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TADC ENVIRONMENTAL/TOXIC TORT NEWSLETTER

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RECENT TOXIC TORT CASES OF INTEREST

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INTRODUCTION

This edition of the ENVIRONMENTAL/TOXIC TORT NEWSLETTER contains decisions from the Texas Courts of Appeals and the Texas Supreme Court, as well as general information concerning toxic tort practice.

This paper attempts to analyze and/or provide pertinent excerpts from recent Texas activity and cases which address issues relevant to the environmental/toxic tort area of legal practice. Due to space limitations, every issue, fact or argument cannot be included and, consequently, this paper contains some of the most precedential, defining and/or reinterpreted issues currently at hand. Obviously, many of the decisions may be subject to rehearing, further appeal, or *en banc* consideration and should therefore be used "with caution" in the future. The following are excerpts from opinions which have addressed issues relevant to this topic. Quotation marks have been omitted but the following consists of quotes from the opinions in the form of a summary.

SUMMARY

Now in the seventh year since implementation of Chapter 90 of the *Texas Civil Practice & Remedies Code*, Environmental litigation in Texas continues to trickle along at a greatly reduced rate.

The silica docket is still essentially dead. No movement or increase of substance has occurred and none is expected. The asbestos docket, while not defunct, is continuing its modest existence. The overall number of new case filings continues to dwindle down significantly from the pre-Chapter 90 level. Plaintiffs' firms continue to file suits in other, more plaintiff-friendly states.

At the end of 2010, both Multi-District Litigation Court judges filed the statutorily required reports for the asbestos and silica dockets. Asbestos Judge Mark Davidson reported that, as of that time, the asbestos docket contained 7,959 cases composed of 6,451 inactive cases and 1,517 active cases. Judge Davidson estimated that the total plaintiffs represented in these cases ranged from 25,000 to 84,000. Silica Judge Ted Halbach reported that the silica docket contained 667 cases composed of 5,839 plaintiffs. However, he noted that only 22 plaintiffs were active but that none had been referred back to trial.

However, in 2011, for the first time since implementation of Chapter 90 of the *Texas Civil Practice & Remedies Code*, a Texas Court of Appeals found the retroactive portion of the law to be unconstitutional. In *Union Carbide Corporation v. Synatzske*, et. al. (discussed herein) the First District denied a motion to dismiss based upon a plaintiff's failure to tender a qualifying report. The effect of this ruling on the litigation as a whole is not yet known.

In the interim, in addition to pursuing asbestos litigation in other states, Plaintiffs' firms continue attempts to find the next asbestos. Pharmaceutical litigation remains active, as anyone watching television can attest.

Additionally, chemical exposure litigation, specifically including benzene, is making yet another attempt to reassert itself. Orange County and Jefferson County maintain a small number of benzene cases. Most recently, in February, Darren Brown of Provost ★ Umphrey obtained a $17 million dollar verdict in Calcasieu Parish, Louisiana. The case concerned a Nederland, Texas petroleum inspector. Plaintiffs' attorneys are obviously heartened by this development.

Consequently, toxic tort litigation in Texas is still precarious but remains alive.

MERCK & CO., INC., PETITIONER, v. FELICIA GARZA, ET AL., RESPONDENTS

NO. 09-0073

SUPREME COURT OF TEXAS

347 S.W.3d 256*; *2011 Tex. LEXIS 638*; *54 Tex. Sup. J. 1697*; *CCH Prod. Liab. Rep. P18,692

January 20, 2010, Argued
August 26, 2011, Opinion Delivered

FACTS: The beneficiaries of Leonel Garza brought a products liability action against the manufacturer, claiming that a drug taken by the decedent, who had a long history of heart disease, was defective as designed and marketed with inadequate warnings. Twenty-five days before his death, Garza complained to his cardiologist, Dr. Michael Evans, of intermittent numbness, pain, and weakness in his left arm. After determining that Garza was not having a heart attack, Evans ordered an ultrasound of Garza's neck to check the circulation to his brain and a stress test to check the circulation to his heart. Evans also gave him a week's supply of 25 mg Vioxx for pain relief and scheduled a follow-up visit eight days later. When Garza returned for his appointment, Evans was out of town, and one of his partners, Dr. Juan Posada, reviewed Garza's test results with him and his wife. The stress test revealed that Garza had a stable cardiac status, and Posada noted in Garza's record that he thought Garza was on optimal medical management. However, the test did reveal some small areas of apical ischemia, meaning that a part of the tip of Garza's heart was not getting enough blood when stressed. Posada offered the possibility of a cardiac catherization to more fully investigate the cause of the apical ischemia, but Garza declined, opting to discuss the results with Evans a month later. According to Mrs. Garza, Posada gave her husband thirty additional 25 mg Vioxx pills. Seventeen days later, on April 21, 2001, Garza died while alone at his ranch near Rio Grande City, Texas. The autopsy found that the immediate cause of death was a "probable myocardial infarction" initiated at least in part by the underlying cause of "severe coronary artery disease".

