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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 two 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, the asbestos docket continues movement at a slow pace. Very few, if any, cases are moving from the pre-trial docket to the trial docket. In fact, only thirty cases (approximately) have been certified for trial since the inception of Chapter 90. Judge Joseph "Tad" Halbach, Jr. is now the presiding judge of the silica multi-district litigation, replacing Judge Tracy Christopher.

The asbestos docket appears to have stabilized. While the overall number of new case filings is down significantly from the pre-Chapter 90 level, Plaintiffs' firms are continuing to file new asbestos exposure cases in Texas. At the same time, these firms are also continuing to file suits in other, more friendly states.

Despite losing his bid for re-election in 2008, Judge Mark Davidson remains in his position as presiding judge of the asbestos multi-district litigation. Cases are being readied, certified for trial and actually being tried around the state.

Additionally, the effect 2007 ruling in *Borg-Warner v. Flores* (which heightened and accentuated the evidentiary requirements) appears to have been negated to a large degree. Plaintiffs have been successful recently in surviving summary judgment motions on *Borg-Warner* grounds, generally by introducing testimony of exposure frequency and duration to establish the exposure dose requirements. In effect, Plaintiffs are using the *Lohrman* factors (the pre *Borg-Warner* standard) for computation of figures for use in an alleged expert formulae which generally will meet the minimum dose requirements. While certainly open to attack by the defense, especially at trial, this approach allows Plaintiffs to overcome the summary judgment evidentiary standards to create a fact issue. As a result, fewer cases are dismissed in pre-trial and the docket continues to progress.

However, in February 2010, the Fort Worth Court of Appeals issued an opinion in *Smith v. Kelly-Moore Paint Co.*, 2010 Tex. App. LEXIS 1367, that may affect the practical application of *Borg-Warner*. Therein, the Court ruled that without scientific evidence of the minimum exposure level leading to an increased risk of development of mesothelioma from exposure to chrysotile-only asbestos, such as that contained in the allegedly offending company's joint compound, an expert's opinion lacked the factual and scientific foundation required by case law and was insufficient to raise a fact issue as to specific causation. In short, expert opinion must be based upon similarly situated products or exposure. As yet, the multi-district court has not considered any case to which this ruling may apply so its effect, if any, is unknown.

In Summer/Fall 2010, the Multi-District Litigation courts for both asbestos and silica are required to submit their respective first accountings of the state of litigation in the era of Chapter 90. Essentially, the reports will be a report card of the state of the litigation, indicating the

number of filings, their status, number of cases certified for trial, and similar information. While, again, the asbestos docket seems to have developed a working and workable system, the silica docket has not and has, in fact, only certified approximately thirty cases for trial in the past five years. Rather than improving and streamlining the docket, silica litigation has been effectively precluded. This effect has reportedly been noted in Austin and, consequently, the Legislature may make some changes to Chapter 90 to address this failing to permit silica litigation to develop along the lines of asbestos litigation.

On the legislative front, as the state legislature will not reconvene until January 2011, no further significant action has taken place concerning modification of the Texas toxic tort litigation. While Senator Duncan unsuccessfully introduced legislation in 2009, it is unknown as yet what additional, if any, legislative efforts will be undertaken in 2011.

Notwithstanding Chapter 90, in the past year, Plaintiffs have had success in various toxic tort cases:

1. *Torrez v. Union Carbide Corp.* resulted in a $3 million verdict in Cameron County (asbestos).
2. *Puckett v. Baker Hughes Inc.* resulted in a $1.2 million verdict in Brazoria County (asbestos).
3. A chemical exposure case tried in the Southern District of Texas, *Garner v. BP Products North America Inc.*, resulted in a $100 million verdict.
4. *Klein v. O'Neal Inc.* resulted in a $110 million settlement (pharmaceutical) in Federal court for the Northern District of Texas.

However, Defendants also won a defense verdict: *Lira v. Sun Valley Dusting Co.*, a chemical exposure case in Cameron County.

As a result of these events, toxic tort litigation in Texas continues to remain a shell of its former self. However, at least as to asbestos practice, litigation appears to be at a manageable and workable level and potentially profitable for Plaintiffs' attorneys. Conversely, silica practice remains essentially dead although some effort may be undertaken to address its status.

On related fronts, two other areas of concern continue in the toxic area. First, welding rod litigation is continuing to remain at least somewhat feasible. On October 7, 2009, in *Cooley v. Lincoln*, Plaintiff won a $6.25 million verdict in the Welding Rod Federal Multi-District Litigation. The jury apportioned $1.25 million in damages for failure to provide adequate warnings and an additional $5 million in punitive damages against Defendants Lincoln Electric, Hobart Brothers, ESAB, and BOC Group. As of late 2009, it has been reported that Defendants have won about 85% of the welding rod trials. Second, with the recent oil spill in the Gulf of Mexico, various claims with environmental implications (personal injury, property and regulatory) will likely arise. As a result, the continuing evolution of toxic tort practice in Texas continues.

