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PRODUCTS LIABILITY

NEWSLETTER

Selected Case Summaries
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I. Summary

1. Supreme Court adopts “substantial factor” causation test in asbestos cases. To prove causation in an asbestos case, a plaintiff must proffer (1) evidence relating to the approximate dose to which the plaintiff was exposed and (2) evidence that such dose was a substantial factor in causing the asbestos-related injury. *Borg-Warner Corp. v. Flores*, 50 Tex. Sup. Ct. J. 851, 2007 WL 1650574 (Tex. June 8, 2007).

2. In order to overcome a no-evidence summary judgment motion, the non-moving party must produce competent summary judgment evidence. Competent summary judgment evidence must demonstrate personal knowledge and cannot contain conclusory or speculative allegations. Also, general references to a record, without pointing to specific evidence in the record, constitute incompetent summary judgment evidence. *Evans v. MIPTT, L.L.C.*, No. 01-06-00394-CV, 2007 Tex. App. LEXIS 4680 (Tex. App.—Houston [1st Dist.], June 14, 2007, no pet.).

3. Trial courts must allow adequate time between plaintiffs’ discovery responses and trial. Setting a mass toxic tort case for trial before plaintiffs provide causation evidence is an abuse of discretion because defendants have no reasonable opportunity to prepare a defense for trial. *In re Allied Chem. Corp.*, 227 S.W.3d 652 (Tex. 2007).

4. The independent knowledge doctrine applies to medical device cases and negates producing cause. A doctor’s independent knowledge of the risks of using a defective stapler when performing plaintiff’s surgery negated the producing cause element of plaintiff’s claim against the stapler’s manufacturer. *Ethicon Endo-Surgery, Inc. v. Meyer*, No. 2-05-071-CV, 2007 Tex. App. LEXIS 2802 (Tex. App.—Fort Worth, April 12, 2007, no pet.).

5. A company owed no duty to warn of the risks to a worker’s spouse from exposure to asbestos from work clothes because the dangers of such exposure were not known. A company had no liability for plaintiff’s mesothelioma when plaintiff’s non-occupational asbestos exposure occurred before the corporation knew of the risks of secondary, clothing exposure. *Alcoa, Inc. v. Behringer*, No. 05-06-00136-CV, 2007 WL 2949524 (Tex. App.—Dallas, Oct. 11, 2007, no pet. h.).

6. The “economic loss rule,” limiting damages in a case where only the product is damaged, must be specifically part of the objection to the court’s charge. Defendant’s no-evidence points in its directed verdict and post-trial motions failed to preserve error because defendant did not explicitly raise the economic loss rule. *Equistar Chems., L.P. v. Dresser-Rand Co.*, 50 Tex. Sup. Ct. J. 727, 2007 WL 1299161 (Tex. May 4, 2007).

7. Plaintiff’s reliance on Defendant’s representations about possible settlement does not excuse late filing of a products liability lawsuit. The Dallas Court of Appeals held (1) defendant’s statement that filing a lawsuit would end settlement negotiations does not excuse plaintiff from the effects of the statute of repose, and (2) statutes of repose do not violate the Texas Constitution’s open courts provision. *Fiengo v. Gen. Motors Corp.*, 225 S.W.3d 858 (Tex. App.—Dallas 2007, no pet.).

8. Supreme Court reiterates high standards for exercising general jurisdiction over non-resident defendants. The Texas Supreme Court held (1) the “continuous and systematic” contacts requirement for exercising general jurisdiction mandates a higher threshold than that required to exercise specific jurisdiction, (2) the relevant time period for assessing general jurisdiction contacts ends when the suit is filed, and (3) to impute a parent’s contacts to its subsidiary, the parent and the subsidiary must function as one entity. *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 50 Tex. Sup. Ct. J. 1153, 2007 WL 2457843 (Tex. Aug. 31, 2007).

II. Discussion

1. **Borg-Warner Corp. v. Flores**, 50 Tex. Sup. Ct. J. 851, 2007 WL 1650574 (Tex. June 8, 2007).

