

TADC

PRODUCTS LIABILITY

NEWSLETTER

Selected Case Summaries
Spring – Summer 2007

Editor:

Joseph S. Pevsner
Thompson & Knight

Contributing Editor:

Julia E. Swenton
Thompson & Knight

1. Juries may not consider harm to non-parties when determining punitive damages. The United States Supreme Court holds that the Constitution's Due Process Clause forbids the use of punitive damages to punish a defendant for harm to non-parties. *Philip Morris USA v. Williamson*, 127 S. Ct. 1057 (2007).

2. Privileged documents disclosed to a designated expert may still be entitled to protection. Privileged documents inadvertently disclosed to one's own testifying expert cannot be "snapped back" but the documents can be protected through the re-designation of the experts as non-testifying. *In re Christus Spohn Hospital Kleberg*, No. 04-0914, WL 1225351 (Tex. Apr. 27, 2007).

3. Robinson factors may be appropriate for evaluating the opinions of non-scientific expert. The Texas Supreme Court affirmed a trial court's use of *Robinson* factors to evaluate the reliability of an expert's testimony whenever those factors are helpful in determining reliability. The Court clarified that its holding in *Gammill* was not intended to limit the use of the *Robinson* factors to only scientific expert testimony. *Mack Trucks v. Tamez*, 206 S.W.3d 572 (Tex. 2006).

4. Trial court may order hospital to produce lung tissue for off-site testing in an asbestos case. Under Texas Rule of Civil Procedure 205.3(b)(3), courts may order non-parties to produce tangible materials for off-site testing of those materials. *In re the University of Texas Health Center at Tyler*, 198

S.W.3d 392 (Tex. App.—Texarkana 2006, no pet. h.).

5. A component manufacturer's Section 82.002 duty to indemnify arises only from an allegation of a defect in that particular component. A bare allegation that a product is defective does not constitute an assertion that all unnamed component parts are defective, and thus does not give rise to a component manufacturer's duty to indemnify under section 82.002. *R.H. Tamlyn & Sons, L.P. v. Scholl Forest Indus.*, 208 S.W.3d 85 (Tex. App.—Houston [14th Dist.] 2006, no pet. h.).

6. A settlement agreement under Tex. Civ. P. Rule 11 can be enforced by judgment in the original case, even if one party purports to withdraw its consent. The Corpus Christi Court of Appeals found that Plaintiffs' motion to enforce a settlement agreement was a sufficient pleading to pursue enforcement of a settlement agreement and that a separate petition for enforcement was unnecessary. *Ford Motor Co. v. Castillo*, 200 S.W.3d 217 (Tex. App.—Corpus Christi 2006, pet. filed).

7. Effect of amended petitions on Section 82.002 duty to indemnify. The Eastland Court of Appeals determined that a manufacturer's duty to indemnify a seller ends when the plaintiff amends his petition to drop all claims against the manufacturer. *Seelin Medical, Inc. v. Invacare Corp.*, 203 S.W.3d 867 (Tex. App.—Eastland 2006, pet. denied).

8. Settlements with parties that later declare bankruptcy can be part of settlement offsets, but cannot be applied to claims of punitive damages. The El Paso Court of Appeals held that non-settling defendants can use the settlements of other defendants as a credit, even if those other defendants subsequently declare bankruptcy – but a trial court cannot apply a settlement credit as an offset against exemplary damages. *Gilcrease v. Garlock, Inc.*, 211 S.W.3d 448 (Tex. App.—El Paso 2006, no pet. h.).

9. Texas Supreme Court enforces agreed protective order despite disclosure by court personnel. The Texas Supreme Court held that a court employee's mistaken document production cannot constitute a party's voluntary waiver of confidentiality and, therefore, such a production cannot result in a loss of the document's confidentiality. *In re Ford Motor Co.*, 211 S.W.3d 295 (Tex. 2006).

II. Discussion of Cases

1. **Philip Morris USA v. Williamson**, 127 S. Ct. 1057 (2007).

In a landmark case for punitive damages, the United States Supreme Court recently ruled that the Constitution's Due Process Clause prevents a state from using punitive damages to punish a defendant for injuries inflicted on non-parties.

In *Philip Morris*, the widow of a heavy cigarette smoker brought suit against Philip Morris, the manufacturer of the decedent's choice cigarette, for negligence and deceit. Ultimately, the jury found that Philip Morris was negligent and had engaged in deceit. On the deceit claim, the jury awarded compensatory damages of \$821,000 and punitive damages of \$79.5 million.