WILHITE V. ALCOA

Cause No. 2008-15687

MULTIDISTRICT ASBESTOS LITIGATION

July 23, 2009, Opinion Delivered

ISSUE: Alcoa presented a Motion for Rehearing in the denial by the MDL Court of a summary judgment motion based upon the "Exclusive Remedy Provision" of the *Texas Workers' Compensation Act*.

FACTS: Plaintiff, who was still alive but suffering from mesothelioma, brought suit against Alcoa for alleged asbestos exposure occurring while he was an employee alleging that Alcoa intentionally caused him injury. Alcoa claimed that his suit was barred by the "Exclusive Remedy Provision" of the *Texas Workers' Compensation Act* and moved for summary judgment. Judge Davidson denied the summary judgment motion.

HOLDING: Judge Davidson found that the extent of Alcoa's knowledge through the 1940's and until the early-1960's regarding asbestos was that a link existed between asbestos exposure and asbestos-related diseases. The information regarding the link was not clear on how much asbestos exposure, if any, was considered safe. Alcoa's knowledge regarding the level of asbestos exposure was clear in 1972 when OSHA passed its initial nationwide standard. However, since Alcoa's medical director was on the OSHA advisory committee and aware of the OSHA regulations in 1968, it can be said that Alcoa had actual knowledge of what were safe asbestos exposure levels in 1968. That is, in 1968, Alcoa was substantially certain that exposure to asbestos caused asbestosis. He reaffirmed his exclusion based upon *Robinson* and its progeny of Plaintiffs' medical experts that Alcoa had pre-1968 knowledge. However, he limited that ruling to this case ("I would like to emphasize that this ruling is limited to this record. If there is peer reviewed literature on the subject of corporate governance, written by experts in the field of corporate governance, and if a qualified expert in that field were to offer testimony based on her/his expertise in conjunction with those studies, it could well create a fact question. No such literature was referred to in this case, and no such expert was offered."). He also ruled "that actual awareness of the substantial certainty of asbestosis does not create liability against a subscribing employer whose employee contracts mesothelioma" since the Texas Legislature made a policy decision in adopting Chapter 90 of the Texas Civil Practice and Remedies Code that asbestosis is not actionable unless it is accompanied by a numerical set of measured breathing disability.

Despite these findings, Judge Davidson did not dismiss the case. He granted it as to all conduct prior to the time Alcoa became aware of the causative link between asbestos exposure and Mesothelioma and denied without prejudice to consideration as to all exposures after that time. He opined that some summary judgment evidence existed that the Plaintiff was exposed to asbestos after the Defendant was aware of the risk of mesothelioma.

BEADLE V. AMATEK

Cause No. 2007-74,274

MULTIDISTRICT ASBESTOS LITIGATION

December 17, 2009, Opinion Delivered

ISSUE: Plaintiff presented a Motion for Rehearing of a Motion for Summary Judgment by two engineering defendants based upon the ten year statute of repose for construction and repairs.

FACTS: The opinion was sparse as to the underlying facts. However, it appears that Plaintiff claimed injury from alleged asbestos exposures occurring during construction or repairs to a facility and that more than ten years had elapsed since that exposure. Those defendants then moved for summary judgment which the Court granted.

HOLDING: Judge Davidson set aside the granting of the summary judgment. In so doing, he relied heavily on *White v. CBS Corp.*, 996 S.W.2d 920 (Tex. App. – Austin 1999) which denied that statute of repose to injuries from personal property prior to the time the personal property became affixed to the property which is the subject of the construction or repair. He ruled that this situation is an exception to the statute of repose.

IN RE UNION PACIFIC RAILROAD COMPANY, RELATOR

NO. 08-0740

SUPREME COURT OF TEXAS

294 S.W.3d 589; 2009 Tex. LEXIS 725; 52 Tex. Sup. J. 1273

September 25, 2009, Opinion Delivered

ISSUE: Whether a trial court abused its discretion when it compelled a rail transportation company to produce confidential "rate structures," which include formulas to determine shipping rates charged to customers.

FACTS: Relator railroad company, Union Pacific, collided with another train in Bexar County in 2004 after the Union Pacific train failed to stop at a signal. The Union Pacific train derailed, a fire resulted, and a loaded tank car was breached, resulting in the release of toxic chlorine gas. A number of nearby residents, including Kathleen Constanzo, claimed to have been injured due to inhalation of the gas. Constanzo sued Union Specific, alleging negligence and gross negligence. She claimed that Union Pacific should have positioned the chlorine car farther toward the read of the train and that hazardous material should not have been placed next to steel cars. During discovery, information about the railroad company's hazardous material rate structures was sought. Union Pacific argued that this information was protected by the trade secret privilege, and the company provided affidavits explaining why the information was valuable within the trade and the potential harm that could result from its disclosure.

