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TADC ENVIRONMENTAL/TOXIC TORT NEWSLETTER

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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

As has been the situation over the past several reports of this newsletter, environmental litigation in Texas has maintained its diminished capacity in Texas as a result of the effects of Chapter 90 of the Texas Civil Practice & Remedies Code.

The silica docket remains effectively silent, although limited activity is beginning to occur. The asbestos docket continues movement at a slow but steady pace. While Plaintiffs' firms are continuing to file some new asbestos exposure cases in Texas, the bulk of the litigation continues to find more Plaintiff-friendly venues in other states.

BARBARA ROBINSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF JOHN ROBINSON, DECEASED, PETITIONER, v. CROWN CORK & SEAL CO., INC., INDIVIDUALLY AND AS SUCCESSOR TO MUNDET CORK CORPORATION, RESPONDENT

NO. 06-0714
SUPREME COURT OF TEXAS
2010 Tex. LEXIS 796; 54 Tex. Sup. J. 71
February 7, 2008, Argued
October 22, 2010, Opinion Delivered

Facts: In 2002, petitioner Barbara Robinson ("Robinson") and her husband, John, Texas residents, filed suit alleging that John, age 63, had contracted mesothelioma from workplace exposure to asbestos products, including respondent Crown Cork & Seal Co., alleging that they were all jointly and severally liable. With respect to Crown, the Robinsons claimed that during John's service in the United States Navy from 1956 to 1976, he worked with asbestos insulation manufactured by the Mundet Cork Corporation, and that when Crown and Mundet merged, Crown succeeded to Mundet's liabilities. Crown has never itself engaged in the manufacture or sale of asbestos products. In November 1963, Crown's predecessor, a New York corporation with the same name, which was then the nation's largest manufacturer of crowns, acquired a majority of the stock in Mundet, another New York corporation, which besides insulation, also manufactured crowns. Within ninety days, in February 1964, Mundet sold all its assets related to its insulation business. Two years later, in February 1966, the companies merged. In 1989, Crown's predecessor was reincorporated as Crown, a Pennsylvania corporation.

Crown acknowledges that under New York and Pennsylvania law, it succeeded to Mundet's liabilities, which, as pertaining to Mundet's asbestos business, have been hefty. Over the years, Crown has been named in thousands of lawsuits claiming damages from exposure to asbestos manufactured by Mundet. At first, Crown did not contest its successor liability to the Robinsons for any compensatory damages; consequently, the trial court granted the Robinsons' motion for partial summary judgment on that issue. But about the same time, the Texas Legislature enacted Chapter 149 of the Texas Civil Practice and Remedies Code, which limits certain corporations' successor liability for asbestos claims. Chapter 149 applies (with exceptions not relevant here) to "a domestic corporation or a foreign corporation that has . . . done business in this state and that is a successor which became a successor prior to May 13, 1968." For a covered corporation (again with some exceptions not relevant here), "the cumulative successor asbestos-related 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", including "the aggregate coverage under any applicable liability insurance that was issued to the transferor . . . collectable to cover successor asbestos-related liabilities". This cap does not apply to a successor that continued in the asbestos business after the consolidation or merger.

Crown promptly moved for summary judgment under the new law, requesting that the prior order establishing its successor liability to the Robinsons be vacated and that their claims for asbestos exposure be dismissed. Crown asserted that the summary judgment evidence established that its merger with Mundet occurred before May 13, 1968, that it had never engaged in Mundet's insulation business, and that its successor asbestos-related liabilities, already more than $ 413 million, greatly exceeded the fair market value of Mundet's total gross assets determined as required by the statute -- about $15 million in 1966 (some $ 57 million in 2003 dollars). Thus, Crown contended, Chapter 149 barred the Robinsons from recovering on their claims. In response, the Robinsons argued that the record did not establish the applicability of Chapter 149, or if it did, the statute violated several provisions of the Texas Constitution.

The trial court granted Crown's motion. Days later, John Robinson died. Barbara Robinson amended her petition to assert statutory wrongful death and survival actions against Crown and the other defendants still remaining in the case. (Several defendants had settled for amounts totaling $859,067 and been dismissed.) Without addressing these statutory actions, Crown moved to sever the summary judgment to make it final and appealable, and the trial court granted the motion. The court also stayed proceedings in Robinson's case against the other defendants.

On appeal, Robinson contends that Chapter 149 is a retroactive law prohibited by article I, section 16 of the Texas Constitution. The law is well-settled, she asserts, that the Legislature has no authority to extinguish vested rights, and that her accrued cause of action against Crown is a vested right. A majority of the court of appeals did not "find the law on vested rights to be as consistent and lucid as Mrs. Robinson claims" and concluded that it provides "no clear answer" to whether Chapter 149 is an invalid retroactive law.