The trial court had refused Philip Morris' requested instruction that the jury must not punish Philip Morris for the impact of its misconduct on others who could bring their own lawsuits. Philip Morris argued that without the requested instruction, the \$79.5 million award could include punishment for harm to non-parties and could constitute a violation of due process.

The Supreme Court held that the trial court's refusal to give the requested instruction violated the Constitution's Due Process Clause because the jury was allowed to award punitive damages for injury to non-parties.

The Court noted that the Due Process Clause prohibits states from punishing individuals without first providing them with an opportunity to present every defense. But a defendant threatened with punishment for injuring a non-party has no opportunity to defend against the claim. For example, the defendant would be unable to show that the non-party victim knew smoking was dangerous or did not rely on defendant's statements.

The Court expressed concern with the near limitless dimension of punitive damages. The jury would be left to speculate as to how many other victims existed, how badly they were injured, and the circumstances of their injuries. This uncertainty could amplify the arbitrariness and lack of notice concerns that already underlie punitive damages.

However, the Court did not rule that juries may never consider harm to others when addressing punitive damages. To the contrary, the Court specifically held

that juries are free to consider the harm to others for a different part of the punitive damages equation: reprehensibility. Evidence of harm to non-parties can be used to show that the risk of harm was to the general public and thus more reprehensible. However, the jury cannot consider this harm to non-parties in determining the appropriate punishment for defendant.

One prominent challenge in applying *Philip Morris* is how a jury can be permitted to consider harm to others in assessing reprehensibility but not consider it in assessing punishment. The Supreme Court had no answer for this problem but instructed states to protect against the danger of confusion where the risk of misunderstanding is significant.

The *Philip Morris* decision may have great significance for product practitioners in defending against claims of punitive damages. Product practitioners must request instructions that instruct the jury not to consider damage to others in assessing the amount of punitive damages.

2. **In re Christus Spohn Hospital Kleberg**, No. 04-0914, WL 1225351 (Tex. Apr. 27, 2007).

In a case presenting a conflict between two discovery rules – Texas Rules of Civil Procedure 193.3(d) and 192.3(e)(6) – the Texas Supreme Court set the conditions for maintaining privilege protection over documents inadvertently produced to a testifying expert.

The underlying action in this case was a medical malpractice action brought by Mona Palmer against Christus Spohn Hospital Kleberg. Upon notice of the pending suit, the Hospital conducted an investigation of the allegations and created documents labeled "CONFIDENTIAL COMMUNICATION PREPARED IN ANTICIPATION OF LITIGATION."

Later, a Hospital paralegal provided these documents to the Hospital's only standard-of-care expert, Nurse Menzies, under the mistaken belief that the documents would remain privileged. At Nurse Menzies' deposition, trial counsel first learned that the privileged documents had been provided to the expert. While Nurse Menzies said she had not read everything provided to her, she admitted she had "glanced" at them.

Upon learning of the disclosure to the expert and resulting production to plaintiff, the hospital filed a

motion seeking to invoke the “snap-back” provisions of Tex. Civ. P. Rule 193.3(d). The trial court denied the hospital’s privilege claims and refused to order return of the documents. The Court of Appeals denied the hospital’s mandamus request.

On petition for writ of mandamus to the Texas Supreme Court, the plaintiff argued that Rule 193.3(d)’s snap-back provision could not apply to information provided to a testifying expert and thus was discoverable under Rule 192.3(e)(6).

In its decision, the court first ruled that Rule 192.3(e) applied whether the documents were prepared by or for Nurse Menzies or whether she actually read them. Under Rule 192.3(e) all documents are discoverable “that have been provided to . . . the expert.” Because the documents were provided to the expert, Rule 192.3(e) applied.

The court then faced the competing interests of Rule 192.3(e)’s production requirement and Rule 193.3(d)’s snap-back provision. The court held that Rule 192.3(e) prevailed over Rule 193.3(d) and that production was required so long as the party intended to call the expert to testify at trial.

The court held that in order to preserve its privilege it must withdraw its designation of Nurse Menzies as a testifying expert. As long as an expert remains designated as a testifying expert, any privileged documents produced to that expert are discoverable.

In re Christus Spohn provides some protection from unintentional disclosures to experts, even after privileged documents are disclosed to an expert and produced to an opponent. The ability to designate an expert as consulting only after deposition is a significant protection for practitioners on both sides of the docket.