HOLDING: The court held that the affidavits established that the rate structures were trade secrets. The court further held the plaintiff failed to demonstrate how the information is "necessary or essential to the fair adjudication of the case." *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 732 (Tex. 2003). Because the railroad company had admitted that it was financially capable of repositioning the railcars, the rates were not necessary to show that the railroad company could have chosen to place hazardous material cars in the back of the train. The rates also were not necessary to support an argument that the railroad company had recognized, yet disregarded, a higher duty with respect to hazardous materials. Restricting those who could view the rate structures did not ensure that ordering disclosure would not violate the trade secret privilege. The court conditionally granted the railroad company's petition for writ of mandamus and directed the trial court to vacate the challenged order.

IN RE E.I. DU PONT DE NEMOURS AND COMPANY, RELATORS

NO. 08-0625

SUPREME COURT OF TEXAS

289 S.W.3d 861; 2009 Tex. LEXIS 465; 52 Tex. Sup. J. 1097

July 3, 2009, Opinion Delivered

ISSUE: Whether the trial court abused its discretion by disregarding the jury verdict and granting a new trial without giving its reasons for doing so.

FACTS: Willis Whisnant's estate and beneficiaries (collectively, Whisnant) sued E.I. du Pont de Nemours and Company (DuPont) for wrongful death. Whisnant asserted that Willis was exposed to asbestos fibers while working for DuPont, which caused him to develop mesothelioma. After a five-week trial, the jury failed to find DuPont negligent and the trial judge entered a take nothing judgment. Whisnant filed a motion for new trial. The trial court granted Whisnant's motion for new trial but did not state a reason for doing so. DuPont sought, but was denied, a writ of mandamus from the court of appeals.

HOLDING: The court held that the trial court abused its discretion by granting a new trial without stating a reason for disregarding the jury verdict, and granting the new trial motion in any event. The court relied on *In re Columbia Medical Center of Las Colinas*, 290 S.W.3d 204, 2009 Tex. LEXIS 476 (Tex. 2009), where it was found that a trial court acted arbitrarily and abused its discretion by not specifically and in a reasonable manner setting out the reasons it disregarded a jury verdict and granted a new trial. It was further held that the relator did not have an adequate remedy by appeal. The court denied, without prejudice, any relief beyond directing the trial court to specify its reasons for granting a new trial.

IN THE ESTATE OF CARL J. HOELZER

NO. 09-09-00003-CV

COURT OF APPEALS OF TEXAS, NINTH DISTRICT,
BEAUMONT

2010 Tex. App. LEXIS 3140

March 1, 2010, Submitted
April 29, 2010, Opinion Delivered

ISSUES: Whether the trial court abused its discretion in proceeding with a removal hearing, and if the record included sufficient grounds to support the removal.

FACTS: Richard David Hoelzer challenged an order removing him as independent executor of the estate of Carl Hoelzer. Carl Hoelzer died in 1987. Carl's will named Lillian Hoelzer -- Carl's wife and Richard's stepmother -- as the independent executor and sole beneficiary of Carl's estate. The last paragraph of the will, above Carl's signature, commands that "no other action shall be had in the County Court in the administration of my estate than to prove and record this will and to return an inventory and appraisement of my estate and list of claims." Twenty-three years ago, the year of Carl's death, Lillian, individually and as independent executor of Carl's estate, filed an asbestos lawsuit in federal court in Beaumont. She settled with various defendants. Carl's children intervened in the lawsuit as wrongful death beneficiaries. Two claims against defendants in bankruptcy remain pending and are listed as property of Carl's estate.

Eighteen years ago, Carl's children filed a petition in probate court to remove Lillian as independent executor of Carl's estate. The petition alleged Lillian breached her fiduciary duty and embezzled estate proceeds. The trial court denied the petition. Finding the appellants lacked standing, this Court dismissed their appeal. Carl's children then filed suit against Lillian in Orange County District Court. They alleged Lillian breached her fiduciary duty by self-dealing, misapplying funds, embezzling funds, and committing gross misconduct. The district court granted summary judgment in favor of Lillian based on the defense of limitations, and this Court affirmed the judgment fourteen years ago.

Lillian died in 2007. In 2008, Richard was named the successor independent executor, as Carl's will provided. Shortly thereafter, Richard filed a verified claim against the estate in the amount of $150,000 on behalf of himself and his three siblings. The sworn claim requested reimbursement for funds Lillian received as a result of the 1987 asbestos litigation but "never distributed" to Carl's children. Richard "allowed and approved" as a result of the claim as independent executor.

Clyde Hebert, Lillian's son and appellee here, then filed a motion to remove and disqualify Richard as independent executor of Carl's estate. The motion asserted that Richard filed the

verified claim against the estate for his personal benefit. The motion stated that Richard's allowance and approval of the claim "constitute sufficient grounds to support the belief that once the expected asbestos bankruptcy settlements are paid to the estate, [Richard] will simply pay the claimants of the [verified claim] the full amount of the asbestos settlement." The motion argues this payment would be a misapplication of estate property because the courts have already determined that the claimants are not creditors of the estate and the claim is time-barred. According to the motion, Richard's interests are adverse to the estate and his actions constitute "gross misconduct and mismanagement." The motion also asserted that Richard was "about to misapply estate assets," and had failed to timely file an inventory. After a hearing, the court concluded Richard was unsuitable to serve as successor executor and removed him as independent executor of Carl's estate.