Holding: Chapter 149 of the Texas Civil Practice and Remedies Code, a statute that limits certain corporations' successor liability for personal injury claims of asbestos exposure, violates the prohibition against retroactive laws contained in article I, section 16 of the Texas Constitution as applied to a pending action.

Analysis: There exists in this country, as the United States Supreme Court observed in *Landgraf v. USI Film Products*, a "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence and embodies a legal doctrine centuries older than our Republic . . . .[T]he 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.'" The United States Constitution does not expressly prohibit retroactive laws, but "the antiretroactivity principle finds expression" in its prohibitions of bills of attainder, ex post facto laws, and state laws impairing the obligation of contracts. Constitutional provisions limiting retroactive legislation must therefore be applied to achieve their intended objectives -- protecting settled expectations and preventing abuse of legislative power.

We think our cases establish that the constitutional prohibition against retroactive laws does not insulate every vested right from impairment, nor does it give way to every reasonable exercise of the Legislature's police power; it protects settled expectations that rules are to govern the play

and not simply the score, and prevents the abuses of legislative power that arise when individuals or groups are singled out for special reward or punishment. No bright-line test for unconstitutional retroactivity is possible. Rather, in determining whether a statute violates the prohibition against retroactive laws in article I, section 17 of the Texas Constitution, courts must consider three factors in light of the prohibition's dual objectives: the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment.

Under this test, changes in the law that merely affect remedies or procedure, or that otherwise have little impact on prior rights, are usually not unconstitutionally retroactive. But these consequences of the proper application of the prohibition cannot substitute for the test itself. The results in all of our cases applying the constitutional provision would be the same under this test. The cases that considered only whether the challenged statute impaired vested rights implicitly concluded that any impairment did not upend settled expectations and was overcome by the public interest served by the enactment of the statute. And the cases that focused on the propriety of the Legislature's exercise of its police power implicitly concluded that the exercise was not merely reasonable but was compelling, notwithstanding the statute's effect on prior rights.

The test the court of appeals distilled from the cases focuses too much on the reasonableness of legislative action and does not give full voice to the concerns addressed by the prohibition against retroactive laws. The court believed that one consideration in applying the prohibition is whether a statute is "appropriate and reasonably necessary to accomplish a purpose within the scope of the police power". The second factor in the court of appeals' test was whether a statute is unreasonable, arbitrary, unjust, unduly harsh, or disproportionate to the end sought to be accomplished. But the intent of the prohibition against retroactive laws is to foreclose these kinds of considerations to the Legislature in enacting laws and to the judiciary in reviewing them. A retroactive law is not permissible merely because the end seems to justify the means. The presumption is that a retroactive law is unconstitutional without a compelling justification that does not greatly upset settled expectations.

Chapter 149 does not directly restrict the Robinsons' common law action for personal injuries due to exposure to asbestos in the workplace. Rather, it supplants the usual choice-of-law rules for determining what state's successor liability law should apply in asbestos cases in Texas by mandating Texas courts to apply Texas law, then for the first time prescribes limits on that liability, even if, as here, successor liability arose under the law of another state.

But the successor liability in this case is not a creature of Texas law; the parties agree that without Chapter 149, New York or Pennsylvania law would apply, and that under the law of those states, Crown's successor liability is unquestionable. So this is not a case like *Dickson*, in which the Legislature abolished a cause of action it had itself created; Chapter 149 limits liability created under other states' laws. Nor is this a case like *Owens Corning*, in which the Legislature changed the statute of limitations so that a nonresident plaintiff would gain no advantage by suing in Texas rather than in his home state; Chapter 149 disadvantages Texas residents, as well as nonresidents, who sue Crown in Texas rather than New York or Pennsylvania. Nevertheless,

Crown has a point that choice-of-law rules are purely procedural and subject to change, often by courts, but certainly by the Legislature if it chooses to do so. An interest in maintaining an established common-law cause of action is greater than an interest in choice-of-law rules. Claims like the Robinsons' have become a mature tort, and recovery is more predictable, especially when the injury is mesothelioma, a uniquely asbestos-related disease. Discovery taken in the case shows that the Robinsons' claims had a substantial basis in fact. Their right to assert them was real and important, and it was firmly vested in the Robinsons. We therefore conclude that Chapter 149 significantly impacts a substantial interest the Robinsons have in a well-recognized common-law cause of action.

