J. 71 (Tex. 2010).

2. Tex. Civ. Prac. & Rem. Code Chapter 82's indemnification (by a manufacturer of a seller) supports indemnity where an independent contractor provided both the product and the service (installing the product on a home). The Texas Supreme Court found that stucco is a "product" and a contractor installing it on a house is a "seller" under Chapter 82, permitting the contractor to be both a seller and installer. Thus, the manufacturer was required to indemnify seller for all losses for which seller was not independently culpable. *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893 (Tex. 2010).

3. Dallas Court of Appeals rejects another plaintiff's attempt to use the "each and every exposure contributes" theory of causation rejected by *Borg-Warner Corp. v. Flores* and

Georgia-Pacific Corp. v. Stephens. *Georgia-Pacific Corp. v. Bostic*, No. 05-08-01390-CV, 2010 WL 3369605 (Tex. App.—Dallas August 26, 2010, no pet. h.).

4. Where a plaintiff's evidence shows only that a product failed when it was being misused or applied inappropriately, such evidence may be insufficient to prove defect. Plaintiff's evidence constituted proof that an allegedly unreasonably dangerous hook broke when being used in an unsafe manner. Such evidence only proved the entire integrated use was unreasonably dangerous—not the hook itself. *Crenshaw v. Kennedy Wire Rope & Sling Co.*, No. 04-09-00410-CV, 2010 WL 2601662 (Tex. App.—San Antonio June 30, 2010, pet. filed by Sept. 10, 2010).

5. Where plaintiffs' expert testified that a competing manufacturer had incorporated a safer, alternative design to the product and that the absence of that design was the cause of the injury, a jury had sufficient evidence to determine plaintiffs' negligence and products liability claims. *Transcontinental Ins. Co. v. Briggs Equip. Trust*, No. 14-08-00795-CV, 2010 WL 3000009 (Tex. App.—Houston [14th Dist.] August 3, 2010, no pet. h.).

6. Circumstantial evidence that Fentanyl patch used by plaintiff was among a recalled group of patches was sufficient to meet required elements of products liability claim. *Alza Corp. v. Thompson*, No. 13-07-00090-CV, 2010 WL 1254610 (Tex. App.—Corpus Christi April 1, 2010, no pet. h.).

II. Discussion

1. *Robinson v. Crown Cork & Seal Co.*, 54 TEX. SUP. CT. J. 71 (Tex. 2010).

In *Robinson*, the Texas Supreme Court found that Chapter 149 of the Civil Practice and Remedies Code (CPRC), which limits certain corporations' successor liability for asbestos claims, is unconstitutional as applied to plaintiff's pending actions because the law violates article I, section 16 of the Texas Constitution, which prohibits retroactive laws.

In 2002, Barbara Robinson and her husband John filed suit against Crown Cork & Seal Company for John's having contracted

mesothelioma from workplace exposure to asbestos products.

Crown had never manufactured or sold asbestos products, but back in February 1966 had merged with a company, Mundet, that did manufacture asbestos insulation. Having succeeded to Mundet's liabilities, Crown had paid over \$413 million in settlements by May 2003, which was significantly greater than Mundet's original value at the time of merger: \$15 million in 1966, but \$57 million in 2003 dollars.

In 2003, the Texas Legislature passed Chapter 149 of the CPRC, which limits certain corporations' successor liability for asbestos claims: "a domestic corporation or foreign corporation that has . . . done business in this state and that is a successor which became a successor prior to May 13, 1968." The statute further explains that "cumulative successor liabilities . . . are limited to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation." But the cap does not apply to a successor that continued manufacturing asbestos products after the merger.

In its passage, Chapter 149 was intended to protect only the "innocent successor." But, when the bill's sponsor was asked on the House floor which manufacturers "in particular" would be protected, the sponsor replied that he was "advised that there's one in Texas, Crown Cork and Seal."

On the basis of Chapter 149, Crown Cork and Seal promptly moved for summary judgment, which the trial court granted. A few days after defendant's summary judgment was granted, John Robinson died. The Court explained that because Barbara's claims were derivative, the parties rightfully assumed the summary judgment was final as to both (i) Barbara and John's original claims and (ii) Barbara's later-added wrongful death and survival actions.