Merck repeatedly challenged the scientific reliability of the Garzas' evidence offered to prove that Vioxx caused Garza's death. The trial court overruled Merck's objections. The jury returned a verdict for the Garzas, awarding $7 million actual damages, plus $25 million in punitive damages, which the trial court reduced to the applicable statutory maximum of $750,000. Merck appealed.

HOLDING: The court found that the two clinical studies cited by the beneficiaries did not meet Havner's standards of reliability. The totality of the evidence could not prove general causation if it did not meet the standards for scientific reliability established by Havner. The court held that the beneficiaries did not present reliable evidence of general causation and were therefore not entitled to recover against the manufacturer.

ANALYSIS: The court found that the two clinical studies cited by the beneficiaries did not meet Havner's standards of reliability. The totality of the evidence could not prove general causation if it did not meet the standards for scientific reliability established by Havner. The court held that the beneficiaries did not present reliable evidence of general causation and were therefore not entitled to recover against the manufacturer. In so doing, the Supreme Court reiterated the Havner ruling that when parties attempt to prove general causation using epidemiological evidence, a threshold requirement of reliability is that the evidence demonstrate a statistically significant doubling of the risk. In addition, *Havner* requires that a plaintiff show "that he or she is similar to [the subjects] in the studies" and that "other plausible causes of the injury or condition that could be negated [are excluded] with reasonable certainty." *Havner* also requires that even if studies meet the threshold requirements of reliability, sound methodology still necessitates that courts examine the design and execution of epidemiological studies using factors like the Bradford Hill criteria to reveal any biases that might have skewed the results of a study, and to ensure that the standards of reliability are met in at least two properly designed studies. Thus, a plaintiff must first pass the primary reliability inquiry by meeting *Havner's* threshold requirements of general causation. Then, courts must conduct the secondary reliability inquiry that examines the soundness of a study's findings using the totality of the evidence test. The Court found that the conditions of the study should be substantially similar to the claimant's circumstances.

IN RE AMF INCORPORATED, Relator

NO. 14-11-01011-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

2012 Tex. App. LEXIS 668

January 26, 2012, Memorandum Opinion Filed

FACTS: The real party plaintiffs, John David Simpson, Individually and as Representative of the Estate of Marion J. Simpson, Danny Lewis Simpson, and Ronnie Wayne Simpson, brought a wrongful death lawsuit against relator after Marion Simpson's death in 2003. In the suit, the real parties alleged that Simpson developed lung cancer as a result of his occupational exposure to asbestos while working as an insulator. Simpson worked at B&B Engineering & Supply Co. Inc., at various times between 1945 and 1970. The real parties asserted that Relator is liable, as a corporate successor to B&B, for Simpson's death. Relator filed a traditional motion for summary judgment seeking to bar the real parties' common law tort claims under the exclusive remedy provisions of the Texas Workers' Compensation Act.[1] *See Tex. Lab. Code 408.001-408.222*. On September 9, 2011, the trial court signed an order in which it granted the motion "as to all claims, other than gross negligence, for the time periods when Plaintiff Simpson was a direct employee of B&B Engineering and such claims are hereby DISMISSED with prejudice." The court denied the motion "for the time period when Plaintiff Simpson was not a direct employee of B&B Engineering." Relato sought a writ of mandamus to order respondent to vacate the September 9, 2011 order and to enter an order dismissing the real parties' common law tort claims against relator.

HOLDING: Mandamus denied.

ANALYSIS: The Court denied mandamus relief under the long-standing holding that mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion, because "trying a case in which summary judgment would have been appropriate does not mean the case will have to be tried twice." The Court considered the recent Texas Supreme Court ruling that mandamus was appropriate to correct the erroneous denial of a motion for summary judgment in extraordinary circumstances, *See In re USAA, 307 S.W.3d 299, 314 (Tex. 2010)* (granting relief to enforce limitations after relator had already endured trial in incorrect jurisdiction), it found no such circumstances in this case.

SCOTT'S MARINA AT LAKE GRAPEVINE LTD., D/B/A SILVER LAKE MARINA, JUST FOR FUN OF NORTH TEXAS, INC. AND SILVER LAKE MARINA STORE, INC., APPELLANTS v. ALLEN JOHNATHAN BROWN, APPELLEE