The legislative record is fairly clear that chapter 149 was enacted to help only Crown and no one else. Crown itself has been unable to identify to us any other company affected by Chapter 149. There is evidence that Crown has about 1,000 employees in Texas and about the same number of former employees on retirement, and that it operates three facilities here. Crown asserts that it continues to be sued on asbestos claims in Texas, but the record is silent concerning the number of those claims or the amount of Crown's probable exposure.The Legislature made no findings to justify Chapter 149. Even the statement by its principal House sponsor fails to show how the legislation serves a substantial public interest. No doubt Texas will benefit from reducing the liability of an employer and investor in the State, but the extent of that benefit is unclear on this record.

For these reasons, we hold that Chapter 149, as applied to the Robinsons' common-law claims, violated article I, section 16 of the Texas Constitution. The court of appeals' judgment is reversed and the case is remanded to the trial court for further proceedings.

CHARLCIE PINK, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF VERYL L. PINK, Appellant v. GOODYEAR TIRE & RUBBER COMPANY AND TEXACO REFINING & MARKETING, INC., Appellees

NO. 09-09-00241-CV
COURT OF APPEALS OF TEXAS, NINTH DISTRICT, BEAUMONT
2010 Tex. App. LEXIS 7461
April 8, 2010, Submitted
September 9, 2010, Opinion Delivered

Facts: Appellant widow challenged a decision of the 172nd District Court, Jefferson County (Texas), which granted appellee company no-evidence summary judgment under Tex. R. Civ. P. 166a(i) and granted a take-nothing judgment in favor of appellee supplier in connection with the widow's claim that the decedent's exposure to benzene caused his renal cell carcinoma.

Alleging that his exposure to benzene while working at Goodyear Tire & Rubber Company caused renal cell carcinoma, Veryl L. Pink and his wife Charlcie Pink sued Goodyear and a number of product suppliers, including Texaco Refining & Marketing, Inc. After Veryl's death, Charlcie Pink maintained the lawsuit. The lawsuit contended that the decedent's exposure to benzene while working for the company caused his renal cell carcinoma. The trial court granted summary judgment to the company and entered a take-nothing judgment for the supplier.

Holding: The court affirmed as to the supplier, reversed as to the company, and remanded. The company owed a decedent a duty to use ordinary care in providing a safe workplace, for purposes of Tex. Lab. Code Ann. § 411.103 (2006). The treating oncologist's report referenced materials he consulted. The court could not say that the opinion concerning etiology was conclusory. The court was not to consider the company's reliability objections as implicitly sustained by the trial court. The necessary process missing was a hearing under Tex. R. Evid. 104(a). Without an express ruling that the oncologist's causation opinion was unreliable, however, the treating oncologist's affidavit remained part of the proof and provided some evidence to defeat the no-evidence motion. Reversal as to the company was required.

Analysis: Pink contends the trial court erred in rendering a final judgment in favor of Texaco, because Texaco did not join in any of the motions for summary judgment. Texaco did not file an answer in the trial court to Pink's petition. Pink did not file a non-suit of the claims against Texaco. After the trial court granted several summary judgments in favor of some defendants and signed an order of non-suit as to other defendants, Pink requested that the trial court sign a final appealable judgment disposing of all the claims; Pink did not request a severance of the claims against Texaco or a default judgment against Texaco. Pink did not complain in the trial court of the judgment disposing of the claims against Texaco. Having voluntarily discontinued the lawsuit against Texaco in the trial court, Pink may not complain of that disposition for the first time on appeal.

The parties dispute what evidence the trial court considered in ruling on Goodyear's motion for summary judgment. Pink filed a response to the motion, and then supplemented the response less than seven days before the summary judgment hearing. Goodyear objected to the late filing, and on appeal argues that the late-filed evidence cannot be considered as part of the summary judgment record. Unless the order indicates that the trial court granted leave, an appellate court generally will presume the trial court did not consider untimely summary judgment evidence. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996) (citing *INA of Tex. v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985)). The interlocutory order granting summary judgment for Goodyear does not indicate whether the trial court considered the late response, but the final judgment states that the trial court considered "all of the evidence on file" when it granted the summary judgment. In addition, the transmittal letter to the trial court drafted by Pink's counsel of record states that the proposed final judgment "makes clear what evidence was considered[]" by stating that "in granting Defendants' motions for summary judgment and in denying plaintiffs' motions for new trial, the Court considered all of the evidence on file at the time of the granting of the summary judgments." It is apparent from the judgment that the trial court considered the supplemental response in rendering judgment. Accordingly, for purposes of appellate review, the summary judgment record includes the affidavit of Dr. Mahesh Kanojia (Pink's treating oncologist) and the deposition testimony of Pink's co-worker, Hamilton Cooper.

Goodyear's motion for summary judgment asserted there was no evidence of a duty or breach of a duty. The summary judgment motion acknowledged that Veryl Pink was a Goodyear employee from approximately 1963 to 1997. He died in 2005.