In *Borg-Warner*, the Texas Supreme Court held (1) an asbestos plaintiff must prove that the defendant's product was a substantial factor in causing the plaintiff's asbestosis and (2) evidence that plaintiff was exposed to "some respirable [asbestos] fibers" is insufficient to prove that defendant's product was a substantial factor in causing plaintiff's asbestosis.

Plaintiff Flores handled Borg-Warner and other brands of brake pads containing asbestos. According to plaintiff's proof, Flores' job required him to grind the brake pads, generating "dust clouds" that Flores inhaled.

The jury found Borg-Warner's manufacture of asbestos-containing brake pads was negligent, proximately caused Flores' asbestosis, and caused Flores' damages. The Court of Appeals affirmed.

The Texas Supreme Court granted Borg-Warner's petition for review and reversed the Court of Appeals.

First, the Supreme Court declined to adopt the Fourth Circuit's *Lohrmann* asbestos causation standard (requiring proof of frequency, regularity and proximity in asbestos cases) because the Court concluded that standard was insufficient to meet the existing causation requirements of Texas law.

Instead, the Court held a plaintiff must prove asbestos exposure sufficient to cause asbestosis and that the defendant's product was a substantial factor in causing the plaintiff's asbestos injuries to comport with Texas causation standards.

Further, the Court held Flores' evidence that he "could" have been exposed to asbestos fibers while grinding brake pads was insufficient proof that the Borg-Warner brake pads were a substantial factor in causing Flores' asbestosis.

The Court noted that differences exist in asbestos-containing products such as encapsulation of the asbestos, and held that Texas law requires proof of the extent and intensity of exposure, including content of dust released from the product.

The Court found that the development of asbestosis requires asbestos exposure above some threshold. By contrast, Flores produced no evidence to prove how much asbestos he inhaled.

Without evidence of dose, Flores (a) did not raise a fact issue on whether he experienced sufficient asbestos exposure to cause asbestosis and (b) failed to establish that the asbestos from Borg-Warner brake pads sufficiently contributed to the combined dose of asbestos that he inhaled over his career.

The Court (a) rejected the concept of mere "exposure" as proof of causation and rejected the plaintiff's theory that every fiber can cause disease and (b) held that while plaintiffs need not trace the path of asbestos fibers, plaintiffs must prove by medical probability that fibers from the defendant's product caused the plaintiff's disease.

Thus, to prove causation in asbestos cases, a plaintiff must produce (1) evidence relating to the approximate dose to which he was exposed and (2) evidence that such dose was a substantial factor in causing the asbestos-related injury. To establish that the dose was a substantial factor in causing the asbestosis, the plaintiff must prove he inhaled enough asbestos to exceed the threshold required to develop the disease.

Defense product practitioners will likely want to consider whether the analysis in *Flores* applies equally to other toxic tort cases.

Since *Flores* was decided, Texas MDL asbestos Judge Mark Davidson has begun applying *Flores* to summary judgment motions in MDL asbestos cases.

However, in one case, Judge Davidson has ruled that *Flores* is procedural and not substantive law and did not apply to a plaintiff exposed outside Texas.

2. **Evans v. MIPTT, L.L.C.**, No. 01-06-00394-CV, 2007 Tex. App. LEXIS 4680 (Tex. App.—Houston [1st Dist.], June 14, 2007, no pet.).

In *Evans v. MIPTT*, the Houston First District Court of Appeals rejected plaintiff's appeal from a no-evidence summary judgment rendered against her.

The court held that plaintiff failed to create a fact issue on either her strict liability or negligence claims. Her summary judgment evidence constituted nothing more than "mere surmise or suspicion."

Plaintiff Evans claimed the crabs she ate at defendant's restaurant caused her food poisoning. She claimed the restaurant was negligent and strictly liable for providing defective food that was unsafe for its intended purpose of human consumption. The restaurant moved for no-evidence summary judgment under Rule 166a(i). The trial court granted the restaurant's summary judgment motion.

The court of appeals affirmed. The court of appeals held a trial court must grant a no-evidence summary judgment motion if (1) the moving party's motion asserts that there is no evidence of specified elements of a claim or defense on which the adverse party would have the burden of proof at trial, and (2) the adverse party produces no summary judgment evidence that raises a genuine issue of material fact on those elements.