NO. 07-10-00277-CV

COURT OF APPEALS OF TEXAS, SEVENTH DISTRICT, AMARILLO

2012 Tex. App. LEXIS 492

January 23, 2012, Decided

FACTS: Plaintiff Brown was employed to work weekends at the Store during the summer of 2005. The Store was owned by Scott's Marina, but had been leased to JFF. Brown was hired by JFF and was paid by JFF. On June 11, 2005, Brown was working the cash register at the Store when he heard a "whoosh-type" noise and was immediately struck by a "godawful smell." A substance began to backup and overflow out of the hub drain of a Pepsi soda fountain machine in the Store. The Store was initially evacuated before Brown was ordered to clean up the backflowed substance. Brown performed the cleanup with the use of a mop and bucket. No additional protective wear was provided to Brown while he cleaned up the backflow. Additional spills occurred over the remainder of the weekend of the 11th. It took Brown about ten to fifteen minutes to clean the spillages each time they occurred. The following weekend, the hub drain again backflowed on multiple occasions. On these instances, two other Store employees assisted Brown in clean up of the spillages. Plumbers were called to the Store on June 20, and apparently installed backflow valves to the hub drain line. Regardless, no further backflows occurred after June 19. During the second weekend, Brown developed a cough and a sore throat. He indicated that the glands in his neck started to swell. Nonetheless, Brown attempted to work through his developing illness. However, due to severe vomiting and diarrhea, Brown eventually had to seek medical attention on July 5. Brown's illness worsened from July 5 to July 11, when Brown had his mother take him to the emergency room because he was vomiting uncontrollably. Brown was hospitalized and diagnosed with enteroviral meningitis and Lemierre's Syndrome. To prevent the spread of these conditions, doctors tied off one of Brown's jugular viens. Brown spent twelve days in the hospital due to this illness. After his release from the hospital, Brown continued to have medical and emotional problems that restricted his everyday life.

Brown filed suit against the appellants contending that the spillage that he was required to clean up in the Store on the weekends of June 11th and 18th of 2005 was sewage containing human feces, and that this exposure to human feces caused Brown's acute and continuing illnesses. At the close of evidence, the case was submitted to the jury who returned a verdict in favor of Brown. Specifically, the jury found that appellants were negligent; that Scott's Marina was 60 percent responsible, JFF was 20 percent responsible, and the Store was 20 percent responsible; and awarded Brown damages of $250,000 for past physical pain and mental anguish, $75,000 for future physical pain and mental anguish, $89,000 for past lost earning

capacity, $102,300 for future lost earning capacity, $60,000 for past medical expenses, and $100,000 for future medical expenses. Appellants filed a motion for entry of judgment notwithstanding the verdict, which was denied by the trial court. The trial court entered judgment on the jury's verdict, and appellants appealed this judgment.

HOLDING: The judgment was affirmed.

ANALYSIS: The Court found evidence was sufficient to support the jury's implied finding that the employee was exposed to sewage containing human feces by cleaning up the backflowed spillage in the employer's store during two weekends because: (1) the evidence was sufficient to establish that the pump-out sewage line was connected to the hub drain line; (2) the evidence would allow a reasonable determination that the employer altered the configuration of the plumbing and then lied about it in court; and (3) testimony provided that the pump-outs could only operate using vacuum suction if they were not connected to the hub drain line. Because the evidence was sufficient for the jury to have concluded that the substance that backflowed into the store was sewage containing human feces, it was foreseeable that making an employee clean up sewage containing human feces by use of a mop and bucket could expose the employee to viruses contained within the human feces. The trial court did not err by admitting the employee's expert medical testimony on causation because the testimony was reliable.

DORIS IMOGENE BAKER, CAROL BECK, DANIEL BECK, PATRICIA BROOKS, ROBERT BROOKS, EVELYN ELLIOTT, JUDY EVANS, CONNIE FICKLE, DOROTHY MILBERGER, AND LIONEL MILBERGER, Appellants, v. ENERGY TRANSFER COMPANY, D/B/A ETC TEXAS PIPELINE, LTD. AND BURLINGTON RESOURCES OIL & GAS COMPANY, LP, Appellees

No. 10-09-00214-CV

COURT OF APPEALS OF TEXAS, TENTH DISTRICT, WACO

2011 Tex. App. LEXIS 8304

October 19, 2011, Opinion Delivered
October 19, 2011, Opinion Filed

FACTS: In September 2006, Appellants sued Energy Transfer Company (ETC) and Burlington Resources Oil & Gas Company, LP (Burlington), alleging numerous causes of action pertaining to the venting of hydrogen sulfide from ETC's natural gas treating plant, which is near Appellants' residences. After the trial court denied Appellants' request for a temporary injunction, the case lay dormant for a year and a half. In May 2008, the trial court entered an agreed scheduling order that required Appellants to designate experts and provide expert reports by November 15, 2008. That deadline was extended by agreement to December 15. After Appellants unsuccessfully sought another extension of that deadline from the trial court on December 14, they served their designation of experts on December 15 and hand-delivered alleged reports and supporting documents the next day. ETC and Burlington jointly moved to strike Appellants' expert designation on the grounds that it was inadequate and incomplete. After a hearing, the trial court granted the motion to strike. ETC and Burlington then filed traditional and no-evidence motions for summary judgment, which the trial court granted. The trial court also sustained ETC and Burlington's objections to Appellants' summary-judgment evidence. Raising five issues, Appellants assert that the trial court erred in granting the motions to strike and for summary judgment and in sustaining the objections. By cross-appeal, ETC and Burlington assert that the trial court erred in not awarding them their court costs.

HOLDING: The court reversed the cost ruling and remanded. The court otherwise affirmed. Due to a typographical error, the opinion, but not the judgment, issued on September 28, 2011 was withdrawn and replaced with the opinion issued on October 19, 2011.