3. **Mack Trucks v. Tamez**, 206 S.W.3d 572 (Tex. 2006).

In *Tamez*, the Texas Supreme Court confirmed that trial courts could apply the *Robinson* factors to non-scientific as well as scientific expert testimony.

Tamez involved the death of Abram Tamez, an operator of a Mack Truck tractor. When the tractor overturned, a fire erupted, which resulted in Mr. Tamez’s death. A suit was filed against the tractor’s manufacturer Mack Trucks, alleging that the fuel system was unreasonably dangerous because it was prone to fail and because the tractor had ignition sources in flammable areas.

Mack Truck filed a no-evidence motion for summary judgment. Plaintiffs responded with the expert report and deposition of their expert, Ronald Elwell.

Prior to ruling on the motion for summary judgment, the trial court held a *Robinson* hearing. The trial court granted Mack Truck’s motion to exclude Elwell’s testimony, finding that his testimony was not sufficiently reliable. The trial court then granted Mack Truck’s summary judgment motion.

The court of appeals reversed the summary judgment, concluding the exclusion of Elwell’s testimony was error. In reversing the trial court’s decision, the court of appeals held that the reliability of Elwell’s testimony was not properly measured by the *Robinson* factors because his opinion was not based on science.

The Texas Supreme Court reversed the court of appeals. In its review, the Texas Supreme Court began by reasoning that experts may testify regarding both scientific and technical matters, but that in both circumstances there must be some basis for the expert’s opinion.

The court reasoned that in *Gammill* it had found that the *Robinson* factors might not apply when assessing non-scientific expert testimony. However, the Court held this did not mean that a trial court should never consider the *Robinson* factors when evaluating the reliability of non-scientific expert testimony. The *Tamez* court ruled that trial courts should use the *Robinson* factors “when doing so will be helpful in determining reliability of an expert’s testimony, regardless of whether the testimony is scientific in nature or experience-based.”

After a review of Elwell’s *Robinson* hearing testimony, the Texas Supreme Court found that the trial court was within its discretion to exclude his testimony and thus did not abuse its discretion.

Product practitioners should argue that *Tamez* demonstrates that the same policy considerations requiring reliability in scientific expert testimony should apply to all expert testimony.

4. **In re the University of Texas Health Center at Tyler**, 198 S.W.3d 392 (Tex. App.—Texarkana 2006, no pet. h.).

The Plaintiffs in this case were the heirs and estate of a man who died after years of smoking and asbestos exposure. As part of discovery, one of the defendants

subpoenaed non-party The University of Texas Health Center at Tyler to produce the decedent's lung pathology materials.

The hospital objected to production, but the trial court overruled the objections and ordered the Hospital to produce the materials. The hospital petitioned the Texarkana Court of Appeals for a writ of mandamus.

The appellate court denied the petition for two reasons. First, the court observed that the hospital had waived its objections to the subpoena by failing to timely object to the subpoena. Second, the appellate court found that even without waiver, the trial court's order requiring production was not an abuse of discretion. The court rejected the hospital's argument that the Texas Rules of Civil Procedure do not permit custodial transfer of tangible items from non-parties.

The court of appeals reasoned that Rule 205.3(b)(3) lists testing as a legitimate purpose of requesting production from a non-party. Given this background, the court defined the pertinent question as whether that testing may be done only while in the possession of the original custodian. The Court of Appeals held that Rule 205.3 did not require such restrictions on production.

The court of appeals reasoned that many forms of testing would be impossible if custody had to remain with the original owner. Because the scope of the rules is broad enough to include physical transfer, the appellate court deemed the trial court's ruling within the discovery rules. (The court of appeals did not face the issue destructive testing because the trial court's order had not allowed for any destructive testing.)

Next the hospital argued that the order presented an undue burden. The discovery rules permit trial courts to limit discovery when the burden of the proposed discovery outweighs its benefit. The hospital argued that allowing off-site testing of materials would burden it by endangering the integrity of the materials, which it needed for research.

The court rejected this argument. Given the litigants' needs and the insufficiency of on-site testing, the appellate court found that the burden on the hospital did not clearly outweigh the benefit to the parties.

In re the University of Texas Health Center at Tyler is useful for litigants seeking production of tangible materials from a non-party for testing. In this case, the court of appeals refused to interpret Texas Rule of

Civil Procedure 205.3(b)(3) so narrowly as to preclude production and testing of tangible materials.