Pink attempted to raise an issue of material fact regarding gross negligent breach of the duty owed by Goodyear through deposition testimony that indicated: (1) in the 1960s and early 1970s Goodyear employees, including Veryl Pink, washed their hands in benzene, a carcinogen; (2) Goodyear supervisors were aware of the practice and did not stop it; (3) Goodyear was aware of benzene's hazards; and (4) a Goodyear supervisor observing this practice did not provide a warning regarding the hazards of benzene or regarding the failure to use respirators around benzene. [3] In this review, we do not decide whether this testimony is credible. Rather, we must assume in this summary judgment review that the testimony is true, view the testimony in a light most favorable to the nonmovant, and indulge every reasonable inference in favor of the nonmovant. *See Nixon*, 690 S.W.2d at 549. Under the applicable review standard, we cannot conclude on this record that Pink produced legally insufficient evidence to support a gross negligence claim.

The motion for summary judgment also asserted there was no evidence of proximate cause. Goodyear maintains Pink produced no evidence that the benzene exposure could cause or did in fact cause Veryl Pink's cancer. Pink argues Dr. Mahesh Kanojia's affidavit, along with the co-worker's testimony of the use of benzene, is some evidence that the cancer was caused by the exposure to benzene at Goodyear.

In his affidavit, Dr. Kanojia states his opinion that:

> Based upon reasonable medical probability it is my opinion that the cause of Mr. Pink's renal cell carcinoma was exposure to chemicals, more than likely benzene. In rendering this opinion I have reviewed Mr. Pink's medical records, the deposition testimony of Mr. Pink and three of [*12] his co-workers, the deposition of Dr. Radelat, and scientific literature.
>
> I was out of town the weeks of January 12, 2009 and January 19, 2009 and unavailable to provide an affidavit to Plaintiff's counsel.

While the etiology of a disease is often significant to a clinician's care of a patient, as well as to public health issues, and while a clinician may have training and experience in the study of cancer and its etiology, the clinician may nevertheless lack the expertise necessary to present a causation opinion related to a toxic chemical exposure. Goodyear has not challenged the qualifications of the treating oncologist to express an opinion on the cause of the cancer, however, and considering the evidence of his education, training, experience, and area of expertise, we consider as true for purposes of this appeal the assertion that Dr. Kanojia has the expertise to determine whether the benzene exposure at Goodyear caused the cancer.

The Texas Supreme Court has explained that when testimony is challenged as being non-probative on its face, or as conclusory, "there is no need to go beyond the face of the record to test its reliability." Dr. Kanojia's report references the materials he consulted. Goodyear made no complaint in the trial court or on appeal about the lack of discovery responses from plaintiff. *See* TEX. R. CIV. P. 194.2(f)(4), 195. Although the oncologist's affidavit does not itself disclose the specific scientific literature the oncologist consulted, and does not identify what the literature states, the implicit assertion is that the scientific literature reviewed supports his opinion. Rule 705(a) of the Texas Rules of Evidence provides that an "expert may testify in terms of opinion or inference and give the expert's reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise." In this case, the trial court made no ruling requiring disclosure of the scientific literature or benzene exposure evidence on which the treating oncologist relied, and did not strike any of Pink's evidence.

We conclude an express ruling on Goodyear's *Robinson* objections to the methodology, technique, or foundational data was required to exclude as unreliable the treating oncologist's causation opinion. In a *Robinson* hearing, the party offering the expert's testimony has the burden to show the testimony is admissible, and "[i]n making its determination the court is not bound by the rules of evidence except those with respect to privileges." The summary judgment process is intended to dispose of "patently unmeritorious" claims when a full evidentiary hearing is unnecessary. *See City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d 671, 678 n.5 (Tex. 1979); *see also generally Kennedy v. Silas Mason Co*., 334 U.S. 249, 256-57, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948) (federal summary judgment procedure "salutary where issues are clear-cut and simple[.]"). The summary judgment procedure is not intended to deprive a party of a right to a full hearing on the merits of any real issue of fact. *See Gulbenkian v. Penn*, 151 Tex. 412, 252 S.W.2d 929, 931 (1952); *see also generally Sartor v. Arkansas Natural Gas Corp*., 321 U.S. 620, 627, 64 S.Ct. 724, 88 L.Ed. 967 (1944) (Summary judgment is appropriate "where it is quite clear what the truth is[.])". The process missing from this appellate record, and necessary in this

case, is a *Robinson* hearing. *See generally* TEX. R. EVID. 104(a). If the trial court decides the affidavit must be stricken because of unreliable foundational data, methodology, or technique, or for some other reason, the trial court may then decide whether to grant the no-evidence summary judgment, or "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." *See* TEX. R. CIV. P. 166a(g). Without an express ruling that the treating oncologist's causation opinion is unreliable, however, the treating oncologist's affidavit remains part of the summary judgment proof and provides some evidence to defeat the no-evidence motion for summary judgment on causation. *See Mitchell*, 109 S.W.3d at 842 [HN30] (objected-to evidence remains part of summary judgment proof without an order expressly sustaining the objection); *Cain v. Rust Indus. Cleaning Servs., Inc.*, 969 S.W.2d 464, 466 (Tex. App.--Texarkana 1998, pet. denied).

