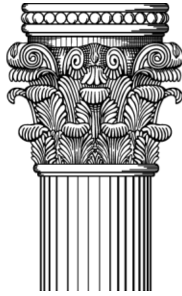

TADC ENVIRONMENTAL/TOXIC TORT NEWSLETTER

October 2, 2009

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

Since the advent of Chapter 90 of the Texas Civil Practice & Remedies Code, environmental litigation in Texas has continued its sharp decline in Texas. At present, the silica docket remains effectively silent and the asbestos docket continues movement at an extremely slow pace. Since the last newsletter publication, Texas courts have continued their strict application of the requirements of Chapter 90.

During the 2009 legislative session, Senator Duncan of the Texas Senate introduced a bill to supersede the 2007 ruling in *Borg-Warner v. Flores* which heightened and accentuated the evidentiary requirements for prosecution of such claims and have provided counsel across the state with very specific guidelines as to prosecution of toxic tort claims. Senate Bill 1123 would have removed the requirement for mesothelioma claimants "to prove, for any purpose, a quantitative dose, approximate quantitative dose or estimated quantitative dose of asbestos fibers to which the exposed person was exposed" in order to meet the standard of causation. Additionally, the law would allow defendants to establish the liability of other responsible parties under the same causation standards as the plaintiff. Although the bill passed a Senate vote, it never left the House Judiciary and Civil Jurisprudence Committee and died.

As a result of these events, toxic tort litigation in Texas remains only a shell of its former self with no signs of resuscitation. As has been their practice since toxic tort reform, Plaintiffs' firms are continuing to pursue toxic tort litigation in other states with less stringent evidentiary requirements such as California, Illinois, Michigan and Delaware and these states continue to experience a boon in environmental litigation.

It appears that toxic tort litigation will remain only a small fraction of litigation practice in the State of Texas for the foreseeable future.

IN RE DIGITEK(R) LITIGATION

MDL No. 09-0408

MULTIDISTRICT LITIGATION PANEL OF TEXAS

2009 Tex. LEXIS 551

August 5, 2009, Opinion Delivered

ISSUE: Seven defendants asked the panel to assign a pretrial judge to nineteen drug liability cases pending in twelve counties.

FACTS: Plaintiffs alleged that the defendants improperly manufactured Digitek tablets that delivered an excessive dosage and caused toxicity-related injuries. Digitek is a generic prescription drug that is used to treat certain abnormal heart rhythms and other problems.

HOLDING: The Panel found that the cases were related because they involved the same product, even though in individual cases the issues of causation and damages would differ. Assigning a pretrial judge would help eliminate duplicative discovery, minimize conflicting demands on witnesses, and prevent inconsistent decisions. Although assignment of the cases to one pretrial court would make it difficult for some lawyers to attend hearings in person, the Panel was confident that lawyers whose offices were far removed from the pretrial court would be able to participate, upon request, by telephone and other electronic means. Two of the defendant doctors argued that the common issues concerning the drug were insignificant when compared to the case-specific issues in their litigation. However, if the Panel did not transfer their case with the others, the common issues would be subject to the repetitive discovery and conflicting demands and orders that Tex. R. Jud. Admin. 13 aimed to prevent. Accordingly, the Panel concluded that the motion to transfer should be granted. The request for a certain judge, however, was denied. It was improper for a motion to seek transfer to a certain court or county.

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: **W**hether 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 sued E.I. du Pont de Nemours and Company 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 grounds were (1) the verdict was contrary to the weight of the evidence, and (2) some jurors may have read newspaper articles about the trial that Whisnant contended were biased toward DuPont. 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. DuPont argued that the trial court abused its discretion by (1) granting a new trial without stating a reason for disregarding the jury verdict, and (2) granting the new trial motion in any event.

HOLDING: The Supreme Court held that the trial court abused its discretion by disregarding the jury verdict and granting a new trial without giving its reasons for doing so. In so holding, the Court relied on *In re Columbia*, 2009 Tex. LEXIS 476 (Tex. 2009), in which the Court held 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. The Court refused to consider DuPont's request that it review the grounds Whisnant asserted in his motion for new trial to determine whether granting his motion on any of those grounds would have been an abuse of discretion. The Court directed the trial court to specify its reasons for granting the new trial.