On appeal, Robinson contended that Chapter 149 is a retroactive law prohibited by article I, section 16 of the Texas Constitution. But the Court of Appeals disagreed, concluding that the law on vested rights did not clearly make Chapter 149 an invalid retroactive law, affirming the trial court's grant of summary judgment.

The Supreme Court granted cert and began by explaining that there exists in this country a presumption against retroactive legislation that is deeply rooted in our jurisprudence that embodies a legal doctrine centuries older than our Republic. While the United States Constitution does not expressly prohibit retroactive laws, it does express that principle through several prohibitions (bills of attainder, ex post facto laws, and state laws impairing the obligation of contracts). The Texas Constitution, however, contains both these specific provisions as well as a general prohibition against retroactive or retrospective laws.

The presumption against retroactivity has two fundamental objectives: (1) it protects the people's reasonable, settled expectations, and (2) it protects against abuses of legislative power. Constitutional provisions limiting retroactive legislation must be applied to achieve these intended objectives.

The Court then tried to show the distinction between a remedy and a vested right being retroactively impaired, explaining that "a law that impairs a remedy does not impair a right, except sometimes." But the Court concluded that what constituted "an impairment of vested rights is too much in the eye of the beholder to serve as a test for unconstitutional retroactivity."

Indeed, while "[n]o bright-line test for unconstitutional retroactivity is possible," courts must consider three factors in light of the prohibition's dual objectives: "[1] the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; [2] the nature of the prior right impaired by the statute; and [3] the extent of the impairment." Under this test, the Court explained, "changes in the law that merely affect remedies or procedure, or that otherwise have little impact on prior rights, are usually not unconstitutionally retroactive." The Court also stated that all of its previous article I, section 16 cases were consistent with this new test and that subsequently applying the constitutional provision would be the same as under precedent.

In applying the *Robinson* test to the facts of the case, the Court first concluded that Chapter 149 significantly impaired a substantial interest that the Robinsons had in a well-recognized common-law cause of action, as discovery had

showed that their claims had a substantial basis in fact. But the Court next concluded that the public interest served by Chapter 149 is “slight.” The Court’s reasoning appeared to turn wholly on the fact that the legislative record stated no public interest served, but rather was clear that Chapter 149 was enacted to help only Crown and no one else. The Court pointed out that even Crown itself was unable to identify another company affected by Chapter 149.

Therefore, the Court held that Chapter 149, as applied to the Robinsons’ common-law claims, violated article I, section 16 of the Texas Constitution, reversing and remanding for further proceedings.

2. *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893 (Tex. 2010).

In *Fresh Coat*, the Texas Supreme Court construed Civil Practice & Remedies Code section 82.002(a)’s requirement that a manufacturer indemnify a seller against loss arising out of a products liability action. The Court applied it to an independent contractor who both provided the product and services by installing the stucco on the structure.

Over 90 homeowners sued K-2, Life Forms, and Fresh Coat, alleging that the exterior insulation and finishing system (EIFS) allowed water penetration that in turn caused structural damage, termite problems, and mold. Among other claims, the plaintiffs alleged that the EIFS was defectively designed, manufactured, and marketed. Life Forms filed cross-claims against Fresh Coat and K-2, seeking indemnity for losses from the homeowners’ claims. All three defendants settled with the homeowners. The case went to trial on various claims that the defendants brought against each other. After the claims were tried to a jury, Fresh Coat received a judgment for all the damages requested.

The Court of Appeals affirmed the trial court’s judgment, except for the settlement payment that Fresh Coat made to Life Forms. There, the court agreed with K-2 that it owed Fresh Coat no statutory indemnity duty because Fresh Coat would have been liable to Life Forms under the contract between the two regardless of whether Life Forms had been the one that caused a defect in the EIFS.

To the Texas Supreme Court, K-2 first argued it owed Fresh Coat no duty because EIFS is not a “product,” and Fresh Coat is not a “seller” under CPRC 82.002(a): “A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller’s negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.”