GEORGIA-PACIFIC CORPORATION, Appellant v. SUSAN ELAINE BOSTIC, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF TIMOTHY SHAWN BOSTIC, DECEASED; HELEN DONNAHOE; AND KYLE ANTHONY BOSTIC, Appellees

No. 05-08-01390-CV
COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS
2010 Tex. App. LEXIS 7072
August 26, 2010, Opinion Filed

Facts: In February 2003, Timothy Bostic's wife, son, father, and mother brought wrongful death claims and a survival action against Georgia-Pacific and numerous other entities alleging Timothy's death was caused by exposure to asbestos. At the time of trial, Georgia-Pacific was the sole remaining defendant, the other named defendants having settled or been dismissed. Appellees alleged Georgia-Pacific was negligent, strictly liable for a product marketing defect, and grossly negligent.

In 2005, Judge Sally Montgomery presided over the trial of this lawsuit in Dallas County Court at Law No. 3. After the jury verdict awarding appellees actual and punitive damages, Judge Montgomery ordered appellees to either elect a new trial on all issues or agree to remit a misallocated award of future lost wages and the award of punitive damages. Appellees elected a new trial. The lawsuit was tried for the second time before a jury in 2006. [1] The jury returned a verdict in favor of appellees, finding Georgia-Pacific seventy-five percent liable and Knox Glass, Inc., a non-party former employer of Timothy, twenty-five percent liable for Timothy's death. The jury awarded $ 7,554,907 in compensatory damages and $ 6,038,910 in punitive damages.

Georgia-Pacific filed a motion to recuse Judge Montgomery. Judge M. Kent Sims granted the motion to recuse, and the lawsuit was transferred to Judge Russell H. Roden, Dallas County Court at Law No. 1. In December 2006, the trial court granted Georgia-Pacific's motion for mistrial and ordered a new trial.

In January 2007, Judge D'Metria Benson became the presiding judge of Dallas County Court at Law No. 1. In February 2008, appellees filed a motion to vacate Judge Roden's order granting a new trial and for entry of judgment. In July 2008, Judge Benson granted appellees' motion to vacate the order for new trial and signed a judgment based on the jury's June 2006 verdict. In October 2008, Judge Benson signed the amended final judgment awarding appellees $ 6,784,135.32 in compensatory damages and $ 4,831,128.00 in punitive damages. Georgia-Pacific appealed.

Holding: Concluding there is legally insufficient evidence of causation, we reverse the trial court's judgment and render judgment that appellees take nothing on their claims against Georgia-Pacific. The court reversed the judgment and rendered judgment that appellees take nothing on their claims against the company.

Analysis: Appellees claimed that the company was negligent, strictly liable for a product marketing defect, and grossly negligent. The trial court awarded appellees damages, but the court reversed on appeal and rendered judgment that appellees take nothing. The company argued that there was insufficient evidence that the company's asbestos-containing joint compound caused the worker's mesothelioma. Appellees' expert could not opine that the worker would not have developed mesothelioma absent exposure to the company's joint compound. Because a plaintiff had to prove that a defendant's conduct was a cause in fact of the harm, appellees' evidence did not satisfy the required substantial factor causation elements for maintaining their suit. The court agreed that appellees did not establish substantial factor causation to the extent they improperly based their showing of specific causation on their expert's testimony that each and every exposure to asbestos caused or contributed to the worker's mesothelioma. There was insufficient evidence of the worker's frequent and regular exposure to the company's joint compound during the relevant time period.

The Texas Supreme Court has determined that an "each and every exposure" theory is legally insufficient to support a finding of causation. *Flores*, 232 S.W.3d at 773. We agree with Georgia-Pacific's assertion that appellees did not establish substantial-factor causation to the extent they improperly based their showing of specific causation on their expert's testimony and the testimony of Dr. Kronenberg that each and every exposure to asbestos caused or contributed to cause Timothy's mesothelioma.

The record does not contain "substantial" evidence of Timothy's frequent use of or exposure to Georgia-Pacific joint compound for the period 1967 to 1977 and does not establish Timothy's use of the joint compound "many times" over that period. In fact, the evidence regarding Timothy's exposure to asbestos-containing joint compound and the number of times it occurred during the period 1967 to 1977 belies an assertion of exposure occurring "many times" and belies the information contained in Timothy's work history sheets reviewed by Dr. Hammar.