CITY OF SAN ANTONIO, PETITIONER, v. CHARLES POLLOCK AND TRACY POLLOCK, INDIVIDUALLY AND AS NEXT FRIENDS OF SARAH JANE POLLOCK, A MINOR CHILD, RESPONDENTS

NO. 04-1118

SUPREME COURT OF TEXAS

284 S.W.3d 809; 2009 Tex. LEXIS 251; 52 Tex. Sup. J. 665

October 18, 2006, Argued
May 1, 2009, Opinion Issued

ISSUE: Respondent homeowners sued petitioner city, claiming that benzene from a closed municipal waste disposal site migrated through the soil to their nearby home, reducing its value and causing their minor daughter to contract leukemia. A jury returned a verdict for the homeowners. The Court of Appeals for the Fourth District of Texas reversed an exemplary damage award and affirmed in all other respects. The city sought further review.

FACTS: Charles and Tracy Pollock's daughter Sarah was born in June 1994. In February 1998, she was diagnosed with acute lymphoblastic leukemia ("ALL"). Cancer is rare in children, but leukemia is the most common, and ALL is the most common type of childhood leukemia. A bone marrow biopsy also found that sixty percent of Sarah's bone marrow cells had 56 to 58 chromosomes instead of the expected 23 pairs; there were trisomies, a tetrasomy, and a translocation. Following an intensive regimen of chemotherapy lasting more than two years, the cancer went into remission and the chromosomal anomalies disappeared. The statistical chance of recurrence is twenty percent. After Sarah began treatment, the Pollocks decided their family had outgrown the home in which they had been living in San Antonio since January 1992, before Sarah and her younger sister were born, and they put it up for sale. The home backed up to an old limestone quarry the City had used as a waste disposal site from 1967 to 1972 called the West Avenue landfill. The landfill had been closed and covered over with several feet of dirt twenty years before the Pollocks bought their home, but they had always smelled what Tracy described as "a really strong, pungent odor" in the house, particularly in the bathrooms. They smelled the same odor in the back yard for several days after a rain. The Pollocks' realtor, wanting to fully disclose the condition of the property to prospective buyers, obtained an April 1998 report prepared for the City on methane gas concentrations around the landfill and gave it to the Pollocks. Anaerobic bacteria digesting landfill waste can produce large quantities of methane. Methane, the principal component of natural gas, is a colorless, odorless gas at room temperature and standard pressure. It has a lower explosive limit of 5% and an upper explosive limit of 15%, which means that it is explosive at a concentration of between 5% and 15% in air. Though not toxic, it can cause asphyxiation at a concentration above 14% in air. Bacterial production of methane increases when leachate is present. Leachate is water that has seeped down into a landfill and percolated through it, collecting various contaminants along the way. Methane can serve as a carrier for other landfill byproducts and volatile organic compounds, such as benzene.

benzene is an aromatic hydrocarbon found in crude oil. At room temperature and standard pressure, benzene is a clear liquid with a sweet smell, but it evaporates quickly and is highly flammable. It is widely used as a gasoline additive, an industrial solvent, and a precursor in the production of other chemicals, and is present in cigarette smoke. benzene is a known carcinogen.

The evidence revealed that several years after the City closed the landfill in 1972, it began receiving complaints from nearby residents about odors caused by gases escaping from the landfill. In 1980, the City found that pockets of methane gas had formed near the landfill, some in potentially explosive concentrations. The highest observed concentrations were along the southwest side of the landfill, in the neighborhood where the home the Pollocks later bought was located. To collect methane from the landfill and prevent its migration into the surrounding area, the City drilled a system of ventilation wells around the perimeter, connected by a pipe, with a compressor to lower the pressure so that gas would be drawn from the landfill into the wells. The City also purchased two residences near the landfill in which gas had been detected, one just two blocks from the Pollocks' property, to use as monitoring facilities.

In 1982, a survey of the water quality in several wells in the Edwards Aquifer detected various volatile organic compounds, including benzene, which might have come from the landfill. A consulting firm hired by the City concluded that methane was migrating through subsurface cracks in the walls and base of the landfill. Once outside the landfill, methane could also flow through the soil along trenches that had been dug to lay residential utilities, like water and sewer lines, and refilled. In that way, methane carrying benzene and other chemicals could migrate to the houses surrounding the landfill, endangering residents. The consultants also concluded that leachate had accumulated in the landfill, increasing methane production and blocking it from reaching the ventilation wells. The consultants recommended that the methane collection system be improved and wells drilled to remove leachate from the landfill.