5. R.H. Tamlyn & Sons, L.P. v. Scholl Forest Indus., 208 S.W.3d 85 (Tex. App.—Houston [14th Dist.] 2006, no pet. h.).

In *R.H. Tamlyn & Sons*, the Plaintiff contracted for the construction of a new home with cement stucco as the exterior. Unknown to the homeowner, the contractor instead installed artificial stucco. When the artificial stucco presented moisture problems, the homeowner sued the contractor and subcontractor.

In response, the subcontractor filed an indemnity claim against SFI, who in turn filed an indemnity claim against Tamlyn. Tamlyn manufactured window flashing, a component part of the artificial stucco.

When SFI moved for summary judgment regarding Tamlyn's duty to indemnify SFI, Tamlyn responded that SFI had failed to establish that the underlying plaintiff had alleged a products liability action involving defective window flashing.

The trial court granted summary judgment to SFI and awarded SFI its costs and fees for defending the action under section 82.002 of the Civil Practice and Remedies Code. The Houston Court of Appeals reversed this decision.

When appealing the decision to the court of appeals, Tamlyn acknowledged that it was a manufacturer of window flashing and that SFI was a seller under section 82.002. However, Tamlyn argued that the plaintiff had not alleged a defect in Tamlyn's window flashing, and thus no statutory right to indemnity existed. SFI responded that the plaintiff's pleadings did claim a defect in the window flashing because the plaintiff had alleged a defect in the artificial stucco of which the window flashing was a component.

The appellate court disagreed with SFI. Instead, it held that a bare allegation that a product is defective does not constitute an allegation that all its unnamed component parts are defective. A component manufacturer's duty to indemnify a seller under 82.002 arises only when the pleadings include an allegation of a defect in the component, not merely in the seller's product.

Because there was no mention of defective window flashing in the plaintiff's pleadings, SFI had no right to indemnity from Tamlyn under section 82.002. The

appellate court reversed the trial court and rendered a take nothing judgment for Tamlyn.

The *R.H. Tamlyn & Sons* case provides a potential additional defense to indemnity claims if plaintiff's pleadings reveal no specific allegation of a defect specific to a component at issue.

6. Ford Motor Co. v. Castillo, 200 S.W. 3d 217 (Tex. App.—Corpus Christi 2006, pet. filed).

The Corpus Christi Court of Appeals found that a plaintiff motorist need not file a separate action to enforce a settlement agreement reached with Ford.

In the underlying matter, Plaintiffs sued Ford for products liability after a roll-over accident involving a Ford sports-utility vehicle. While the jury was in deliberations on the matter, the trial court received a note from the presiding juror asking, "What is the maximum amount that can be awarded?"

After hearing the question, the parties reached a settlement agreement, which they announced to the court. The trial court recognized the agreement and dismissed the jury.

Upon interviewing the jury, Ford's counsel learned that the questions on liability had not yet been determined. Thus, the jury arguably violated the charge, which instructed them to consider damages only after determining liability. Further, the note was apparently sent by the presiding juror without the knowledge or consent of the other jurors. Ford believed these facts indicated improper outside influence on the jury.

Ford subsequently refused to honor the settlement agreement, leading Plaintiffs to file a motion to enforce the settlement agreement. At the hearing, Ford's counsel assured the trial court that it would pay but needed more time to draft the documents. The trial court granted extra time to Ford but otherwise granted Plaintiffs motion to enforce.

Ultimately, Ford filed a motion asking the trial court to set aside the settlement agreement. The trial court denied Ford's motion.

Plaintiffs then filed a motion for summary judgment for breach of contract. Ford responded that a motion for summary judgment was inappropriate and that Plaintiffs' only recourse was to bring a separate lawsuit. The trial court granted Plaintiffs' motion for summary judgment.

In its brief to the Corpus Christi Court of Appeals, Ford argued that the trial court erred by failing to treat judicial enforcement of the settlement agreement as an ordinary claim for breach of contract. Ford believed that Plaintiffs failed to properly plead the claim and thus that Ford was denied discovery.

First, the appellate court acknowledged that because Ford withdrew its agreement before entry of judgment, the trial court could not enter an agreed judgment. However, the appellate court reasoned that the present case involved an entry of judgment enforcing a settlement agreement, not an agreed judgment. The court found that although a court cannot render a valid agreed judgment absent consent, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with Rule 11 – even if one side no longer consents.