Because “product” is undefined by Chapter 82, K-2 argued that products placed into the stream of commerce are not products once they become integrated into a house, which is real property, even if they were products for all purposes beforehand. But the Court noted that Chapter 82 contains no such limitation. Instead, the Court held that EIFS was indeed a “product” as that word is used in the text of Chapter 82, referencing both Black’s Law Dictionary and the Third Restatement of Torts in defining the word.

Further, the court noted that even if K-2 were correct that an EIFS *wall* is the relevant “product,” a manufacturer may be liable for defects in “any component part thereof,” thus excluding such a narrow reading of “product.”

K-2 next contended that Fresh Coat was not a “seller” under Chapter 82 because Fresh Coat did not place EIFS into the stream of commerce since EIFS was applied to walls that were part of newly constructed homes. Rather, K-2 argued, Fresh Coat was a service-provider that provided installation services. Fresh Coat acknowledged that it provided EIFS installation services, but claimed that it was *both* a product seller and service provider, the latter of which it could be and still be considered a “product seller” under Chapter 82.

The Texas Supreme Court agreed with the appellate court that Chapter 82’s definition of “seller” did not exclude a seller who is also a service provider. Because Fresh Coat was in the business of providing EIFS products combined with the service of EIFS installation (base coat, mesh, and finish coat of the stucco), the Court held that Fresh Coat was not precluded from also being a seller.

The Court then noted the Court of Appeals error: applying the CPRC 82.002(a) exception. The exception to a manufacturer’s requisite

indemnity under Chapter 82 was for “any loss caused by the seller’s negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.” K-2 did not argue Fresh Coat had improperly installed the EIFS, rather, it argued that Fresh Coat’s contract with Life Forms required Fresh Coat’s indemnification of Life Forms regardless of any fault on the part of Life Forms.

The Court had previously explained that “[t]o escape this duty to indemnify, the indemnitor must prove the indemnitee’s independent *culpability*.” What matters is not merely whether but *why* a seller is independently liable. Therefore, the Court of Appeals’ decision to ignore all words between “except” and “for which the seller is independently liable” was a mistake, and it unnecessarily treated that intervening language as surplusage. Accordingly, Fresh Coat was a seller under Chapter 82.

Thus, the Texas Supreme Court affirmed in part and reversed in part, rendering judgment for Fresh Coat in accord with the trial court’s judgment.

3. *Georgia-Pacific Corp. v. Bostic*, No. 05-08-01390-CV, 2010 WL 3369605 (Tex. App.—Dallas August 26, 2010, no pet. h.).

In *Bostic*, the Dallas Court of Appeals held that, despite plaintiffs’ attempt to construe the “each and every exposure” theory of mesothelioma causation as viable, the theory was and is expressly rejected.

Timothy Bostic’s survivors brought a wrongful death action against Georgia-Pacific for asbestos exposure for allegedly causing Timothy’s mesothelioma. After the jury verdict awarding the plaintiffs actual and punitive damages, the trial judge ordered plaintiffs to either remit a misallocated award or elect a new trial. The plaintiffs elected a new trial. After the second jury awarded more than \$13 million in total recovery, Georgia-Pacific, the only remaining defendant who had not settled out, moved to recuse the trial judge; that motion was granted and the lawsuit was transferred to Dallas County. There, Georgia-Pacific’s motion for mistrial was granted and a new trial was ordered. Plaintiffs then filed a motion to vacate the order

for new trial when the judge granting mistrial was replaced. Judge Benson then signed the amended final judgment from 2006, awarding more than \$11 million in damages.