The City made several improvements in 1985, but subsidence in the landfill continued to impair operation of the methane collection system and the leachate collection wells, causing portions of the system to collapse. Subsidence also allowed water to pool at the surface, increasing drainage through the landfill and the amount of leachate, which in turn increased methane production. When the Pollocks bought their home, there was a large hole in the back yard, apparently due to subsidence near the landfill. At the Pollocks' request, the City filled the hole, but it developed again later, and the City filled it a second time.

In late 1989, a City engineer recommended major repairs to the methane collection system, and in August 1994, an outside contractor hired by the City recommended that the entire system be replaced. The City installed a new system in early 1998.

Over the years, the City regularly tested for landfill gas in the ventilation wells and at several homes near the landfill, including those used as monitoring facilities. The air near the Pollocks' home was field-tested for methane at various times between 1981 and 1997, using a hand-held explosimeter. No methane was detected near the Pollocks' home while they lived there. At trial, the Pollocks' expert, Dan Kraft, an engineer with experience in landfill management, attempted to extrapolate the presence of landfill gas on the Pollocks' property in 1993 and 1994, when

Tracy was pregnant with Sarah, from samples taken in 1998 from a sealed monitoring well 128 feet deep, located 30 feet from the Pollocks' back yard and 70 feet from their home. Those samples contained methane at a concentration of 477,000 ppm (47.7%) and benzene at 146 ppb by volume. Assuming that the ratio of benzene to methane remained constant over time while methane from the landfill was decreasing -- an assumption the City agreed was reasonable -- and using an accepted EPA gas generation model, Kraft concluded that, had a sample from the sealed well been taken in 1993-1994, it would have contained at least 160 ppb benzene. Kraft then stated that in his opinion, gas with a composition similar to the sample entered the Pollocks' home "on a regular basis". Of course, landfill gas would immediately dissipate in the open air. Even greatly diluted, the gas would have been asphyxiating and explosive. Kraft offered no opinion regarding any concentrations of methane or benzene in the ambient air in the Pollocks' home and yard.

Dr. Mahendar Patel, Sarah's other treating oncologist, testified that in his opinion, Sarah's leukemia was caused by Tracy's exposure to benzene while she was pregnant with Sarah. Patel was experienced in diagnosing and treating ALL but had done no research himself on the causes of the disease or any connection between ALL and benzene. He based his opinion at trial on Kraft's testimony and on several studies of cancer rates in workers occupationally exposed to benzene. None of the studies considered an exposure to benzene at a concentration less than 31 ppm, which is 31,000 ppb, over 200 times the concentration in the 1998 sample on which Kraft relied. The studies also found chromosomal anomalies in subjects, some of which were similar to Sarah's, but the studies did not conclude that exposure to benzene was the most likely cause of anomalies like Sarah's.

HOLDING: The Supreme Court of Texas concluded that there was no evidence to support an award of personal injury damages on the theories of nuisance or negligence. As to testimony offered to prove that the child was exposed in utero to landfill gas at levels high enough to cause her illness, the expert opinion of the mother's chronic exposure to benzene concentrations of 160 ppb had no basis in the record and was directly contradicted by the expert's own data showing such concentrations present only in the well, rather than in the ambient air of the home and yard. There was no basis for another expert's testimony that the child's pattern of chromosomal anomalies indicated her illness was benzene -induced because the expert testified that some of the chromosomal anomalies were unrelated to benzene exposure. The conclusory opinions provided no evidence that the illness was caused by the mother's exposure to benzene from the landfill. The city's negligent failure to prevent landfill gas migration was not evidence that it intended to damage the property. Since there was no evidence of a compensable taking, the city was immune from the property damage claims under Tex. Const. art. I, § 17.

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 the trial court erred in granting Luminant Generation Company, L.P. and Brown & Root, Inc.'s motions for summary judgment regarding causation.

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 the trial court and on appeal, Luminant and Brown & Root contend that Boyd presented no evidence of causation to support his premises liability claim.

HOLDING: The Court affirmed the trial court's grant of summary judgment. In so doing, the Court relied on the Texas Supreme Court's holding that "asbestos in the defendant's product [must be] a substantial factor in bringing about the plaintiff's injuries." *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 770 (Tex. 2007). The Court reviewed Boyd's summary judgment evidence and found that none of this evidence addresses the approximate dose to which Boyd was exposed and that, accordingly, Boyd failed to raise a fact issue as to whether the substance of which he complained was a substantial factor in causing his injury.