Richard raised three issues on appeal. First, he argues the trial court committed reversible error and denied him due process because he had not received forty-five days' notice of the hearing. Second, he maintains the trial court committed reversible error and denied him due process by overruling his verified motion for continuance. Third, he asserts there was no evidence, or alternatively insufficient evidence, to warrant removal under section 149C of the Texas Probate Code.

HOLDING: The court held that the trial court did not abuse its discretion in proceeding with the removal hearing. Because the Texas Probate Code had a specific provision for notice of a removal hearing that did not require forty-five days' notice to the independent executor, Tex. R. Civ. P. 245 did not apply to the removal proceeding. The executor was served with the motion by "personal service" as that term was used in Tex. Prob. Code Ann. §§ 149C (Supp. 2009) and 33(f)(1) (2003) by timely service on his attorney of record. The executor did not establish that the trial court clearly abused its discretion in denying his motion for continuance requesting time for discovery and presented on the day of the removal hearing. The record included sufficient grounds to support the executor's removal. The trial court found sufficient grounds under the removal statute as well as the disqualification statute to replace the executor. The trial court could reasonably have concluded that the process the executor followed as independent executor to pursue his contested adverse claim against the estate was sufficient grounds for the executor's removal under § 149C(a)(2).

GREGORY A. BEAVERS, ET AL., Appellants, v. ALUMINUM COMPANY OF AMERICA, ET AL., Appellees.

NUMBER 13-08-00214-CV

COURT OF APPEALS OF TEXAS, THIRTEENTH DISTRICT, CORPUS CHRISTI - EDINBURG

2010 Tex. App. LEXIS 1775

March 11, 2010, Delivered
March 11, 2010, Filed

ISSUE: Whether the trial court erred in granting summary judgment in favor of appellees.

FACTS: At the summary judgment hearing, finding all of the former employees' summary judgment evidence to be inadmissible, the trial court sustained appellees' objections. The former employees asserted asbestos-related claims against product manufacturers, premises owners, equipment manufacturers, and contractors. The trial court signed and entered a final judgment sustaining appellees' objections and motions to strike the former employees' responses and exhibits, and ordered all of the former employees' summary judgment evidence stricken. The former employees asserted that the trial court erred when it granted summary judgment. The former employees asserted that there was sufficient evidence in the summary judgment record to demonstrate the existence of a genuine issue of material fact, thus, summary judgment was not proper.

HOLDING: The appellate court determined the former employees did not assert that the trial court erred by striking the evidence, this they had waived any right to complain about the exclusion. Without the stricken evidence, the former employees had no summary judgment evidence before the appellate court, and they had failed to produce more than a scintilla of evidence establishing the existence of any element of their claims. The no-evidence summary judgment was affirmed.

CENTOCOR, INC., Appellant, v. PATRICIA HAMILTON, THOMAS HAMILTON, AND MICHAEL G. BULLEN, M.D., Appellees.

NUMBERS 13-07-00301-CV

COURT OF APPEALS OF TEXAS, THIRTEENTH DISTRICT, CORPUS CHRISTI - EDINBURG

2010 Tex. App. LEXIS 1623

March 4, 2010, Delivered
March 4, 2010, Filed

ISSUE: Whether the defendant drug manufacturer, Centocor, was shielded from liability under the learned intermediary doctrine and if an award of damages for future pain and suffering was improper.

FACTS: Centocor produced a drug, Remicade, to treat the symptoms of Crohn's disease and marketed it directly to consumers. After seeing the advertisements, the consumer, Patricia and Thomas Hamilton, spoke with her doctor about the drug, who agreed to prescribe the medication for her. As a result of taking the drug, the consumer developed lupus-like symptoms. She filed suit against the drug manufacturer and received a favorable judgment. Patricia was shown a video that she alleged over-emphasized the benefits of Remicade but intentionally omitted warnings about the adverse side-effects she suffered. A jury found in favor of the Hamiltons on all issues presented. The trial court entered judgment on the jury's verdict in Patricia's favor for $4,687,461.70 in actual and punitive damages, and in Thomas's favor for $120,833.71 in actual and punitive damages, based on the jury's finding of fraud.

HOLDING: The court held that, where the drug manufacturer marketed its product directly to consumers through advertisements that were misleading and failed to accurately disclose possible side effects, the learned intermediary doctrine did not shield it from liability, and the drug manufacturer could not rely on its adequate warnings to physicians to satisfy its duty to warn the ultimate consumers. However, because the consumer ceased having symptoms when she discontinued using the drug and there was no expert testimony establishing that the symptoms could return, future damages were improperly awarded because a claim of future pain, suffering, or mental anguish could not be premised on a fear that one might suffer an adverse event in the future that was not presently manifested. The court reversed the trial court's award of future pain and mental anguish damages, modified the judgment to reflect this change, and affirmed as modified.