Further, the Corpus Christi Court of Appeals found that a motion to enforce settlement was a sufficient pleading, which provided Ford with adequate notice of the Plaintiffs' claims. In fact, where a settlement dispute arises while the trial court has jurisdiction over the underlying action, a claim to enforce the settlement agreement *should* be asserted in that court under the original cause number.

Because the motion to enforce settlement was procedurally appropriate and provided Ford with adequate notice, the *Castillo* court affirmed the trial court's grant of summary judgment.

The *Castillo* appears to support enforcement of agreements pursuant to Tex. Civ. P. Rule 11. Although an agreed judgment may be inappropriate if one party withdraws consent, a motion to enforce settlement can still support entry of judgment under Rule 11.

7. Seelin Medical, Inc. v. Invacare Corp., 203 S.W.3d 867 (Tex. App.—Eastland 2006, pet denied).

The underlying case involves a products liability suit brought by Reynaldo Baeza against Seelin, Invacare, and Graham-Field for injuries he sustained when his walker collapsed.

Invacare, the manufacturer of the walker, filed a no-evidence motion for summary judgment. While that motion was pending, Seelin, the seller of the walker, filed an indemnity cross-claim against Invacare under

Section 82.002. Invacare's no-evidence motion was later granted.

Baeza then filed a third amended petition, which asserted no claim against Invacare and which did not allege that the walker was defective. Instead, Baeza alleged only that the platform assembly was defective. He asserted this claim against Seelin and Graham-Field, the platform manufacturer.

Invacare defended Seelin's claim for indemnity by filing a motion for summary judgment, which the trial court granted.

The Eastland Court of Appeals began its review by observing that the purpose of Section 82.002 is to require a manufacturer to indemnify an innocent seller for damages and litigation expenses arising out of a products liability action. In applying this section, courts cannot consider extrinsic evidence. Instead, courts must look only to the allegations in a products liability pleading to determine whether the claimant asserts an allegation that falls within Section 82.002.

Seelin argued that because the original petition alleged that the walker was defective, Section 82.002 was applicable and it was entitled to indemnity. It claimed that if a products liability petition ever asserts a claim covered under Section 82.002, the manufacturer must indemnify the seller so long as the seller remains a party. On the other hand, Invacare argued that if a claimant abandons a products liability claim against the manufacturer, the manufacturer's duty to indemnify is retroactively eliminated.

The court of appeals disagreed with both parties. It found that Invacare had a duty to indemnify Seelin for claims relating to the walker. Because Plaintiff Baeza's initial pleading claimed that the walker was defective, these allegations triggered Invacare's duty to indemnify Seelin under Section 82.002.

However, this duty to indemnify was not without limitation. The court found this duty ended when Baeza amended his petition to abandon the claims against Invacare. This duty did not end when Invacare received summary judgment against Baeza because Baeza could still appeal or present a motion to reconsider. It did end when Baeza amended his petition.

After determining when Invacare's duty to indemnify began and ended, the court of appeals affirmed the trial court's judgment except to the extent the trial court found that Invacare owed no duty to indemnify

Seelin for costs in defending claims prior to the time Baeza amended his petition.

Seelin provides more guidance to analysis of the extent of indemnity obligations under section 82.002, defining the beginning and end of a manufacturer's duty to indemnify a seller.

8. Gilcrease v. Garlock, Inc., 211 S.W.3d 448 (Tex. App.—El Paso 2006, no pet. h.).

After spending all his working life as a pipe fitter and plumber, Fred Gilcrease contracted mesothelioma. While Mr. Gilcrease was still alive, he and his wife filed suit against many defendants for damages from exposure to asbestos. They settled with a majority of the defendants.

After Mr. Gilcrease died, Plaintiffs amended the petition to add the Gilcreases' adult children as plaintiffs. Almost one year later, the Plaintiffs non-suited their claim against Garlock, but the following day filed an original petition asserting identical claims against Garlock.

After a jury trial, the jury awarded \$2,547,798.26 for compensatory damages and \$1,000,000 in exemplary damages. Plaintiffs' moved for entry of judgment, which brought into issue the appropriate amount of settlement credits. The settlements included a \$200,000 payment from the Johns-Manville Trust, of which only \$20,000 had been paid, and settlements with three defendants that had later declared bankruptcy.