The court of appeals held that the restaurant properly specified the challenged elements of Evans' strict liability and negligence claims. Therefore, the burden shifted to Evans to produce competent summary judgment evidence on both her claims. Competent summary judgment evidence must demonstrate personal knowledge and cannot include conclusory or speculative evidence.

Evans relied on three categories of evidence that the appellate court deemed incompetent summary judgment evidence. First, Evans relied on her own allegations that she suddenly became intensely ill after eating the crab and that she "did not know" of anyone else who consumed the crab. The court held that a claim of sudden illness is not sufficient to create a fact issue. Similarly, Evans' lack of knowledge that anyone else ate the crab did not equate to personal knowledge that no one else ate the crab.

Second, Evans relied on the City of Houston's inspection of the restaurant. Evans argued that the inspection showed health violations, "each of which could have been the cause" of Evans' illness. The violations Evans relied upon included violations for an inadequate concentration of bleach in the dishwasher and food debris found on a can-opener roller. The court held that Evans' arguments that these violations "may have caused" her illness were conclusory and constituted mere speculation.

Third, Evans relied upon evidence in an appendix to her motion, which included affidavits, discovery, her pleadings, excerpts from depositions, and medical affidavits. But Evans failed to specifically refer to any of these documents in her

summary judgment response. She merely argued that the documents "set forth" summary judgment proof. The court held general references to a record, absent any direction to specific evidence contained in the record, are insufficient in a summary judgment response. The court also reiterated the rules that pleadings and a party's own answers to an interrogatory do not constitute summary judgment evidence.

Evans provides defense product liability practitioners additional ammunition in supporting motions for summary judgment.

In order to defeat a no-evidence motion for summary judgment, a plaintiff must produce evidence (i) that demonstrates personal knowledge, (ii) that does not represent mere speculation, and (iii) that does not consist of pleadings or a party's own interrogatory answers. Likewise, general references to a record in a summary judgment response are insufficient to defeat summary judgment.

3. In re Allied Chem. Corp., 227 S.W.3d 652 (Tex. 2007).

In a mass toxic tort case, the Texas Supreme Court granted mandamus to defendants and ordered the trial court to vacate its order setting a plaintiff's claim for trial.

Approximately 1,900 plaintiffs sued 30 defendants, alleging exposure to emissions from land where defendants stored pesticides. Five years after plaintiffs filed the suit, the trial court set a trial for a single plaintiff's case for six months away.

When the trial court set the trial date, plaintiffs had not yet identified any specific products or incidents that they alleged caused their injuries. Instead, plaintiffs claimed that their injuries resulted from exposure to a "toxic soup" of emissions.

Likewise, defendants requested that plaintiffs provide an expert who could connect plaintiffs' injuries to defendants' products, but plaintiffs all responded either "not applicable" or that "none of their treating physicians" could make a connection. The Supreme Court held that these responses essentially confirmed that no one could make a causal connection between plaintiffs' injuries and defendants' products.

Also, the Court rejected plaintiffs' argument that their supplemental answers constituted proof of the required causal connection. Plaintiffs' supplemental

answers included lists of chemicals to which they were “potentially exposed” and medical articles suggesting that some of those chemicals were “capable of causing” or “significantly contributed” to their injuries. But toxic tort plaintiffs must do more than produce epidemiological studies. They must produce an expert who can testify why a study is reliable and how plaintiffs’ exposure is similar to the study subjects’ exposure. An expert also must exclude other causes with “reasonable certainty.”

Because plaintiffs did not provide defendants with any causation evidence, the trial court’s order setting a trial was premature and constituted an abuse of the trial court’s discretion. Without any evidence of how plaintiffs would prove causation at trial, defendants would have no chance of developing a defense. Instead, defendants would have to blindly prepare for trial.

The Texas Supreme Court directed the trial court to vacate its order setting any of plaintiffs’ claims for trial until plaintiffs identify expert testimony connecting defendants’ products to their injuries, allowing defendants a reasonable opportunity to prepare for trial.