Georgia-Pacific’s appeal involved three issues, but it was resolved on the first: legal insufficiency of the evidence. That issue had two parts. First, Georgia-Pacific argued that there was insufficient evidence that Georgia-Pacific joint compound caused Timothy’s mesothelioma, and that even if there was such evidence, there was no evidence of dose. Georgia-Pacific pointed out that plaintiffs’ experts’ theory that “each and every exposure” to asbestos caused Timothy’s mesothelioma was already rejected by the Texas Supreme Court in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007). Most of the evidence presented that linked Timothy to Georgia-Pacific asbestos was through his father, Harold, with whom Timothy had worked. But Harold identified only one specific project where Georgia-Pacific joint compound was used, and there he could not recall whether Timothy had performed drywall work or was present during the drywall work on that project. In fact, only three projects were identified in which both Harold and Timothy may have performed drywall work together or where Timothy was present.

Moreover, the plaintiffs acknowledged that Timothy was exposed to numerous asbestos products and asbestos-containing products, both occupationally and through household and bystander exposure.

Based upon the record, however, the Dallas Court of Appeals disagreed with Georgia-Pacific’s argument that there was no evidence that Timothy was exposed to Georgia-Pacific asbestos-containing joint compound.

Second, Georgia-Pacific challenged the legal sufficiency of plaintiffs’ substantial-factor causation argument because, it argued, plaintiffs introduced no evidence of cause-in-fact. Plaintiffs’ only expert on specific causation of Timothy’s mesothelioma could not opine on whether Timothy would have developed mesothelioma absent exposure to Georgia-Pacific asbestos-containing joint compound. Instead, that expert presented an “each and every exposure” theory of causation, that each and every exposure to asbestos caused or contributed to cause Timothy’s mesothelioma. But the

Texas Supreme Court had already rejected such a causation theory, noting the pernicious problem: If a single fiber could cause asbestosis, then “everyone” would be susceptible, but no one suggests that this is the case.

On appeal, the plaintiffs tried to contend that their expert relied not on the “each and every exposure” theory, but instead on substantial-factor causation. But the Dallas Court of Appeals disagreed. On the record, it found that there was insufficient evidence of Timothy’s frequent and regular exposure to Georgia-Pacific’s asbestos-containing joint compound during the relevant time period. Further, the court pointed out that in addition to needing to show frequency, regularity, and proximity of exposure to the product, the plaintiff also has to show reasonable quantitative evidence that the exposure increased the risk of developing the asbestos-related injury. Yet, plaintiffs’ expert had stuck with his story that he did not know of any safe level of exposure to asbestos under which disease does not occur (*i.e.*, the each and every exposure theory of causation). Thus, on the record presented, the Dallas Court of Appeals held that the plaintiffs’ evidence was insufficient to provide quantitative evidence of Timothy’s exposure to asbestos fibers from Georgia-Pacific’s joint compound or to establish that Timothy’s exposure was in amounts sufficient to increase his risk of developing mesothelioma. Therefore, the Dallas Court of Appeals reversed the trial court’s judgment and rendered judgment that Timothy’s survivors take nothing on their claims against Georgia-Pacific.

4. *Crenshaw v. Kennedy Wire Rope & Sling Co.*, No. 04-09-00410-CV, 2010 WL 2601662 (Tex. App.—San Antonio June 30, 2010, pet. filed by Sept. 10, 2010).

In *Crenshaw*, the San Antonio Court of Appeals permitted a plaintiff’s defective design action to be dismissed for insufficient evidence of defect where the evidence presented only regarded misuse or inappropriate application of the product, instead of showing defect.

David Goehring was fatally injured while working as a floorhand on a drilling rig operated by his employer. He was moving two casing bails—overhead—with the use of a braided wire rope sling, which was attached to the bail by a sliding choker hook while the other end was

connected to the hoist on the rig. The accident occurred when the bails disengaged from the sling and struck Goehring. Goehring’s parents filed a wrongful death suit against the manufacturer of the sling, Kennedy Wire Rope & Sling Co. (Kennedy) and the manufacturer of the hook Newco Manufacturing Co., Inc. (Newco). Jamie Crenshaw intervened in the action, alleging she was Goehring’s common law wife. Plaintiffs alleged that the sling and hook were defectively designed.

Goehring’s parents subsequently settled with Kennedy and Newco, leaving Crenshaw’s claims to proceed to trial. At the close of the evidence, both parties moved for directed verdict, both of which the trial court denied. The jury answered “no” to the question of whether Crenshaw and Goehring were married and therefore did not answer the remaining questions related to liability, proportionate responsibility, and damages. Thus, the trial court entered a take-nothing judgment against both defendants.