OVERVIEW: The homeowners sued the companies on causes related to the venting of hydrogen sulfide from a gas treating plant that was near the homeowners' land. The court affirmed in part, reversed in part, and remanded. The trial court did not abuse its discretion in striking the designation of medical experts under *Tex. R. Civ. P. 193.6(a)*, given that (1) the homeowners did not provide any mental impressions or opinions of certain experts or a brief

summary of their bases, (2) the homeowners did not identify any particular document containing opinions about the topics in question, and (3) for the identified health-care providers, the homeowners did not state what type of care or field was involved. This case, concerning toxic exposure, required expert testimony. Because homeowners' experts were stricken, they had no expert causation evidence, and the grant of summary judgment on the homeowners' negligence and negligence per se claims was proper. The trial court did not explain its reason for ruling that each party was to bear its own costs, and no party requested the trial court to state good cause on the record under *Tex. R. Civ. P. 141*.

CLENTEN CARR AND WALTERINE CARR, INDIVIDUALLY AND AS NEXT FRIEND OF KATARA MCDUFFIE AND MIA BROOKS, MINORS, Appellants v. UNION PACIFIC RAILROAD COMPANY, Appellee

NO. 14-10-00675-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

2011 Tex. App. LEXIS 7794

September 29, 2011, Memorandum Opinion Filed

PROCEDURAL POSTURE: Appellant injured parties challenged a decision from the 258th District Court San Jacinto County, Texas, which entered a no-evidence summary judgment in favor of appellee railroad company in a negligence case.

FACTS: After a train collision, the injured parties contended that they experienced strange smells and suffered from a variety of physical ailments. They filed a negligence lawsuit, but a no-evidence summary judgment motion was granted.

HOLDING: The Court affirmed the judgment.

ANALYSIS: The appellate court determined that it had jurisdiction to hear this case because a final judgment was entered. The order disposed of the negligence claim, and no other claims remained before the trial court. When causation was an issue, the causal link between an event sued upon and the injuries had to be shown by competent evidence. The existence of a causal connection between exposure to a certain chemical and injury or disease required specialized expert knowledge and testimony because such matters were not within the common knowledge of lay persons. The injured parties here did not allege anything other than exposure to a noxious chemical caused their symptoms. Because no expert evidence was presented, the trial court did not err by granting the no-evidence summary judgment motion.

Appellants, Chester L. Slay, Jr., Individually; Union Texas Limited Partnership; and Chester L. Slay, Jr., Trustee of Peckham Family Trust, Cross-Appellant, Texas Commission on Environmental Quality v. Appellee, Texas Commission on Environmental Quality, Cross-Appellees, Chester L. Slay, Jr., Individually; Union Texas Limited Partnership; and Chester L. Slay, Jr., Trustee of Peckham Family Trust

NO. 03-10-00297-CV

COURT OF APPEALS OF TEXAS, THIRD DISTRICT, AUSTIN

351 S.W.3d 532*; *2011 Tex. App. LEXIS 7278

August 31, 2011, Filed

FACTS: Plaintiffs, current and former owners of a tract contaminated with hazardous wastes, sought review of a judgment from the District Court of Travis County, which, after finding that it had jurisdiction over the owners' declaratory judgment cause of action under *Tex. Gov't Code Ann. § 2001.038* (2008), rendered judgment that defendant agency's administrative policy on assessment of penalties was not a rule and upheld the penalties assessed. An administrative law judge (ALJ) identified several violations. In assessing administrative penalties pursuant to *Tex. Water Code Ann. §§ 7.051(c), (d)* (2008) 7.053 (2008), the agency relied on an internal policy and modified the ALJ's penalty recommendations.

HOLDING: The court reversed the denial of the plea to the jurisdiction, reversed the trial court's determination that it had subject-matter jurisdiction over the rule invalidity claim, rendered judgment dismissing that claim for want of subject-matter jurisdiction, and otherwise affirmed.

ANALYSIS: The court held that the trial court lacked subject-matter jurisdiction to render a declaratory judgment because the policy was not a rule as defined by *Tex. Gov't Code Ann. § 2001.003(6)* (2008). The policy did not bind the agency's commissioners to follow its methodology but instead appeared to be an enforcement guideline as described in *30 Tex. Admin. Code § 70.3 (2011)*, and it was an internal statement not affecting private rights, within the meaning of *§ 2001.003(6)(C)*. Substantial evidence under *Tex. Gov't Code Ann. § 2001.174(2)(E)* (2008) supported findings that certain materials were solid waste as defined in *30 Tex. Admin. Code § 101.1(93) (2011)* or hazardous waste as defined in *§ 101.1(42)*. A retroactivity argument under *Tex. Const. art. I, § 16* lacked merit because the policy was not a rule. The modification of the ALJ's penalty recommendations under *Tex. Gov't Code Ann. § 2003.047(m)* (2008) was not arbitrary.