ROSEMARY SMITH, BRADY SMITH, AND DONNA HUBBARD, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF DORMAN SMITH, DECEASED, APPELLANTS v. KELLY-MOORE PAINT COMPANY, INC., APPELLEE

NO. 2-08-198-CV

COURT OF APPEALS OF TEXAS, SECOND DISTRICT, FORT WORTH

2010 Tex. App. LEXIS 1367

February 25, 2010, Delivered

ISSUE: Whether the trial court erred by granting a no-evidence summary judgment.

FACTS: Dorman began working in the construction business, specifically as a self-employed drywaller finisher using joint compound, around 1955, and he performed the same type of work through the mid 1980s. Doctors eventually diagnosed him with mesothelioma in early 2005. As a result, the Smiths sued several defendants, including Kelly-Moore, in Tarrant County, claiming that exposure to the asbestos in those defendants' joint compound products proximately caused Dorman's mesothelioma. Dorman died after filing suit, on December 9, 2005. Ultimately, the trial court granted the company summary judgment.

HOLDING: The court held that a plaintiff in a mesothelioma suit that he claimed was caused by an asbestos-containing product had prove the elements set forth in case law's substantial factor causation test. There was at least a fact question as to how often the worker used, and was exposed to, the company's joint compound as opposed to other companies' joint compounds. However, without scientific evidence of the minimum exposure level leading to an increased risk of development of mesothelioma from exposure to chrysotile-only asbestos, such as that contained in the company's joint compound, an expert's opinion lacked the factual and scientific foundation required by case law and was insufficient to raise a fact issue as to specific causation. The court affirmed the trial court’s judgment.

LANCER INSURANCE COMPANY, Appellant v. Oscar PEREZ, II, Daniel Calhoun, Adriana Riojas, Juan Gabriel Gonzalez, Marisol Salazar, Raul Guerra, Jr., Maria E. Guerra, and John A. Vela, Jr., Appellees

No. 04-08-00839-CV

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

2009 Tex. App. LEXIS 9693

December 23, 2009, Delivered
December 23, 2009, Filed

ISSUE: Whether the bus driver's active tuberculosis infection resulted from the use of the bus itself, as required for coverage under the insurer's policy.

FACTS: The Alice Independent School District contracted with Garcia Holiday Tours to transport the students on one of its buses. The bus driver was Raul Garcia, an employee of Garcia Holiday Tours. Unknown to Raul Garcia, he was infected with active tuberculosis. During the trip, several students observed Raul Garcia coughing on the bus. After the trip, Raul Garcia was diagnosed with active tuberculosis and all the passengers were subsequently tested. While some of the passengers' tests were negative, several of the passengers tested positive for latent tuberculosis. The passengers who tested positive brought suit against Raul Garcia and Garcia Holiday Tours, asserting they were negligently exposed to the tuberculosis while on the trip and contracted it as a result of being in the closed environment of the bus. Upon being sued by the passengers, Garcia Holiday Tours made a written demand on Lancer for it to defend pursuant to the business automobile insurance policy Lancer had issued covering the bus. Lancer denied it had a duty to defend, and the Passengers' Suit proceeded to trial. The jury found in favor of the passengers, and they were awarded a judgment for $5.25 million in total damages against Raul Garcia and Garcia Holiday Tours. The company then sought a declaration that the insurer had to defend and indemnify them. The trial court granted the passengers and other passenger summary judgment and denied the insurer's same motion.

HOLDING: The court concluded that there was conflicting evidence in the record as to whether the passengers were infected with tuberculosis while inside the bus's natural territorial limits or whether they were infected during contact with the driver outside the bus. Thus, the passengers were not entitled to summary judgment. Because the other passenger had no justiciable interest in the coverage action, the judgment in his favor could not stand. The motion for rehearing was denied. The court withdrew its prior opinion and judgment and substituted this one. The court reversed the summary judgment in favor of the passengers and remanded. The other passenger lacked standing, and thus the court reversed the summary judgment in his favor and rendered judgment dismissing his claim for want of jurisdiction.

MARIA LOURDES RODRIGUEZ, Appellant, v. DUNCAN M. CROWELL, Appellee.

No. 08-07-00269-CV

COURT OF APPEALS OF TEXAS, EIGHTH DISTRICT, EL PASO

2009 Tex. App. LEXIS 9705

December 22, 2009, Decided

ISSUE: Whether appellant's claim was barred by limitations, and whether the trial court erred in denying Rodriguez's motion for leave to amend her pleadings.

FACTS: Maria Rodriguez began working at the office building in question around 1995. A year or two later, she started experiencing shortness of breath and a general feeling of malaise. The claimant began to notice that her health condition improved whenever she left the building. The claimant admittedly noticed pigeons all around her office building, including the break area. Over the years, there was a consistent presence of dust and debris filtering down from the ceiling of her workplace, and she was aware that co-workers were complaining about air quality in the building and that e-mails were circulated concerning air quality issues. In March 2002, the claimant received a specific e-mail from her employer regarding employment health concerns and workers' compensation procedures. The claimant filed suit in February 2005. Claimant argued that reasonable minds could differ about when she knew or should have known through the exercise of reasonable diligence about the likely causal connection between her symptoms and her occupational exposure.