The two major issues before the San Antonio Court of Appeals were whether the trial court erred (1) in giving the jury charge that it did on common law marriage and (2) in not granting one of the parties’ motions for directed verdict.

The jury charge regarding common law marriage that the trial court gave included the following contested language: “Represented to others means that both Jamie Crenshaw and David Goehring represented to other people that they were married. Mere isolated references to each other as husband and wife does not amount to adequate evidence to prove that they represented to others that they were married.”

Crenshaw had many problems with the language, which focused on the fact that it was not in the statutory definition of common law marriage, improperly characterized the evidence (“mere isolated references”), and constituted a direct comment on the weight of the evidence. Kennedy and Newco responded that the instruction appropriately tracked the Family Code, and then they presented several cases supporting the proposition that isolated or occasional references to “husband” or “wife,” without more, are no evidence of holding out.

But the San Antonio Court of Appeals disagreed with Kennedy and Newco. All of the

cases the defendants had referenced had applied a very fact-specific analysis to determine whether the holding out element of common law marriage was proven. Instead, the Court of Appeals held that the challenged portion of the instruction nudged the jury in a specific direction and was more than an incidental comment on the weight of the evidence—indeed, it was a direct comment on one of the elements on which plaintiff had the burden. The mere fact that an instruction is a correct statement of the law does not mean it should be included in the charge, nor does it prevent it from being an incorrect comment on the weight of the evidence. Thus, its use was an abuse of discretion.

Regarding each of the parties' arguments that the trial court erred in denying their respective motions for directive verdict, the San Antonio Court of Appeals first held that Crenshaw's motion on common law marriage was correctly submitted to the jury because the evidence was not conclusive.

Next, the appellate court held that it was error to deny Newco's motion because Crenshaw had presented insufficient evidence that Newco's hook was defective. Instead, the appellate court read Crenshaw's evidence to show that the issue was more one of misuse or inappropriate application of the hook than defective design of the hook itself. For example, one of the witnesses on which Crenshaw relied stated that she would not recommend using the Newco hook without a safety latch on a cable assembly for work overhead. The other witness also verified that what he was referring to as a defective design was the integrated product (the particular sling), not the Newco hook by itself.

Kennedy's motion for directed verdict, however, was properly denied because reasonable minds could differ on the basis of its argument: that the evidence failed to raise a fact issue on the five risk-utility factors used to determine whether the defective design of a product rendered it unreasonably dangerous.

Therefore, the take-nothing judgment against Newco was affirmed, but the judgment as to Kennedy was reversed and remanded because inclusion of the jury charge was error and that Crenshaw presented evidence creating a fact issue on the five risk-utility factors.

5. *Transcontinental Ins. Co. v. Briggs Equip. Trust*, No. 14-08-00795-CV, 2010 WL 3000009 (Tex. App.—Houston [14th Dist.] August 3, 2010, no pet. h.).

In *Transcontinental*, 14th District Houston Court of Appeals held that where plaintiffs' expert testified that a competing manufacturer had incorporated a safer, alternative design to the product and that the absence of that design was the cause of the injury, a jury had sufficient evidence to determine plaintiffs' negligence and products liability claims.

The Congregation Beth Yeshurun (Congregation) wanted to replace light bulbs in its sanctuary, which were approximately forty feet from the floor. A lift was needed to do this. Further, because of the sloped nature of the sanctuary, a straddle would be needed, on which the lift would be placed to make it level.

The day before the accident, two men from Briggs brought the equipment, saw the area where the lift would be used, and equipped it with a straddle so that the lift could be placed over the seats in the sanctuary to operate.

The next day, Congregation employee Reabon Jackson, Jr. was raised up in the lift. The present Congregation employees had believed that since the green lights were on, it was proper to operate the lift. When it became unstable and tilted over, Jackson fell to his death. The lift also injured another Congregation employee, Donald Robinson, who had been trying to keep the lift from tipping over.