In re Allied is an important extension of *Able Supply* and requires mass toxic tort plaintiffs to disclose a basis for the required causal connection between the defendants’ products and the plaintiffs’ injuries in discovery before a trial court may properly set a case for trial.

In re Allied also includes some important language requiring expert testimony to show that published studies were conducted in a manner similar to plaintiff’s exposure.

4. Ethicon Endo-Surgery, Inc. v. Meyer, No. 2-05-071-CV, 2007 Tex. App. LEXIS 2802 (Tex. App.—Fort Worth, April 12, 2007, no pet.).

In *Ethicon*, the Fort Worth Court of Appeals became the first Texas court to extend the independent knowledge doctrine to medical product cases.

Plaintiff Meyer sued her doctor for medical negligence regarding a bowel surgery the doctor performed on her. Meyer then amended her petition to sue Ethicon for products liability. During the surgery, the doctor used an Ethicon stapler to cut Meyer’s bowel and staple the cut ends of the bowel together. The doctor tested the stapled bowel to make

sure the staples were holding. Days after the surgery, however, one of the staple lines separated, allowing bowel contents to leak into Meyer’s abdomen and cause serious infection.

A jury found that the Ethicon stapler was defectively marketed and awarded damages to Meyer. Ethicon appealed.

The court of appeals held that the doctor’s independent knowledge of the risks of using the stapler negated producing cause on Meyer’s products claim.

To prove a marketing defect, a plaintiff must establish five elements: (1) a risk of harm that is inherent in the product or that may arise from the intended use of the product, (2) the product supplier knew or reasonably foresaw the risk of harm at the time the product is marketed, (3) the product possessed a marketing defect, (4) the absence of the warning or instructions rendered the product unreasonably dangerous to the ultimate user or consumer, and (5) a causal connection existed between the failure to warn and the user’s injury.

The court held the failure to warn is not a producing cause of an injury resulting from a product’s use if the product’s user decides to use the product despite his knowledge of the possible danger.

The doctor testified that he was aware a staple line could leak and knew that even after checking a staple line, a possibility of leakage still existed. Also, the doctor confirmed that a safety alert from Ethicon providing him with even more knowledge would not have deterred him from using the stapler. Similarly, a defense medical expert testified that the possibility of staple-line separation was common knowledge among general surgeons.

Because the doctor’s independent knowledge of the risks of using the stapler negated the producing cause element of Meyer’s claim, the court of appeals reversed the trial court’s judgment and rendered judgment that Meyer take nothing.

Ethicon provides Texas practitioners with a new potential method of negating producing cause when defending against products liability cases involving a medical device. Additionally, *Ethicon* could be extended further when a learned intermediary is the user of the product.

5. Alcoa, Inc. v. Behringer, No. 05-06-00136-CV, 2007 WL 2949524 (Tex. App.—Dallas, Oct. 11, 2007, no pet. h.).

In *Alcoa*, the Dallas Court of Appeals held that a corporation did not owe a legal duty to a plaintiff who developed mesothelioma in 2003 after breathing the asbestos dust brought home on her husband's work clothes in the 1950s.

During four years in the 1950s, plaintiff Behringer's husband worked for Alcoa. Part of the husband's job required him to work near large industrial pots lined with insulation blocks containing asbestos. Employees used a jackhammer to remove insulation from the pots. This process generated white dust, which often covered the husband's work clothes. Every other day during the four years that her husband worked at Alcoa, Behringer would take her husband's dusty work clothes outside and shake them off.

After 1959, Behringer divorced her husband and ceased to come in contact with his clothing again. Four decades later, Behringer developed mesothelioma.

Behringer sued Alcoa, alleging Alcoa failed to provide adequate safety measures and protective gear and failed to adequately warn Behringer and her husband of the dangers of non-occupational asbestos exposure. A jury returned a verdict for Behringer on counts of negligence and gross negligence. Alcoa appealed.

The Dallas Court of Appeals held that Alcoa could not foresee the harm of non-occupational, secondary exposure to asbestos from work clothes in the 1950s. Thus Alcoa owed no legal duty to Behringer.