HOLDING: The court held that the claim was barred by limitations, because the claimant waited more than two years after her cause of action accrued. The court viewed the evidence in Rodriguez's favor, and the record established that her symptoms manifested to a degree and for a duration that would put a reasonable person on notice that she had been injured and that she knew or should have known that the injury was likely work-related. The evidence demonstrated that the claimant had more than a subjective belief, and had both reason to believe and objective verification that she had been injured no later than March 2002. The court relied on *Greenhalgh v. Service Lloyds Ins. Co.,* 787 S.W.2d 938, 939 (Tex. 1990) to rule that a court has no discretion to refuse an amendment unless the opposing party presents evidence of surprise or prejudice, or the amendment asserts a new cause of action or defense, and thus is prejudicial on its face, and the opposing party objects to the amendment.

UNION CARBIDE CORPORATION AND HEXION SPECIALTY CHEMICALS, INC., Appellants v. OLIVER D. SMITH AND PEGGY ANN BOWEN SMITH, Appellees

NO. 01-08-00641-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

2009 Tex. App. LEXIS 7723

October 1, 2009, Opinion Issued

ISSUE: Whether Tex. Civ. Prac. & Rem. Code Ann. § 95.003(1) and Tex. Lab. Code Ann. § 408.001(a) bars a suit by a former employee against a landowner and employer, even if ownership is applied retroactively.

FACTS: While working for the employer's predecessor in interest, the employee was exposed to asbestos-containing products at the property owner's facility and subsequently developed mesothelioma. The employer was an independent contractor. There was some evidence that the property owner supplied and specified the use of some asbestos-containing products, that it provided the employee with asbestos gaskets, and that it conducted safety meetings. The 122nd District Court, Galveston County (Texas), held a jury trial and awarded damages to appellees. The trial court denied motions for judgment notwithstanding the verdict.

HOLDING: The court concluded that the property owner could not be held liable under Tex. Civ. Prac. & Rem. Code Ann. § 95.003(1) (Supp. 2008) because there was no evidence that the property owner exercised or retained any control over the manner in which the employee's work was performed. The court further held that workers' compensation exclusivity under Tex. Lab. Code Ann. § 408.001(a) (2006) protected the employer. Although the injuries occurred prior to a merger in which the employer acquired the company where the employee had been working, the court declined to apply the dual-persona doctrine to avoid the exclusive remedy provision, finding no such legislative intent in Tex. Lab. Code Ann. § 417.004 (2006) or elsewhere. The court reversed the trial court's judgment and rendered a take nothing judgment in favor of the property owner and the employer.

BOB CHAMBERS, et al., Appellants v. JOHN O'QUINN, JOHN M. O'QUINN, P.C., and JOHN M. O'QUINN D/B/A O'QUINN & LAMINACK, Appellees

NO. 01-04-01029-CV
COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON
305 S.W.3d 141; 2009 Tex. App. LEXIS 7702
October 1, 2009, Opinion Issued

ISSUE: Whether legal malpractice claims for personal injury are claims for personal injury pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 171.002.

FACTS: The clients sued appellees for malpractice in connection with the representation and settlement of toxic tort claims. Appellees filed a motion to compel arbitration, which was granted. The trial court dismissed the case for want of prosecution because no final arbitration hearing had commenced by a certain date. The trial court also denied a motion for reinstatement or a new trial.

HOLDING: The court affirmed. The clients asked the court to hold that in a legal malpractice case, the test for deciding whether Tex. Civ. Prac. & Rem. Code Ann. § 171.002 applied was whether the underlying case involved personal injury, but the court declined. The court adopted the majority view that legal malpractice claims were not claims for personal injury, and arbitration agreements were enforceable in the context of a legal malpractice suit. Because the parties' contract did not relate to interstate commerce and was executed between Texas residents in Texas to be performed in Texas, the Texas Arbitration Act controlled. The arbitration clause did not violate Tex. Disciplinary R. Prof. Conduct 1.08(g), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (year) (Tex. State Bar R. art. X, sec. 9).

IN RE EDWARD AND MARGIE WILHITE, Relators

NO. 01-09-00387-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON
298 S.W.3d 754; 2009 Tex. App. LEXIS 7745

September 25, 2009, Opinion Issued
Motion denied by In re Wilhite, 2009 Tex. LEXIS 1027 (Tex., Dec. 4, 2009)

ISSUE: Whether a trial judge must be recused if his prior law firm represented a party in similar prior cases.

FACTS: Relators, a former employee and his wife, sought a writ of mandamus, claiming that respondent multidistrict pretrial court erred in denying their motion to disqualify the trial court judge under Tex. R. Civ. P. 18b(1)(a) and Tex. Const. art. V, § 11 from presiding over the underlying asbestos lawsuit filed against real party in interest company. The judge had declined to remove himself from presiding over the case. The employee and his wife alleged that the judge should have been disqualified under Tex. R. Civ. P. 18b(1)(a) and Tex. Const. art. V, § 11 because his previous law firm represented the company in two prior similar asbestos lawsuits.