As set forth in *Flores*, *Stephens*, and *Smith*, the "each and every exposure" theory and the theory that there is no level of asbestos exposure below which the potential to develop mesothelioma is not present have been rejected. In order to prove substantial factor causation, a plaintiff must not only show frequency, regularity, and proximity of exposure to the product, the plaintiff must also show reasonable quantitative evidence that the exposure increased the risk of developing the asbestos-related injury. *Flores*, 232 S.W.3d at 769-72; *Smith*, 307 S.W.3d at 833; *Stephens*, 239 S.W.3d at 312. "Because most chemically induced adverse health effects clearly demonstrate 'thresholds,' there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of 'causation' can be inferred." *Flores*, 232 S.W.3d at 773 (quoting David L. Eaton, *Scientific Judgment and Toxic Torts-A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & POL'Y 5, 39 (2003)). Thus, the evidence had to not only show Timothy's exposure to Georgia-Pacific asbestos-containing product on a frequent and regular basis, but also that the exposure was in sufficient amounts to increase his risk of developing mesothelioma.

UOP, L.L.C. F/K/A UNIVERSAL OIL PRODUCTS, Appellant v. SHANDA KOZAK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF WALTER SCIFRES, DECEASED, AND KEITH SCIFRES, Appellees; SHANDA KOZAK, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF WALTER SCIFRES, DECEASED, AND KEITH SCIFRES, Appellants v. UOP, L.L.C. F/K/A UNIVERSAL OIL PRODUCTS, Appellee

NO. 01-08-00896-CV
COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON
2010 Tex. App. LEXIS 3876
May 20, 2010, Opinion Issued

Facts: Walter Scifres worked at the Sun Oil refinery in Duncan, Oklahoma for several decades. The Kozak Plaintiffs alleged that UOP designed the Sun Oil refinery and acted afterwards as a general contractor at the refinery facility. In 2005, Walter died of mesothelioma, a form of cancer usually linked to asbestos exposure. Two years after Walter's death, the Kozak Plaintiffs, many of whom were his heirs, filed suit against UOP and another defendant who is not a party to this appeal under a variety of theories. Their first amended petition, the "live" pleading at the time of the dismissal ruling, asserted some allegations against UOP, some against the other defendant, and some against both defendants.

In the section of the first amended petition relating exclusively to UOP, the Kozak Plaintiffs claimed that UOP had "acted as an engineering design service provider [and] acted as a general contractor during construction by handling the bid process, evaluating the bids and communicating with the bid winner." The petition then alleged a claim against UOP for the failure to warn of the dangers of asbestos, in UOP's capacities both as designer and general contractor. The specifics of this claim will be set out further below. The petition also asserted claims against both defendants for gross negligence, fraud, conspiracy, and loss of consortium. The claimants did not procure a certificate of merit, and argued that they should be excused from the requirement because the facility in question no longer existed.

Appellant company and appellees, claimants, challenged the motion to dismiss entered by the 11th District Court, Harris County, Texas, rendering judgment on all of the claims asserted by the claimants against the company except for a claim based on the company's alleged failure to warn of the dangers of asbestos. The company argued that the trial court abused its discretion by not dismissing the remaining failure-to-warn claim.

Holding: The appellate court ruled that the failure-to-warn claim, whether alleged against the company in its capacity as a designer or general contractor, was a claim for damages arising out of the provision of professional services by a licensed or registered professional engineer within the meaning of former Tex. Civ. Prac. & Rem. Code Ann. §150.002(a). The alleged source of the company's knowledge concerning asbestos was the same regardless of the capacity in which it

was sued. Also, the failure-to-warn claim alleged against the company in either capacity sounded in negligence. The order was reversed to the extent that it denied the company's motion to dismiss the failure-to-warn claim against the company, the order was affirmed in all other respects, and the case was remanded with instructions for the trial court to dismiss the referenced claim.