The court reasoned that liability for negligence cannot exist without a legal duty. To determine whether a legal duty exists, courts must assess whether a defendant could foresee the risk of the plaintiff's injury.

Although the court concluded that evidence indicated the danger of occupational asbestos exposure in some circumstances was known by the 1930s, it was not generally known that non-occupational, secondary exposure to asbestos from work clothes could be dangerous until the mid-1960s. The court noted that the first epidemiological study of the increased risk of disease resulting from non-occupational asbestos exposure was published in

1965. Moreover, the Occupational Safety and Hazard Administration (OSHA) mandated restrictions on allowing asbestos to be carried home on clothing for the first time in 1972.

Because the danger of non-occupational, secondary exposure to asbestos dust was not reasonably foreseeable in the 1950s, Alcoa owed no legal duty to Behringer at the time her husband worked at Alcoa. Without a legal duty owed to Behringer, Alcoa had no liability for negligence.

This case supports a defense as a matter of law when evidence indicates the specific risk was not known at the time of exposure.

Defense product practitioners may consider using *Behringer* to argue that plaintiffs cannot recover under a negligence theory when the evidence demonstrates that the absence of foreseeability of the risk precludes the existence of a legal duty.

6. Equistar Chems., L.P. v. Dresser-Rand Co., 50 Tex. Sup. Ct. J. 727, 2007 WL 1299161 (Tex. May 4, 2007).

The Texas Supreme Court held that defendant failed to preserve for appellate review a claim that a jury charge's measure of damages violated the economic loss rule. Defendant objected in the trial court only that the evidence was not legally or factually sufficient to support a jury charge on damages.

Equistar, a chemical manufacturing company, purchased several parts from Dresser-Rand for use in Equistar's gas compressor. These parts failed, causing damage to the gas compressor and nearby parts of Equistar's plant. Equistar sued Dresser for strict liability, negligence, and breach of warranty. A jury apportioned causation for the parts failure 80% to Dresser and 20% to Equistar.

In assessing damages, the trial court instructed the jury that it must consider the cost of repairs "to restore the Equistar Chemicals' ethylene plant to the condition it was in immediately before the occurrence in question." Dresser did not object to the damages question or instruction, except for legal and factual sufficiency objections.

The economic loss rule applies when losses arise from a product's failure and loss is limited to the product itself. When losses are limited only to the product, the economic loss rule precludes tort recovery and limits recovery to contractual damages.

The court of appeals held Dresser properly preserved error as to the economic loss rule. Specifically, the court explained that Dresser's no-evidence points in its directed verdict and post-trial motions "encompassed" the economic loss rule, even though the motions did not mention the rule.

Rejecting the appellate court's reasoning, the Texas Supreme Court held Dresser did not preserve error based upon the trial court's failure to apply the economic loss rule.

First, the Court clarified that because Equistar had the burden to plead and prove the existence and amount of damages, Dresser did not have to assert the economic loss rule as an affirmative defense in order to preserve error. The economic loss rule functioned as a consideration in measuring damages.

However, the Court reasoned that Dresser failed to preserve error when it neglected to object to the damages question or the jury instruction regarding damages. The damage question asked the jury to find only one damage amount. The jury instruction did not request the jury to distinguish tort damages from contract damages.

To preserve error for the economic loss rule, Dresser was required to object that the jury charge incorrectly allowed the jury to find both tort and contract damages.

Because Dresser failed to object to the jury charge on this basis, Dresser failed to preserve error to challenge the measure of damages that the trial court instructed the jury to use. Dresser's no-evidence points in its directed verdict and post-trial motions were insufficient because they did not clearly argue that the economic loss rule precluded Equistar's tort recovery.

This case reminds product practitioners to explicitly object when the submission of damages is inconsistent with a defense or fails to permit a determination necessary to allow application of a defense.

7. *Fiengo v. Gen. Motors Corp.*, 225 S.W.3d 858 (Tex. App.—Dallas 2007, no pet.).

In *Fiengo*, the Dallas Court of Appeals held (1) plaintiffs failed to raise a fact issue on their claim that defendant was equitably estopped from asserting the statute of repose as a defense to their lawsuit; and (2) statutes of repose do not violate the Texas Constitution's open courts provision.