The trial court included these credits in its calculation of settlement offsets. It found that Garlock was entitled to a settlement credit of \$4,572,354 and entered a take-nothing judgment because this amount exceeded the jury's damages. The trial court specifically found that the settlement credits could be used to offset the punitive damages award.

Upon review, the El Paso Court of Appeals found that settlement agreements would not be counted as settlement credits if they were contingent at the time the settling defendants promised to pay. However, for the Gilcrease Plaintiffs, this was not the case. The appellate court found that, with the exception of the settlement with Johns-Manville Trust, the settlement agreements were not contingent at the time they were made because the settling defendants made unconditional promises to pay. The court held that the post-settlement insolvency of a settling defendant cannot transform the settlement into a contingent one.

Thus, the appellate court upheld the trial court's ruling that the plaintiffs' settlements with subsequently bankrupt defendants count as settlement credits under Chapter 33 of the Civil Practice and Remedies Code.

The appellate court next turned to a review of the trial court's application of settlement credits to the exemplary damages award.

Under the one satisfaction rule, a non-settling defendant may only claim a credit based on the damages for which all tortfeasors are jointly liable. The court of appeals explained that under this rule, a non-settling defendant is allowed to offset any liability for joint and several damages by the amount paid by the settling defendant. But it may not receive a credit for any amount of separate or punitive damages paid by the settling defendant.

The appellate court confirmed that exemplary damages were intended to punish only one defendant. Thus, the underlying requirement of a joint liability is missing for exemplary damages.

Garlock argued that because Plaintiffs' counsel argued to the jury that it could consider the conduct of other defendants in answering the exemplary damages question, it could not be said that the exemplary damages were specific to Garlock. The appellate court refused to consider this argument, stating that the issue of reversible error for an improper final argument was not before it.

The court thus reversed the trial court's ruling that settlement credits could be used to offset the punitive damages award.

Practitioners will find *Gilcrease* useful in ensuring the application of settlement credits based on a bankrupt defendant's settlement. However, settlement credits cannot be used to offset exemplary damages.

9. In re Ford Motor Co., 211 S.W.3d 295 (Tex. 2006).

In this case, the Texas Supreme Court reinforced the security that agreed protective orders offer, finding that a court clerk's mistaken disclosure of privileged documents should not destroy confidentiality.

In the underlying case, Matthew Marroquin died in a rollover accident involving his Ford Expedition. His family filed a products liability suit against Ford and

sought numerous documents from Volvo, a wholly-owned Ford subsidiary.

To facilitate discovery while still respecting confidentiality, the parties agreed to a joint protective order for Volvo's documents. The order stipulated that the parties would keep confidential any Volvo documents containing trade secrets and other confidential information.

After filing the agreed protective order, Ford produced under seal many Volvo documents concerning reports related to rollover testing of the Volvo XC-90 SUV.

In Florida state court, another plaintiff was litigating a similar claim against Ford, and Ford submitted under seal the same documents under a similar protective order. The clerk of that court inadvertently allowed the media, interest groups, and other unknown persons access to the documents. The Florida plaintiff moved to have the documents declared non-confidential. The Florida court rejected this argument.

Following the Florida action, the Marroquins also argued that the Volvo rollover documents were no longer confidential. The trial court granted the Marroquins' motion and deemed the documents non-confidential. Ford sought a writ of mandamus to vacate the trial court's order.

Before the Texas Supreme Court, the Marroquins argued that regardless of whether the documents were once covered by the protective order, their publication destroyed any claim of confidentiality. Ford resisted this argument, focusing instead on how the documents were disclosed rather than on the number of people who may have ultimately accessed them.

The Texas Supreme Court agreed with Ford, holding that a document's confidentiality belongs to the document owner, not the trial court. And under Texas law, a party waives privilege or protection over a document only by voluntary disclosure. A court employee's mistaken document production cannot constitute a voluntary waiver of confidentiality.

The *In re Ford* court ruled that regardless of how many people saw the documents; disclosure by the third-party did not waive the privileged nature of the information. The court believed that this principle "should apply with particular force when documents are entrusted to a court."

The Texas Supreme Court thus conditionally granted the writ of mandamus, directing the trial court to vacate its order ruling the Volvo documents no longer confidential.

In re Ford confirms both the enforceability of interim agreed protective orders and confirms that the cause of disclosure is more significant than the fact of disclosure. The Supreme Court's ruling provides parties with needed confidence that their protective orders will function as intended and that mistakes of court personnel will not be mistakenly considered waiver.