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

2009 Tex. App. LEXIS 6660

August 25, 2009, Majority and Concurring Opinions on En Banc Review Filed

ISSUE: 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.

FACTS: The employee developed an asbestos-related disease from his workplace exposure. Appellants filed suit against Union Carbide for exemplary damages, alleging that the company's intentional, knowing, or reckless acts or omissions in regularly exposing Homer to respirable asbestos fibers without providing respiratory protection or advising him of the health risks caused the injuries that resulted in Homer's death. But the Release executed by Homer and Marjorie Ross broadly covers all claims and damages against Union Carbide, including those under the Wrongful Death Act. Thus, the Release bars appellants' claims unless the claims are properly asserted on some basis other than the Wrongful Death Act. Appellants expressly deny that their claims are brought pursuant to the Wrongful Death Act, and instead contend that specific provisions of the Texas Constitution and the Workers' Compensation Act, alone or in combination, create an exemplary-damages cause of action that is both independent of the Wrongful Death Act and nonderivative of Homer's rights. 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: 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.

FACTS: The employee filed a verified petition seeking permission for a presuit deposition under Tex. R. Civ. P. 202. 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. The trial judge granted the request, and this writ petition followed.

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. Mandamus relief was conditionally granted. The writ only issued if the trial judge failed to issue an order denying the petition for a presuit deposition.

JOHN MCDONALD AND CHERYL MCDONALD, INDIVIDUALLY AND AS NEXT FRIEND FOR MINOR PATRICK TUCKER MCDONALD, APPELLANTS v. CITY OF THE COLONY, TEXAS, APPELLEE

NO. 2-08-263-CV

COURT OF APPEALS OF TEXAS, SECOND DISTRICT, FORT WORTH

2009 Tex. App. LEXIS 4861

June 25, 2009, Delivered

ISSUE: Appellant property owners sued appellee, the City of the Colony, Texas, for nuisance, breach of contract, inverse condemnation, breach of warranty, negligence, gross negligence, and negligence per se. The 211th District Court of Denton County, Texas, granted the City's plea to the jurisdiction with respect to all claims except for the breach of contract and inverse condemnation claims. Appellants filed an appeal.

FACTS: The City leased to Club Fore Sports Center a tract of land for the construction and operation of a golf driving range and public recreation facility (the "Golf Center"). Appellant John McDonald subsequently purchased the Golf Center business and assumed the lease of the premises pursuant to a written assignment.

The City owns and operates a wastewater lift station on a portion of the leased premises as part of its wastewater collection system. The lift station is located on the east side of the leased premises and is surrounded by a chain link fence with a gated entrance. The lift station uses motor-driven equipment to pump raw sewage uphill from the low-lying area where the station is located to another part of the sewage system located on adjacent land owned by the City. It was designed to accommodate four submersible pumps. When the McDonalds filed suit in May 2007, two of the four submersible pumps were damaged beyond repair and no longer in operation and one of the two operational pumps was "assumed to be offline in order to meet the [Texas Commission on Environmental Quality] TCEQ requirements." Thus, the operating capacity of the lift station was limited to 3.5 million gallons per day (MGD) (the operating capacity of the single online operational pump), although the station was operating at an estimated capacity of 5.0 MGD.

Wastewater enters the lift station through an influent box that was designed to include a mechanical bar screen. The mechanical bar screen uses a conveyor belt system to remove any large objects that enter the lift station with the wastewater flows. The mechanical bar screen protects the pumps from those large objects and is required for the reasonable and safe use of the pumps. Due to frequent mechanical and maintenance problems with the mechanical bar screen, the City removed it around October 2006, which left the influent box and the underground

motors and pumps exposed. The City covered the opening with a metal cover "to prevent malodorous gases from escaping."

In September 2006, the McDonalds learned that the lift station was emitting harmful hydrogen sulfide gas (H[2]S). Mr. McDonald contacted the TCEQ, complaining of headaches, nausea, dizziness, eye and throat irritation, and corneal opacity. The TCEQ took air quality samples from the lift station, and on September 29, 2006, it issued a report that H[2]S concentrations from these samples were "within range to cause the symptoms that Mr. McDonald [was] experiencing." Specifically, the TCEQ reported that "[o]f the 73 samples that were taken, 36 were well above the residential, recreational, business or commercial regulation 30-minute standard of 0.08 ppm," and it "strongly recommend[ed]" that actions be taken to reduce exposure to H[2]S. Mr. McDonald also hired Green Star Environmental to follow up with independent air quality tests, and these tests revealed that the lift station was emitting H[2]S in excess of nationally prescribed reporting limits.