In 2004, Fiengo was involved in a car accident while driving his 1990 Pontiac. Fiengo's relatives sued General Motors (GM), alleging design and manufacturing defects. GM began investigating plaintiffs' claims. Plaintiffs testified that during the investigation, a GM representative asked plaintiffs to postpone filing a lawsuit so GM could complete its investigation. Plaintiffs testified GM's representative also told them that filing a lawsuit would end any settlement negotiations.

In March 2005, the 15-year statute of repose for products liability claims expired, and plaintiffs still had not filed a lawsuit. A month later, GM notified plaintiffs that it had completed the investigation and had decided to deny the claim. Plaintiffs filed suit two months later.

In its summary judgment motion, GM asserted that the statute of repose barred plaintiffs' claims. The trial court granted GM's motion for summary judgment and plaintiffs appealed.

First, plaintiffs claimed that equitable estoppel prevented GM from raising the statute of repose as an affirmative defense. The court of appeals did not rule on whether a plaintiff can ever assert an equitable principle to prevent a defendant from raising a statute of repose as an affirmative defense; rather, the court held that, even assuming plaintiffs can assert an equitable principle to estop GM, plaintiffs produced insufficient evidence on the estoppel elements to raise a fact issue.

The court held that nothing in the record indicated GM's statement to plaintiffs that settlement negotiations would end if plaintiffs filed a lawsuit was false. Plaintiffs produced no evidence that settlement negotiations would continue if plaintiffs filed a lawsuit. Further, GM's request that plaintiffs wait for the investigation to end so that it could negotiate a settlement did not constitute a representation that GM would necessarily negotiate a settlement.

Additionally, the court held that plaintiffs did not reasonably rely on GM's statements. GM began investigating plaintiffs' claim six months before the statute of repose expired. Four months before the statute expired, GM told plaintiffs that the investigation might take several more months to complete. As the statute's expiration date neared, it became unreasonable for plaintiffs to delay filing their lawsuit.

Second, the court of appeals rejected plaintiffs' claim that applying the statute of repose to their case violates the Texas Constitution's open courts provision. Plaintiffs argued that GM did not need the protection of the statute of repose because it had all the relevant evidence within the repose period. But the court of appeals reaffirmed that statutes of repose do not violate the open courts provision of the Texas Constitution. Plaintiffs knew they had a cause of action before the statute of repose expired, but they failed to timely exercise their right to sue.

The court of appeals thus affirmed the trial court's decision to grant GM's motion for summary judgment.

The *Fiengo* case mandates that a request to a plaintiff not to file suit cannot as a matter of law constitute estoppel. Plaintiffs must exercise their right to sue within the time limits of the applicable statute of repose.

8. PHC-Minden, L.P. v. Kimberly-Clark Corp., 50 Tex. Sup. Ct. J. 1153, 2007 WL 2457843 (Tex. Aug. 31, 2007).

In this case, the Texas Supreme Court set standards for Texas courts to follow when evaluating whether general jurisdiction exists over a non-resident defendant.

The underlying suit involved a products liability claim. While visiting Louisiana, Texas resident Jajah Eddington obtained treatment for flu-like symptoms at MHC-Minden Hospital. Four days later, another hospital diagnosed Eddington with toxic shock syndrome, which eventually caused her death.

Eddington's estate sued Kimberly-Clark, alleging that Eddington's use of Kotex tampons caused her toxic shock syndrome. Kimberly-Clark filed a third-party petition against PHC-Minden, L.P., which owned Minden Hospital. Kimberly-Clark claimed Minden's negligence proximately caused Eddington's death.

PHC-Minden is a non-resident of Texas, and Province Health Care, also a non-resident, is PHC-Minden's parent company.

The trial court held that it had general jurisdiction over Minden. The court of appeals affirmed, concluding that Texas had general jurisdiction over Minden because (i) Minden had "continuous and systematic" contacts with Texas, and (ii) Province and Minden functioned as a single

business enterprise, and Province's contacts with Texas should thus be imputed to Minden.