THE CITY OF EL PASO, Appellant, v. GUADALUPE RAMIREZ, NORMA RAMIREZ, RAMIREZ PECAN FARMS, L.L.C, WILLIAM H BOUTWELL, JACKIE BOUTWELL, RAUL ZAMORANO, JR., AMY K. ZAMORANO, GEORGE WYNN, PATRICIA WYNN, LARRY R. WEBB, MARIA L. WEBB, JAMES R. RALEY, YARIELA G. RALEY, RUSSELL T. STURGEON, KERRY L. STURGEON, KENNETH A. JOHNSON, AND JULIE R. JOHNSON, Appellees.

No. 08-10-00174-CV

COURT OF APPEALS OF TEXAS, EIGHTH DISTRICT, EL PASO

349 S.W.3d 181; 2011 Tex. App. LEXIS 6777

August 24, 2011, Decided

FACTS: Appellees are property owners who reside and operate agricultural businesses located within one mile of the southwestern boundary of the Clint Landfill. The City of El Paso has operated the Clint Landfill as a solid waste disposal site since it purchased the facility in the early 1980's. The land between the landfill and the properties at issue consist primarily of unimproved, open desert. Running through the open desert to the landfill's southwestern boarder, and leading to the Appellees' properties, are natural drainage ways - arroyos - which have been designated by FEMA as arroyos Nine, Ten, and Eleven. In late July and early August 2006, the City experienced a series of extraordinary rainstorms, resulting in extensive flooding in the City and surrounding areas. The landfill's retention ponds overflowed causing huge amounts of water, silt, trash, and other waste to flow down through the arroyos and onto Appellees' properties destroying structures and ruining crops. Appellees filed suit against the City in June 2007, raising claims for inverse condemnation, nuisance, trespass, violations of the Texas Water Code, and seeking a permanent injunction. Each property owner alleged that the flooding caused one million dollars in property damages, including past and future repair and restoration costs, loss of fair market value, lost profits, mental anguish, and in some cases, pain and suffering.

HOLDING: The order was reversed, and the case was remanded.

ANALYSIS: In reversing the order, the Court relied on the Texas Tort Claims Act and found that the presented claims constituted only negligence and did not rise to a level sufficient to maintain an inverse condemnation allegation.

E-Z MART STORES, INC., and FaEllen Yates, as Executrix and Personal Representative of the Estate of James Earl Yates, Appellants v. RONALD HOLLAND'S A-PLUS TRANSMISSION & AUTOMOTIVE, INC. and Holland R. Inc., Appellees

No. 04-10-00192-CV

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

358 S.W.3d 665; 2011 Tex. App. LEXIS 6000; 41 ELR 20273

August 3, 2011, Delivered
August 3, 2011, Filed

FACTS: Throughout the 1980s, Mapco owned the property adjacent to the Hollands and ran the convenience store located on the property. In 1988, a leak in a petroleum storage tank was discovered by the Texas Natural Resources Conservation Commission ("the TNRCC"), now the Texas Commission on Environmental Quality ("the TCEQ"). Because of contamination, the TNRCC required Mapco to install ten monitoring wells. In September 1989, Mapco sold the property to Yates, and Yates immediately leased it to E-Z Mart, which thereafter operated the convenience store. In 1992, another gas leak was discovered and reported to the TNRCC. Six years later, E-Z Mart demolished the existing convenience store, built a new facility, and replaced the fuel tank system. During this renovation, E-Z Mart found contamination in excess of the TNRCC standards. After E-Z Mart completed testing and remedial measures, the TNRCC issued a standard letter stating E-Z Mart complied with the remedial measures and no further corrective action was necessary. During this time, the Hollands contracted with Trinity Wireless Cell Company ("Trinity") to build a cell phone tower on the Hollands' property, for which Trinity would make lease payments. In 2001, when Trinity began drilling, there was an explosion. After the explosion, Trinity pulled out of the lease agreement because an environmental testing firm, hired to inspect the Hollands' property, concluded the level of Benzene**,** a gasoline additive, was eight times above the TNRCC allowed standard. The firm opined that because the Hollands' land had never been used to store gas, the gas must have migrated from E-Z Mart's gas station. The Hollands then sued E-Z Mart, Yates, and Mapco for trespass, nuisance, and negligence.

In the first suit, Mapco and E-Z Mart filed no-evidence motions for summary judgment. The trial court granted the motions and on appeal, this court affirmed the judgment as to Mapco "because the Hollands failed to produce more than a scintilla of evidence of the causation element of their claim . . . ." *Ronald Holland's A-Plus Transmission & Auto., Inc. v. E-Z Mart Stores, Inc., 184 S.W.3d 749, 760 (Tex. App.--San Antonio 2005, no pet.).* We reversed and remanded the trial court's judgment as to E-Z Mart and Yates because the Hollands produced more than a scintilla of evidence to support their claims against E-Z Mart and Yates. *Id.* The case then proceeded to a jury trial without Mapco as a party. Nevertheless, E-Z Mart was

allowed to present evidence as to Mapco's alleged responsibility for the gas leaks. The jury deadlocked and a mistrial was declared.