Transcontinental Insurance Co. (Transcontinental), the Congregation's workers' compensation carrier, paid benefits to Robinson, Jackson's estate, Nettie Adams (Jackson's mother), and for the benefit of a child that Selener Love alleged was Jackson's. Without the benefit of genetic testing, the hearing officer had found that the child was Jackson's daughter. Subsequently, subrogee-Transcontinental and Love sued Briggs Equipment Trust for wrongful death and survival.

The trial court ordered paternity testing, but it sealed the test results after letting each party view the results *in camera*. Defendants filed four motions for summary judgment: (1) a no-evidence motion against most of

Transcontinental and Love's claims, (2) one with traditional and no-evidence grounds claiming that the products liability claims against Briggs fail under Chapter 82, (3) one with traditional and no-evidence grounds asserting that the genetic testing under seal conclusively proved Jackson was not the child's father, and (4) a no-evidence motion against Love's claims, attacking the essential element that Love be Jackson's surviving spouse.

The trial court granted the first three summary judgment motions and dismissed with prejudice all claims asserted by plaintiffs. Transcontinental and Love appealed.

The 14th District Houston Court of Appeals held that the trial court did not err in granting summary judgment against Love's claims because Love failed to respond to the first three motions, which was fatal to her ability to successfully appeal those. On the fourth, Love failed to point out summary-judgment evidence raising a genuine issue of material fact as to the essential element attacked in Briggs' no-evidence motion that she was Jackson's surviving spouse. Thus, the appellate court affirmed the trial court's grants of summary judgment against Love.

Transcontinental, however, was successful in gaining the appellate court's reversal of summary judgment as to all of its claims. First, Transcontinental had presented evidence regarding duty, breach, and proximate cause for its negligence claims and strict-products-liability claims: Transcontinental's expert had given an affidavit regarding Briggs responsibility of ordinary care; it had entered a report, deposition testimony, and affidavits regarding the breach of that duty (by failing to nix the lift's operation without outriggers to stabilize the lift when it was on a straddle); and it had provided deposition testimony and affidavits regarding causation.

Further, for the products liability claims, Transcontinental had entered evidence that Briggs had placed the product in the stream of commerce—as lessors of products remain subject to strict liability claims. Further, Transcontinental had entered evidence that the product was defectively designed—among many reasons, the most fatal was the availability of an interlocking system (to shut down use of the lift without outriggers installed when the lift was on

a straddle) from a competing manufacturer, which showed the technical feasibility of incorporating such a design into the product. Finally, Transcontinental had entered evidence that the product was a producing cause of the alleged damages—its expert testified that if the lift had been equipped with an interlock system, the lift would not have tipped over.

Therefore, there were material issues of fact for Transcontinental's negligence and products liability claims, negating summary judgment.

6. *Alza Corp. v. Thompson*, No. 13-07-00090-CV, 2010 WL 1254610 (Tex. App.—Corpus Christi April 1, 2010, no pet. h.).

In *Alza*, the malfunction and causation requirements of strict products liability manufacturing defects were overcome where a fentanyl patch used at the time of death was circumstantially part of a recalled group of patches.

Michaelynn Thompson wore prescription fentanyl patches for chronic pain in her back due to a car crash. The patch is a prescription pain patch that uses a transdermal system, adhering to the patient's skin, giving the patient a continuous, systematic delivery of fentanyl—a potent opioid analgesic. The patch Thompson wore at the time of her death was manufactured by Alza. From 2001 to 2004, Alza had documented many instances where patients had received patches with flawed seals due to a fold-over defect that was not detected by Alza's visual inspection process.

A senior technician at Alza testified that the inspection process involved a visual inspection of 120 lines of product per minute. Despite the fact that this technician was made aware of the fold-over defect in 2001, at trial he testified he had still never seen a fold-over defect. Further, Alza's visual inspections detected no problems with the 2.5 million patches ultimately recalled by Alza in 2004 due to the prevalence of fold-over defects.