Analysis: Former section 150.002(a) requires a certificate of merit only in actions or arbitration proceedings "for damages arising out of the provision of professional services by a licensed or registered professional . . . ." Act of May 12, 2005, 79th Leg., R.S., ch. 189, § 2, 2005 Tex. Gen. Laws 348, 348; Act of May 18, 2005, 79th Leg., R.S., ch. 208, § 2, 2005 Tex. Gen. Laws 369, 370. The Occupation Code defines the practice of engineering as "the performance of . . . any public or private service or creative work, the adequate performance of which requires engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service or creative work." TEX. OCC. CODE ANN. § 1001.003(b) (Vernon Supp. 2009). The practice of engineering includes, among other things, design of engineering works or systems; engineering for construction of real property; engineering for preparation of operating or maintenance manuals; and Aany other professional service necessary for the planning, progress, or completion of an engineering service." *Id*. § 1001.003(c). Based on the definitions provided in the Occupation Code, and the plain language of former section 150.002(a), a claim for damages asserted against a professional engineer arises out of the provision of professional services (and thus requires a certificate of merit) if the claim implicates the engineer's education, training, and experience in applying special knowledge or judgment. *See Gomez v. STFG, Inc*., No. 04-07-00223-CV, 2007 Tex. App. LEXIS 7860, 2007 WL 2846419, at *3 (Tex. App.--San Antonio Oct. 3, 2007, no pet.) (memo. op.) (holding that claims for tortious interference, conspiracy, breach of contract, wrongful termination, and breach of fiduciary duty, loyalty, and good faith and fair dealing did not require certificate of merit because they did not "implicate a professional engineer's education, training, and experience in applying special knowledge or judgment."). Conversely, "if a plaintiff's claim for damages does not implicate the special knowledge and training of [the subject professional], it cannot be a claim for damages arising out of the provision of professional services." *Williams*, 315 S.W.3d 102, 2010 Tex. App. LEXIS 1411, 2010 WL 670584, at *4.

The first amended petition thus alleged two categories of claims against UOP: (1) those asserted against it in capacity as designer, and (2) those asserted against it in its capacity as a general contractor. In both of these capacities, UOP was sued for failure to warn of the dangers of asbestos-containing equipment, materials, or machinery. The alleged source of UOP's knowledge concerning asbestos--the engineering expertise that allowed it to design the refinery--was thus the same regardless of the capacity in which UOP was sued.

IN RE VALVOLINE COMPANY, A DIVISION OF ASHLAND, INC.

NO. 01-10-00208-CV
COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON
2010 Tex. App. LEXIS 3696
May 14, 2010, Opinion Issued

Facts: Robert Russell ("Robert") worked in automotive service stations from 1955 until 1985. Russell developed acute myeloid leukemia and died in 2005. Mr. Russell's wife, Gloria Russell ("Gloria"), in her capacity as representative of Robert's estate, filed suit alleging that Robert developed leukemia as a result of exposure to benzene contained in various products Robert had used during his employment. Gloria sued Ashland and a number of other companies. She asserted number of legal theories, including products liability. Gloria alleged that Ashland and the other defendant companies had manufactured and supplied the benzene-containing products that caused Robert's leukemia.

In answering Ashland's interrogatories, Gloria asserted that Robert had used the following products manufactured by Ashland during his employment from 1955 to 1985: Valvoline carburetor and choke cleaner, Valvoline engine treatment, and Valvoline fuel system cleaner. Gloria also sent interrogatories and requests for production to Ashland. Gloria's First Amended Interrogatories and Requests for Production to Ashland contained 19 interrogatories and 16 requests for production. Ashland answered the first interrogatory without objection, but objected to the remaining interrogatories and requests for production.

Gloria filed a motion to compel Ashland to answer the discovery. Ashland filed a response to the motion. As it had in response to the discovery requests, Ashland reiterated its objections that the discovery requests are "vague and ambiguous, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence."

The trial court conducted a hearing on the motion to compel. At the hearing's conclusion, the trial court overruled Ashland's objections and granted Gloria's motion to compel. The written order signed by the trial judge required Ashland "to give full and complete answers to the foregoing interrogatories and requests for production without objection responsive to Plaintiff's First Amended Interrogatories and Requests for Production . . . ." In its petition for mandamus, Ashland requests that we order the trial court to vacate the order compelling discovery.

Relator manufacturer sought mandamus relief from an order of respondent, the judge of the 11th District Court of Harris County (Texas), which compelled the manufacturer to answer real party in interest claimant's interrogatories and requests for production in a products liability suit.

Holding: The court held that the discovery sought did not comply with the relevance requirement of Tex. R. Civ. P. 192.3(a), (b). Some of the interrogatories and requests were

overly broad because they included products that had not been identified by the claimant as products to which the decedent had been exposed. Others were overly broad because they exceeded the alleged period of exposure by many years. A request for discovery regarding benzene-related lawsuits was overly broad because it was not limited to suits involving acute myelogenous leukemia. In addition, the trial court erred by requiring the manufacturer to further answer an interrogatory that it had adequately answered. The court conditionally granted mandamus relief and directed the trial court to vacate the discovery order.