HOLDING: The court denied mandamus relief. For disqualification purposes, the issue was not whether the cases had the same or similar pleadings, but rather whether they were the same matters. Similarities between the prior lawsuits and the current lawsuit were insufficient to show that the three cases were the same matter in controversy, given that (1) the plaintiffs in the three cases were strangers and suing for their own personal injury, (2) nothing showed that the injuries arose from the same incident or same exposure to asbestos, and (3) in addition to suing the company, each plaintiff also sued different defendants, meaning each lawsuit concerned different liability theories and defenses. Disqualification was not required and thus mandamus relief was not appropriate.

WILLIAM BOYD, Appellant v. TEXAS UTILITIES ELECTRIC COMPANY, TEXAS UTILITIES, AND BROWN AND ROOT, INC., Appellees
No. 10-08-00172-CV
COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO
2009 Tex. App. LEXIS 7129
September 9, 2009, Opinion Delivered
September 9, 2009, Opinion Filed

ISSUE: Whether a generic affidavit claiming toxic exposure is sufficient to create a fact issue on causation concerning dose.

FACTS: William Boyd sued Luminant Generation Company, L.P. and Brown & Root, Inc. for negligence, breach of warranty, and gross negligence based on premises liability. The trial court granted Luminant's and Brown & Root's no-evidence and traditional motions for summary judgment. In two issues, Boyd challenges the granting of these motions. Boyd maintains that summary judgment was improperly granted on his premises liability claim. In the trial court and on appeal, Luminant and Brown & Root contend that Boyd presented no evidence of causation to support his premises liability claim. In his affidavit, Boyd states that he was exposed to Amerlock paint that "exceeded acceptable levels," did not receive protective equipment, and suffered disability as a result. Dr. Vernon Rose provided an affidavit stating that Boyd's symptoms were common responses to "inhalation of excessive levels of organic solvent vapor" and that Amerlock paint contains "several hazardous components." Rose noted that the record contained no "air monitoring data" to "demonstrate [that] airborne solvent levels were less than acceptable limits," but there is indirect evidence of over-exposure. He identified a 1974 study where workers exposed to "epoxy paint in 'confined quarters with inadequate ventilation'" experienced symptoms "compatible" with Boyd's and the "solvents equaled or exceeded federal standards in 2 of 15 air measurements." Rose opined that Boyd was "more likely than not, overexposed." Dr. Alfred Johnson opined in an affidavit that Boyd suffered from "toxic exposure to epoxy paint" in a dose of "particularly strong concentration."

HOLDING: The Court affirmed the summary judgments relying on *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 770 (Tex. 2007), stating "an opinion on causation should be premised on three preliminary assessments. First, the expert should analyze whether the disease can be related to chemical exposure by a biologically plausible theory. Second, the expert should examine if the plaintiff was exposed to the chemical in a manner that can lead to absorption into the body. Third, the expert should offer an opinion as to whether the dose to which the plaintiff was exposed is sufficient to cause the disease." The Court found that Boyd's evidence did not address the approximate dose to which Boyd was exposed.

MARJORIE ROSS, JOAN SEELBACK, TIMOTHY R. ROSS, JAMES R. ROSS, BILLY R. ROSS, AND ROBERT R. ROSS, Appellants v. UNION CARBIDE CORPORATION, Appellee
NO. 14-07-00860-CV
COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON
296 S.W.3d 206; 2009 Tex. App. LEXIS 6660
August 25, 2009, Majority and Concurring Opinions on En Banc Review Filed

ISSUE: Whether a general release in a product claim can be used to shield a subsequent wrongful death employee claim.

FACTS: Appellant survivors challenged a decision from the 133rd District Court Harris County, Texas, which granted summary judgment in favor of appellee former employer in a case seeking exemplary damages and loss of consortium. The employee developed an asbestos-related disease from his workplace exposure. He and his wife sued several manufacturers, and a settlement was reached. A release was signed by the employee and his wife. After the employee's death, the survivors tried to file an independent cause of action against the employer under Tex. Const. art. XVI, § 26 and Tex. Lab. Code Ann. § 408.001(b) (2006). Summary judgment was granted to the employer, and this appeal followed.

HOLDING: In affirming, the appellate court determined that the exemplary-damages claim was not a nonderivative cause of action. The prior decision in Perez v. Todd Shipyards Corp., 999 S.W.2d 31 (Tex. App.--Houston 14th Dist. 1999), pet. denied, 35 S.W.3d 598 (2000), was overruled. Further, the release was not void due to an impermissible settlement of workers' compensation claims. It also did not apply only to products-liability claims. The release was not unenforceable as the result of unilateral mistake; moreover, it was not unconscionable, and it did not otherwise violate public policy. As such, the survivors' exemplary-damages and loss-of-consortium claims were encompassed within the release.