Before the second trial began, the trial court excluded all evidence relating to Mapco and its alleged responsibility for the gas leaks. The trial court then took judicial notice that Mapco was not responsible for the Hollands' damages, and twice instructed the jury that Mapco was not responsible for any portion of the Hollands' damages. After deliberation, the jury rejected the trespass theory, but found for the Hollands on their nuisance and negligence theories, awarding the Hollands over $550,000 in damages. E-Z Mart then perfected this appeal.

HOLDING: The judgment was reversed and remanded for further proceedings.

ANALYSIS: The store argued the landowners failed to show that but for the store's leak, they would not have suffered an injury because the landowners' expert did not rule out other potential causes of the explosion. The appellate court found that it would be illogical to hold that the landowners did not present sufficient evidence to exclude another neighbor as a possible source of contamination after the trial court took judicial notice, and instructed the jury, that the neighbor was not responsible for the contamination. The expert's testimony that the explosion was caused by gasoline was some evidence the store caused the explosion. The landowners were not barred by law from recovering damages. The evidence was legally sufficient to support the damage award. The landowners' failure to produce enough evidence to withstand a motion for summary judgment was not conclusive proof that the neighbor was not liable for the contamination and explosion. The trial court abused its discretion in excluding the evidence related to the neighbor. The inability to offer evidence negating causation was a key issue, and the erroneously excluded evidence probably caused the rendition of an improper judgment.

UNION CARBIDE CORPORATION, Appellant v. BOB K. MARTIN, Appellee

No. 05-09-01052-CV

COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS

349 S.W.3d 137*; *2011 Tex. App. LEXIS 5282

July 13, 2011, Opinion Filed

FACTS: In an **asbestos** case, the 193rd Judicial District Court, Dallas County, Texas, granted plaintiff's motion assessing sanction of $ 11,250 against defendant for discovery abuse, finding that a subpoena duces tecum was overbroad, unduly burdensome, and harassing.

Appellee filed a personal injury lawsuit against Union Carbide and other defendants in a Mississippi state court, claiming that exposure to the defendants' **asbestos**-containing products caused him to develop asbestosis (the Mississippi lawsuit). The Mississippi lawsuit is one of hundreds of **asbestos** lawsuits in Mississippi state courts in which Martin's counsel represent plaintiffs. The Mississippi lawsuit was set for trial on August 24, 2009. In advance of that trial setting, counsel for Union Carbide prepared to take the deposition of Richard Tannen, M.D., a retained expert for Martin. Dr. Tannen, a pulmonologist hired by Martin's attorneys to screen x-rays of hundreds of persons in Texas and Mississippi for **asbestos**-related diseases, resides in Dallas County, Texas. Martin's counsel agreed to produce Dr. Tannen for deposition in the Mississippi lawsuit, and the parties to the suit agreed the deposition would be taken on June 17, 2009. Union Carbide obtained letters rogatory for the deposition and Union Carbide then filed the "miscellaneous action" underlying this appeal requesting that the subpoena duces tecum be issued to Dr. Tannen. Pursuant to the subpoena duces tecum, Dr. Tannen was to produce, among other things, "[a]ll files, including but not limited to patient files, relating to the testing, screening or diagnosing of any person." The subpoena duces tecum defined "client" or "person" as "any person which [Dr. Tannen has] rendered services to or for at any time, including but not limited to, diagnostic testing, medical screening or other testing performed."

On Monday, June 15, 2009, Martin filed an emergency motion for protective order and to quash the subpoena duces tecum, as well as a motion for sanctions, asserting that the subpoena duces tecum was unduly burdensome as it encompassed records that spanned his over thirty-year medical practice. In the motions, Martin requested that the trial court quash the subpoena duces tecum on the grounds that the document request was a fishing expedition; that it was overbroad, harassing, and annoying; that it improperly requested **asbestos** litigation screening documents for patients other than Martin; and that compliance would be unduly expensive. Martin also filed a withholding statement pursuant to *rule of civil procedure 193.3* asserting the subpoena duces tecum demanded Dr. Tannen disclose privileged information between him "and his patients and other individuals who are in no way related to the [Mississippi] lawsuit" and regarding legal services provided Dr. Tannen by his personal attorneys. Martin requested that the trial court enter

an order of sanctions against Union Carbide, awarding Martin his costs in defending against the subpoena duces tecum.

Union Carbide was served with copies of Martin's motions on June 15, 2009 and thereafter made several attempts to contact Martin's counsel by telephone and forwarded electronic correspondence to Martin's counsel stating a willingness to withdraw the subpoena duces tecum. Martin's counsel never responded. That evening, Union Carbide's counsel circulated a proposed pleading to all counsel withdrawing the subpoena duces tecum and voluntarily nonsuiting the miscellaneous action in the Dallas district court. In advance of the hearing on Martin's motions, Union Carbide filed its notice of withdrawal of the subpoena duces tecum and voluntary dismissal of the miscellaneous action "due to the impending trial date.