While Alza did finally change some of its inspection procedures in 2004, complaints from the public had escalated so sharply between 2003 and 2004 that the FDA had investigated, and it ultimately found Alza's remedial actions inadequate. When the FDA suggested the

producing machine should be retired, Alza wished to keep the machine and improve the output, so it recalled about 2.5 million patches in 2004. Also during that time, Thompson's doctor prescribed her fentanyl patches, but he did so before the Alza recall.

In February 2004, Thompson entered the hospital complaining of dizziness, nausea, vomiting, and abdominal pain. An EKG showed normal results. Eventually, when Thompson's daughter returned to the room, she found her face-down in her pillow, with Thompson's legs and fingernails purple. A code was sounded, but she was unable to be resuscitated. During the attempted resuscitation, the doctor had removed the fentanyl patch from Thompson's back.

When Thompson's blood was tested for fentanyl, it registered a quantitation of 11.4 ng/ml. A therapeutic range is 1.0 ng/ml to 2.0 ng/ml, and a toxic range is 3.5 ng/ml to 5.0 ng/ml. But the county's medical examiner had not tested her blood, so it found that Thompson died of an enlarged heart (Thompson was six feet tall, weighing 367 pounds).

Thompson's survivors brought a wrongful death action against Alza, including negligence, products-liability, and gross negligence claims. The complaints centered on Alza having continued the visual inspection process despite knowledge that the process was inadequate to detect and remove flawed patches. The trial court granted judgment on a jury verdict rendered against Alza for negligence and strict products liability (but not gross negligence). Alza appealed.

In reviewing the evidence of a manufacturing defect and causation for legal and factual sufficiency, the Corpus Christi Court of Appeals held that there was sufficient legal evidence of Thompson's proper use of the patch: (1) the timing of this incident indicated that Thompson was wearing one of the newly prescribed patches at the time of her death; (2) her medical records on entry into the hospital indicated she was wearing that patch; and (3) there was no indication that day, or in her history, of any abuse.

Next, the appellate court held that the evidence was legally and factually sufficient for the jury to determine whether the particular analysis of Thompson's blood (the 11.4 ng/ml

finding) was credible. The appellate court noted that the trial court had applied the *Daubert* analysis and found that the underlying science was reliable.

Alza tried to argue that even if the test had been reliably taken, the level of fentanyl in Thompson's blood was the result of postmortem redistribution rather than an overdose. But based on the evidence presented, as well as that from plaintiffs challenging the same, the appellate court was not convinced that Alza's evidence conclusively established that the fentanyl level was due to postmortem redistribution. In fact, it stated that the evidence presented in support of the theory was speculative at best.

Alza also contended that the evidence conclusively established Thompson could not have been wearing one of the recalled patches when she died because Thompson could not prove that she was wearing one of the recalled patches. The appellate court ignored this because proof that the specific patch she was wearing was recalled was not an element of plaintiffs' claims, and therefore, was immaterial. Further, in discussing the fact that the doctor removed and discarded her patch before it could be analyzed, the appellate court noted that the plaintiffs did not need to show direct proof of the defect—circumstantial evidence was sufficient. Given the evidence in the record, the jury had legally and factually sufficient evidence to conclude as it did.

As far as causation, the appellate court held that the plaintiffs met their burden of proving that their experts' testimony on causation was relevant and reliable. Further, plaintiffs' evidence of causation was sufficient because deciding whether Thompson died from an enlarged heart or a sudden arrhythmia (as alleged by Alza) or a fentanyl overdose (as alleged by plaintiffs) turned on the jury's examination of the evidence and assessment of the various witnesses' credibility.

For evidence of negligence, the appellate court held that while plaintiffs might not have presented a retained expert on pharmaceutical manufacturing to establish negligence in the manufacturing process, Alza's own representatives offered expert opinion testimony regarding the patch, from which the jury could have concluded that Alza was negligent.

Finally, the appellate court overruled Alza's two evidentiary challenges, as both Thompson's blood test and evidence of Alza's 2004 recall were both properly admissible. Thus, the Corpus Christi Court of Appeals affirmed the judgment of the trial court.