The Texas Supreme Court rejected both of the court of appeals' grounds for exercising general jurisdiction over Minden.

Applying the holdings of the U.S. Supreme Court, the Texas Supreme Court held that the standard for exercising general jurisdiction involves a "more demanding minimum contacts analysis" with a "substantially higher" threshold. Non-resident defendants subject to general jurisdiction usually engage in continuous and frequent contacts with the forum state, such as maintaining a local office, identifying an agent for the service of process, and marketing and performing services in the forum state.

Before analyzing Minden's Texas contacts, the Texas Supreme Court first resolved the conflict among the Texas courts of appeal regarding the appropriate time period for assessing general jurisdiction contacts. The Supreme Court held that the relevant period for assessing a non-resident defendant's general jurisdiction contacts ends when the suit is filed.

The Court concluded that Minden did not have "continuous and systematic" contacts with Texas. Minden's only facility was located in Louisiana. Minden did not advertise in Texas. Minden owned no Texas property and had no Texas office or bank accounts. Finally, Minden did not have a registered agent in Texas to receive service of process.

The Court held that attendance by Minden employees at two Province meetings in Dallas in 1999 did not constitute the required "continuous and systematic contacts." Similarly, Minden's purchases from Texas companies also did not justify general jurisdiction over Minden. As the U.S. Supreme Court held, "mere purchases, even if occurring at regular intervals, are not enough" to justify general jurisdiction.

Neither of Minden's two contracts with Texas companies warrant general jurisdiction either. In 2002, Minden hired a Texas company to conduct a week-long telephone marketing survey of Louisiana residents located near Minden Hospital. The court held that this sporadic Texas contact was not "continuous and systematic."

The Court did find that Minden's other Texas contract, a three-year contract with Louisiana-licensed doctors located in Texas to provide

radiology services, did qualify as a substantial Texas contact. However, the court concluded that this contact did not rise to the level of “continuous and systematic” contact.

The Supreme Court thus reversed the court of appeals, holding Minden did not have sufficient contacts with Texas to justify general jurisdiction.

The Supreme Court also rejected the court of appeals’ second basis for imposing general jurisdiction on Minden -- that Minden, through Province, had “continuous and systematic” contacts with Texas.

In fact, the Supreme Court remarked that it had never endorsed the single business enterprise theory. The Court held that no justification existed for imputing Province’s Texas contacts to Minden. Texas law presumes that two separate corporations are distinct entities, and courts must separately assess each corporation’s contacts. General jurisdiction over a parent corporation establishes general jurisdiction over a subsidiary only if the parent controls the subsidiary’s internal business operations and affairs. The parent’s degree of control must rise above the “level of control normally associated with common ownership and directorship.” That is, Kimberly-Clark must prove that Province and Minden operate as the same entity so that “the corporate fiction should be disregarded to prevent fraud or injustice.”

Here, Province and Minden operated as two distinct business entities. The evidence demonstrated nothing more than normal parental control. Province and Minden maintained separate headquarters. Minden’s Board of Governors approved Minden’s budget and oversaw daily operations. Minden established its own policies and procedures. Minden and Province shared no directors. Province did not participate in Minden’s physician recruitment. Although several of Minden’s upper-level employees receive their paychecks from Province and Province provides Minden employees’ with health insurance, Minden’s revenues fund these paychecks and insurance policies. Therefore, the Supreme Court concluded that no basis exists for imputing Province’s Texas contacts to Minden.

Accordingly, the Supreme Court reversed the court of appeal’s judgment and rendered judgment dismissing Kimberly-Clark’s third-party claims against Minden for lack of jurisdiction.

This case has important implications for assessing whether general jurisdiction exists over non-resident defendants.

To prove a basis for exercising general jurisdiction, a party must meet a higher threshold of proof than the threshold required for establishing specific jurisdiction.

Also, to gain general jurisdiction by imputing a parent’s Texas contacts to its subsidiary, a party must prove that the parent and the subsidiary functioned as one entity.

Finally, in evaluating whether Texas can properly exercise general jurisdiction over a non-resident defendant, Texas courts must consider contacts up until the time the suit is filed.