Martin proceeded with the hearing on his motions for protective order, to quash the subpoena duces tecum, and for sanctions as scheduled on June 16, 2009. The trial court took under advisement the motion for sanctions. The trial court stated at the hearing that if sanctions were imposed, the sanctions had "to be tailored to the incident," and "they have to be some sort of function of the attorney's fees . . . ." With regard to Martin's motion to quash the subpoena duces tecum, the trial court noted that Union Carbide had withdrawn the subpoena duces tecum and instructed the parties that Dr. Tannen was not required to produce any documents at his deposition on June 17, 2009. The trial court did not grant Martin's motion for protective order and did not place topical limitations on the scope of Dr. Tannen's deposition. The trial court advised the parties that if Dr. Tannen was asked for information he believed was privileged, he could assert the privilege and refuse to answer the question, and Union Carbide could thereafter seek an order compelling Dr. Tannen to answer if it disagreed with the assertion of privilege and refusal to answer. Dr. Tannen's deposition proceeded on June 17, 2009 as noticed.

Also on June 17, 2009, the trial court signed an order sanctioning Union Carbide in the amount of $11,250.

HOLDING: The court reversed the trial court's judgment and vacated the order imposing the monetary sanction.

ANALYSIS: The Court found that neither the record nor the sanctions order establishes that the trial court considered the availability of a less stringent sanction or whether a lesser sanction would promote compliance with discovery rules. Neither the record nor the sanctions order contains a statement by the trial court that lesser sanctions would not be effective. In fact, the monetary sanction of $11,250 imposed by the trial court exceeded Martin's request for $10,000 in fees and expenses. Further, the Court determined that Martin's counsel did not contact Union Carbide's counsel to confer regarding Martin's opposition to the subpoena duces tecum prior to filing the motions to quash the subpoena duces tecum, for protective order, and for sanctions, and that the motions did not contain a certificate of conference.

UNION CARBIDE CORPORATION, Appellant v. DAISY E. SYNATZSKE AND GRACE ANNETTE WEBB, INDIVIDUALLY AND AS REPRESENTATIVES AND CO-EXECUTRIXES OF THE ESTATE OF JOSEPH EMMITE, SR., JOSEPH EMMITE, JR., DOROTHY A. DAY, VERA J. GIALMALVA AND JAMES R. EMMITE, Appellees

NO. 01-09-0114 1-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

2011 Tex. App. LEXIS 4934

June 30, 2011, Opinion Issued

FACTS: The Emmites allege that Joseph, while employed by Union Carbide from 1940 to 1975, was exposed to **asbestos** and, as a result of this exposure, he contracted asbestosis and died on June 15, 2005. The Emmites attached to their original petition a physician report authored by Dr. R. Kradin. Union Carbide moved to dismiss the Emmites' claims, asserting that they had failed to serve it with an adequate physician report. In response, the Emmites served upon Union Carbide a second physician report, dated August 9, 2007, authored by Dr. J. D. Britton. On September 14, 2007, during the MDL pretrial court's hearing on Union Carbide's motion, the Emmites asked the court to compel Union Carbide to produce from its personnel files Joseph's medical records. The Emmites sought to obtain the results of any pulmonary function testing that Union Carbide had performed on Joseph at the time that he had been employed by Union Carbide. At the end of the hearing, the court, stating that it considered this case to be "exceptional," orally denied Union Carbide's motion to dismiss "for good cause." On October 1, 2007, Union Carbide moved for reconsideration of the MDL pretrial court's oral ruling, and, at the beginning of the November 30, 2007 hearing on the motion, the court stated that it would not sign a written order denying Union Carbide's motion to dismiss. In fact, the court made it clear to the parties that it did not intend to sign an appealable interlocutory order.[10] After Union Carbide stated that this was "fine," the parties then discussed the Emmites' pending efforts to apply for an amended certificate of Joseph's death. The Emmites represented that Dr. S. McClure, on the day before the hearing, had signed an application for an amended death certificate that would support a finding that asbestosis was at least one cause of Joseph's death. Union Carbide complained that the affidavit that the Emmites proffered to substantiate this claim contained hearsay and it had not had the opportunity to depose McClure. Union Carbide then placed in the record additional medical records for Joseph and his death certificate. The court stated that it would keep the record open for six weeks and, if the Emmites filed an amended death certificate showing that asbestosis was a cause of Joseph's death, the court would deny Union Carbide's motion.

On January 14, 2008, the Emmites served, for a second time, Union Carbide with the August 9, 2007 physician report of Dr. Britton, and indicated that, given the "extraordinary circumstances" of this case, they intended to rely upon it as their required physician report. On January 18, 2008, the MDL pretrial court conducted a hearing, at which the Emmites expressed,

consistent with their recent service of Britton's report upon Union Carbide, their intent to rely upon it as their required physician report. The Emmites explained that they were still trying to obtain a certified copy of Joseph's amended death certificate, and they requested "a full evidentiary hearing" to present witnesses and additional evidence. The Emmites argued that their case presented an "extraordinary circumstance" because Union Carbide had produced to them Joseph's pulmonary function testing from when he had been a Union Carbide employee. The court granted the Emmites' request for a full evidentiary hearing, and it granted Union Carbide's request to depose Dr. McClure, who had signed Joseph's amended death certificate.