Mr. McDonald closed the Golf Center in October 2006 because of the harmful gas emissions. In May 2007, the McDonalds filed suit against the City, asserting claims for nuisance, breach of contract, inverse condemnation, breach of warranty, negligence, gross negligence, and negligence per se. They twice amended their petition to include causes of action for premises defect and fraud and to seek injunctive relief. In addition to claims based on the City's operation of the lift station, the McDonalds also alleged that the City drove large vehicles and back hoes over the grassy areas of the Golf Center, creating deep, muddy ruts on the leased premises and damaging the golf greens and sprinkler system.

The City filed a plea to the jurisdiction, asserting that it was immune from suit. The McDonalds filed a response to the City's plea and attached as evidence an affidavit of John McDonald, the agreement between the City and Club Fore Sports Center and various assignments of that agreement, the TCEQ report, and a laboratory report from Green Star Environmental's air quality testing around the lift station. In a supplemental response to the City's plea to the jurisdiction, the McDonalds attached a seventy-page preliminary design report dated June 25, 2007 (the "Preliminary Report"), which was prepared at the City's request by a third-party engineering firm and which explained the condition of the lift station and recommended certain improvements to it.

After a hearing on the City's plea, the trial court orally granted the City's plea regarding all of the McDonalds's claims except for their breach of contract and inverse condemnation claims. In June 2008, after hearing the McDonalds's motion for reconsideration, the court entered a written order granting the City's plea to the jurisdiction with regard to the McDonalds's causes of action for nuisance, breach of warranty, negligence, gross negligence, negligence per se, premises defect, and pure takings. It denied the plea with regard to the McDonalds's breach of contract and inverse condemnation claims. The McDonalds timely perfected an appeal to this court.

HOLDING: The trial court erred by granting the City's plea to the jurisdiction on appellants' negligence, gross negligence, negligence per se, and premises defect claims based on governmental immunity. Appellants' pleadings and evidence established the "use" of motor-

driven equipment sufficient to fall within the TTCA's waiver of immunity under Tex. Civ. Prac. & Rem. Code Ann. § 101.021(1). The trial court also erred by granting the City's plea to the jurisdiction on the nuisance claim. Because appellants' breach of implied warranty claims involved a lease of real property for commercial purposes, no warranty of fitness for a particular purpose or of habitability existed as a matter of law under the facts of this case; thus, the trial court properly granted the City's plea to the jurisdiction on these claims. The portion of the trial court's order granting the City's plea was affirmed as to claims for negligence alleging use of tangible personal property, use of motor-driven vehicles, and for breach of warranty. The trial court's order granting the City's plea was reversed as to claims for negligence alleging use of motor-driven equipment, for premises defect, and for nuisance; the case was remanded to the trial court for further proceedings.

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: Appellant property owner sought review of a summary judgment from the 105th District Court of Nueces County (Texas), which ruled that its suit against appellee oil company asserting negligence, trespass, nuisance, gross negligence, and malice claims arising from alleged environmental contamination was time-barred.

FACTS: The property in question is the Colonia del Rey RV Park (the "Park") located in Flour Bluff, Texas. The Park is adjacent to a tract of land where ExxonMobil and its predecessor, Humble Oil and Refining Company, once operated a gas plant. On June 20, 1972, the property where the Park is now situated was conveyed to Raymond Sims. Raymond and his wife, Robbie Faye Sims, conveyed the property to their son, Ernest Sims, on April 18, 1990. Ernest conveyed the property to DBMS on December 27, 2002. DBMS has owned the property continuously since Ernest's conveyance. On November 28, 2005, Raymond and Robbie Faye executed a written assignment of their rights to any causes of action involving the property to Ernest, and Ernest, on the same day, executed a similar written assignment to DBMS. After learning that the underground water and sub-surface soil had been contaminated, Ernest filed his original petition on January 23, 2006, against Pittencrieff America, Inc. ("Pittencrieff"), a subsequent owner and operator of the gas plant. On February 20, 2006, Ernest and DBMS jointly filed a first amended original petition adding ExxonMobil and others that are not parties to this appeal. In their first amended petition, Ernest and DBMS asserted causes of action for negligence, trespass, nuisance, and breach of contract against Pittencrieff, and gross negligence and malice against ExxonMobil relating to the contamination of the Sims Tract by petroleum hydrocarbons and other toxic materials and wastes. ExxonMobil filed its original answer to Ernest and DBMS's first amended petition on March 27, 2006, generally denying the claims made by Ernest and DBMS and asserting numerous affirmative defenses, including statute of limitations and standing, and noted that "Plaintiffs failed to exercise due diligence necessary to invoke the discovery rule as an exception to the statute of limitations. Plaintiffs['] damages claim, if any, was not inherently undiscoverable to Plaintiffs."