Analysis: The supreme court held in *CSX Corp*. that an interrogatory requiring the defendant company to identify all safety personnel employed for a 30-year period was impermissibly broad. 124 S.W.3d at 153. The supreme court stated, "A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information." *Id*. We conclude that Gloria's discovery requests, which include the 25-year period since Robert's last alleged benzene exposure, are overly broad. The requests could be more narrowly tailored to exclude the period following Robert's claimed benzene exposure. It may be determined that, to some degree, the relevant dates for discovery purposes do exceed the date of Robert's last alleged benzene exposure, but the trial court has a duty to make an effort to impose reasonable discovery limits. *See TIG Insurance, Inc*., 172 S.W.3d at 167. To the extent that some information and documents might be relevant beyond the years of Robert's exposure, the time limits placed on the discovery must be limited in a manner that requests only information that is reasonably calculated to lead to admissible evidence. *See id*. Here, the discovery requests, which have no defined time limitation, could have been more narrowly tailored.

TOMMIE FAY DARDEN, HENRY DARDEN, RONALD DARDEN, KIM K. DARDEN, AND KLINT K. DARDEN, Appellants v. UNION CARBIDE CORPORATION, Appellee

NO. 14-08-00843-CV
COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON
2010 Tex. App. LEXIS 3340
May 6, 2010, Memorandum Opinion Filed

Facts: In 1989 Henry H. Darden and Tommie Fay Darden, alleging that Mr. Darden was injured as a result of being exposed to asbestos while employed by appellee, filed suit against numerous defendants. Some of the defendants in this litigation were members of the Center for Claims Resolution ("CCR"), a nonprofit consortium of twenty-one asbestos exposure defendants formed in 1988 to act as agent for its member companies in asbestos related litigation. Appellee was a member of the CCR from its inception through 2001, when the CCR stopped handling the defense of claims for its members. In 1990, a year after Henry H. Darden retired from his employment with appellee, the Dardens' attorney negotiated a payment from the CCR to the Dardens in settlement of their asbestos exposure lawsuit. While Union Carbide was not a party to the underlying asbestos exposure lawsuit, the CCR included Union Carbide as a party to the settlement and release (the "Release").

Following Mr. Darden's death, appellants filed suit against appellee asserting gross negligence claims and seeking to recover exemplary damages. Appellee answered the lawsuit and asserted release as an affirmative defense. In addition, appellee counterclaimed for indemnity. Appellee eventually moved for summary judgment on both its affirmative defense as well as its indemnity counterclaim. The trial court granted appellee's motion for summary judgment on both its affirmative defense of release and on its indemnity counterclaim. This appeal followed.

Holding: The court affirmed on appeal.

Analysis: The relatives raised various issues in support of their claim that the trial court erred in granting summary judgment. However, these issues were not new. In a separate appeal filed by the same attorneys who represented the relatives, the court addressed and rejected each argument made in this case. The court had also overruled case law on which the relatives relied. Thus, the court overruled the relatives' issues.

These issues are not new. Recently, in *Ross v. Union Carbide Corp*., an appeal filed by the same attorneys that currently represent appellants, we addressed, and rejected, each of the arguments made by appellants in this case. *Ross v. Union Carbide Corp*., 296 S.W.3d 206 (Tex. App.-Houston [14th Dist.] 2009, pet. filed). [2] In addition, [HN1] in *Ross*, we expressly overruled *Perez*, the primary case appellants' rely on to support their arguments on appeal. *Id*. at 214-16. Therefore, for the same reasons expressed in *Ross*, we overrule appellants' issues on appeal.

KING V. EI DUPONT DE NEMOURS & CO. ET AL.
MDL-875

Facts: In 1995, multiple plaintiffs filed suit in Jefferson County, Texas. The case was removed and transferred to the federal asbestos MDL in the Eastern District of Pennsylvania where each claim was severed into a separate action.

Following implementation of Chapter 90 of the Civil Practice & Remedies Code, two defendants moved to stay or dismiss the cases for failing to file medical reports establishing that they satisfy criteria for impairment and causation.

Holding: The Court granted dismissals finding that Chapter 90 constitutes a substantive legal rule that must be applied in a federal action governed by Texas law.

Analysis: The Court found no conflict between Chapter 90 and federal procedural rules. The court believed that a failure to apply Chapter 90 would result in cases escaping the law of Texas by movinf the case into a Federal court.

CARRIE RAMSEY V. BORG WARNER MORSE TEC. INC., ET AL

11th District Court (MDL)

Facts: Plaintiff's was previously married to a DuPont facility worker. Plaintiff laundered his work clothes. She was diagnosed with pleural mesothelioma in 2008.

Holding: Judge Mark Davidson denied summary judgment and determined that DuPont owed a duty to the spouse of one of its workers who developed mesothelioma.

Analysis: Judge Davidson based his ruling on findings that DuPont was aware of the dangers of asbestos by the early 1960s, DuPont knew of a link between small exposures to asbestos and cancer by 1966, and the workers exposure occurred following the time interval DuPont documents show they were aware of the dangers to its employees' families.