Although Union Carbide did not depose Dr. McClure until September 10, 2009, which was over one and one-half of a year after the MDL pretrial court's January 2008 hearing, a substantial portion of this delay was attributable to the fact that McClure had been seriously injured in an accident. And when Union Carbide did obtain McClure's deposition, she still suffered from some impairment due to her injuries. Shortly after obtaining McClure's deposition testimony, Union Carbide, on October 19, 2009, filed a "renewed" motion to dismiss the Emmites' claims.

In their November 5, 2009 response to the renewed motion to dismiss, the Emmites argued that Union Carbide had waived its right to seek dismissal because the parties had engaged in significant discovery and the motion was untimely filed. Moreover, the Emmites produced an October 28, 2009 physician report, authored by Dr. J. Prince, which they offered as an addendum to Prince's June 12, 2008 letter report that the Emmites had previously given to Union Carbide in the discovery process.

At its subsequent hearing on Union Carbide's renewed motion to dismiss, the MDL pretrial court instructed Union Carbide to file its written objections to Dr. Prince's report. The court explained that it wanted a complete record, including a copy of Prince's deposition, which had been obtained before the hearing. Pursuant to the court's instructions, Union Carbide filed its written objections to Prince's report. The Emmites then filed their response to Union Carbide's objections and Prince's December 2009 amended report, which had been prepared in an effort to respond to some of Union Carbide's written objections.

In his amended report, Dr. Prince, who had been Joseph's pulmonologist during a 2005 hospital visit, stated, in relevant part, that he had physically examined Joseph and provided him with a pulmonary consultation and treatment. Prince noted that Joseph was 85 years old at the time and had a medical history of benign prostatic hypertrophy, osteoarthritis, and dementia. Joseph, who also had a remote history of smoking cigars, had been brought to the emergency room "with a complaint of bilateral lower extremity edema as well as difficulty ambulating." Prince took an occupational exposure history from Joseph, who told Prince that he had worked as an insulator at Union Carbide for many years and "had a possible diagnosis of asbestosis." Prince also noted that Joseph's chest exam revealed "diminished breath sounds at the right lung base with associated dullness to percussion." Moreover, Joseph was "somewhat confused" and "unable to support his own weight while" standing or sitting. The hospital admitted Joseph with pneumonia, and Prince noted "the presence of bilateral calcified pleural plaques consistent with a prior exposure to **asbestos**." After conducting a computed tomography scan of Joseph's chest and

administering other diagnostic tests, Prince diagnosed Joseph as suffering from "pulmonary asbestosis."

On December 4, 2009, the MDL pretrial court granted Union Carbide's motion for reconsideration and conducted its final hearing, but the court did not rule on Union Carbide's renewed motion to dismiss. Rather, on December 22, 2009, the court, after considering all of the evidence, signed its order denying Union Carbide's motion to dismiss the Emmites' claims.

HOLDING: The order was affirmed.

ANALYSIS: On appeal, the court held that appellees' expert report did not comply with *Tex. Civ. Prac. & Rem. Code Ann. § 90.010(f)(1)(B)(ii)* (2011) because the pulmonary function testing performed on the employee by the employer 40 years before the employee's death and provided no evidence of impairment could not be used to satisfy the pulmonary function testing requirement. However, the court held that *§ 90.010(f)(1)(B)(ii)*'s requirement of a verification that the employee had had a pulmonary function testing performed on him in order for appellees to assert their asbestos-related claims was unconstitutional as applied to them under *Tex. Const. art. I, § 16* because it was undisputed that at the time of the employee's death, a physician report containing a pulmonary function test was not required, such a test could not be performed on the employee before he died, and the evidence on file showed that appellees' claims had a substantial basis in fact. In addition, no public interest would be served by *§ 90.010(f)(1)(B)(ii)*'s application to appellees.

IN RE THE KANSAS CITY SOUTHERN RAILWAY COMPANY, Relator

NO. 14-11-00336-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

2011 Tex. App. LEXIS 3126

April 28, 2011, Memornadum Opinion Filed

FACTS: On September 27, 2010, real parties in interest Nathaniel Dinkins, Vernon Brooks, Earnest Henderson, and Melvin Goines filed suit against relator alleging injury from exposure to "harmful and/or hazardous substances, including but not limited to dusts, fumes, and vapors." On December 10, 2010, relator filed a motion to dismiss pursuant to *section 90.007 of the Texas Civil Practice and Remedies Code* because the employees failed to serve a compliant report for any asbestos exposure claims.

HOLDING: Petition denied.

ANALYSIS: The Court determined that the suit is governed by the Federal Employers' Liability Act (FELA) *45 U.S.C. §51, et. seq.* Further, the Court determined that *Section 51.014(a)(11) of the Texas Civil Practice and Remedies Code* permits appeal from an interlocutory order that "denies a motion to dismiss filed under *Section 90.007*." *Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(11)*. Consequently, a party challenging the denial of a motion to dismiss filed under *Section 90.007* has an adequate remedy by appeal, not mandamus.