HOLDING: 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. 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. The court affirmed the judgment of the trial court.

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

2008 Tex. App. LEXIS 9867

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

ISSUE: 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.

FACTS: Vioxx, known generically as rofecoxib, belongs to a general class of pain relievers known as non-steroidal anti-inflammatory drugs ("NSAIDs"). NSAIDs work by inhibiting cyclooxygenase ("COX"), an enzyme that stimulates synthesis of prostaglandins, which are chemicals produced in the body that promote certain effects. Traditional NSAIDs, such as Advil (ibuprofen), Aleve (naproxen), and Voltaren (diclofenac), have been longstanding treatment options for patients needing relief from chronic or acute inflammation and pain associated with osteoarthritis, rheumatoid arthritis, and other musculoskeletal conditions. This relief, however, has historically come with significant adverse side effects. Specifically, traditional, NSAIDs greatly increase the risk of gastrointestinal perforations, ulcers, and bleeds ("PUBs"). This risk is further increased when high doses are ingested, which is often necessary to remedy chronic or acute inflammation and pain.

In the early 1990s, scientists discovered that the COX enzyme had two forms--COX-1 and COX-2--each of which appeared to have several distinct functions. Scientists believed that COX-1 affected the synthesis or production of prostaglandins responsible for protection of the stomach lining, whereas COX-2 mediated the synthesis or production of prostaglandins responsible for pain and inflammation. This belief led scientists to hypothesize that "selective" NSAIDs designed to inhibit COX-2, but not COX-1, could offer the same pain relief as non-selective NSAIDs with a reduced risk of fatal or debilitating PUBs. In addition, scientists believed that such drugs might also prove beneficial for the prevention or treatment of other conditions, such as Alzheimer's disease and certain cancers where evidence suggests that inflammation may play a causative role. In light of these scientific developments, pharmaceutical companies began developing new drugs known as "COX-2 inhibitors" or "coxibs." Merck developed a COX-2 inhibitor and named it Vioxx.

On November 23, 1998, Merck submitted a new drug application for Vioxx to the Food and Drug Administration ("FDA") and requested an expedited review of its application. Six months later, on May 20, 1999, the FDA approved Vioxx as safe and effective for treatment of osteoarthritic pain, menstrual pain, and acute pain based on the data and label supplied by Merck.

On September 15, 2000, a physician prescribed a daily 25-milligram dose of Vioxx to Bob Ernst to alleviate tendinitis pain in Ernst's hands. On May 6, 2001, approximately one hour after Ernst went to bed, appellee noticed that he was unconscious and was having trouble breathing. Appellee called emergency medical personnel and began cardiopulmonary resuscitation ("CPR"). Ernst never regained consciousness and was pronounced dead shortly after arriving in the emergency room. An autopsy was performed the following morning, and the report listed his death as cardiac arrhythmia secondary to coronary atherosclerosis.

Appellee, Carol Ernst, sued Merck alleging that the ingestion of Vioxx caused the death of her husband. Ernst's suit was tried to a jury, which found that the design and marketing of Vioxx was defective, that Merck's negligence proximately caused Ernst's death, and that the harm to Ernst resulted from malice attributable to Merck. The jury awarded a total of $24,450,000 in compensatory damages and assessed $ 229,000,000 in exemplary damages. Pursuant to section 41.008 of the Texas Civil Practice and Remedies Code, the trial court reduced the assessment of exemplary damages and entered judgment for appellee in the sum of $ 26,100,000.

HOLDING: 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. The court of appeals disagreed. 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. The trial court's judgment was reversed and judgment was rendered that the wife take nothing.