IN RE: CONTRACTOR'S SUPPLIES, INC.
NO. 12-09-00231-CV
COURT OF APPEALS OF TEXAS, TWELFTH DISTRICT, TYLER
2009 Tex. App. LEXIS 6396
August 17, 2009, Opinion Delivered

ISSUE: Whether a deposition to perpetuate testimony must be preceded by exhaustion of administrative efforts before the Texas Workers Compensation Commission.

FACTS: Relator former employer filed a petition for a writ of mandamus seeking to challenge a decision from respondent, a trial judge from the 217th Judicial District Court, Angelina County, Texas, which granted a petition for a presuit deposition filed by real party in interest former employee. The employee anticipated filing a lawsuit against the employer, but the employee had Stage 4 metastatic lung cancer that was allegedly caused by silica exposure.

HOLDING: In conditionally granting relief, the appellate court determined that the exhaustion of administrative remedies doctrine did not apply here. Therefore, the trial judge had jurisdiction over the petition for a presuit deposition. The employee did not anticipate suit against the employer's workers' compensation carrier, so he was not required to name the carrier as an expected adverse party. However, the trial judge's order constituted an abuse of discretion because the record contained no evidence supporting the employee's petition and request to shorten the required notice of hearing. Neither the employee's verified petition nor his counsel's letter were offered or admitted into evidence; even if they had been, pleadings were not generally competent evidence, and the letter amounted to hearsay. Finally, the employer had no adequate remedy at law.

DBMS INVESTMENTS, L.P., Appellant, v. EXXONMOBIL CORPORATION F/K/A HUMBLE OIL AND REFINING COMPANY, Appellee.
NUMBER 13-08-00449-CV
COURT OF APPEALS OF TEXAS, THIRTEENTH DISTRICT, CORPUS CHRISTI - EDINBURG
2009 Tex. App. LEXIS 4140
June 11, 2009, Memorandum Opinion Delivered
June 11, 2009, Memorandum Opinion Filed

ISSUE: Whether the discovery rule tolls limitations in property contamination cases.

FACTS: This dispute pertains to allegations of underground water and sub-surface soil contamination by appellee, ExxonMobil, the prior operator of a gas plant. By two issues, appellant, DBMS Investments, L.P. ("DBMS"), appeals the trial court's granting of traditional motion for summary judgment and plea to the jurisdiction. The property was adjacent to a tract of land where the oil company and its predecessor had operated a gas plant. Approximately 15 years after the plant had ceased to operate, the previous owners of the property assigned to the current owner their rights to any causes of action involving the property. It was undisputed that the two-year statute of limitations in Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (2008) was applicable. The owner pleaded the discovery rule for the first time in an amended petition. The record did not contain a ruling on a motion for leave to amend. Upon reviewing the record, the court concluded that the trial court considered the owner's discovery rule arguments and that the oil company did not demonstrate surprise or prejudice; thus, the court presumed that the trial court granted leave to amend under Tex. R. Civ. P. 63.

HOLDING: The court held that the discovery rule did not toll the limitations period because the contamination was not inherently undiscoverable; a reasonably diligent property owner would have inquired about the operations of the abutting gas plant and investigated the records thereof. The assigned causes of action therefore were time-barred.

MERCK & CO., INC., Appellant v. CAROL A. ERNST, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT CHARLES ERNST, DECEASED, Appellee

NO. 14-06-00835-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON
296 S.W.3d 81; 2008 Tex. App. LEXIS 9867

May 29, 2008, Decided
June 4, 2009, Opinion Filed

ISSUE: Whether the exclusion of risk factors equated to the exclusion of causes in determinationn of causation.

FACTS: Appellant drug company appealed the judgment of the 23rd District Court, Brazoria County (Texas) that entered judgment for appellee wife in a personal-injury and wrongful-death suit filed by the wife in which she alleged that ingestion of a drug manufactured by the company caused the sudden cardiac death of her husband. The wife argued, inter alia, that the failure to find a blood clot did not defeat causation, arguing that her expert ruled out all non-thrombotic causes of the decedent's arrhythmia through the use of differential diagnosis.

HOLDING: The trial court's judgment was reversed and judgment was rendered that the wife take nothing. The diagnostic process did not contemplate the consideration of risk factors; it was a consideration of symptoms and potential causes. In arguing that there was some evidence through the use of differential diagnosis, the wife argued that her medical experts excluded all other risk factors for heart attack except the drug. The exclusion of risk factors did not equate to the exclusion of causes. Further, the company's uncontradicted expert testimony was that risk factors had no application after death. Additionally, no expert ruled out atherosclerosis as a cause of the decedent's arrhythmia. The epidemiological evidence supported the conclusion that the drug, at a certain dose and duration, was associated with an increased risk of thrombotic cardiovascular events. However, the experts' speculation that a clot "could have" existed, but "could have" dissolved, been dislodged, or fragmented gave rise to nothing more than conjecture.