Solomarketing

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TEXAS SUPREME COURT ADVISORY

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ORDERS AND OPINIONS ISSUED JUNE 8, 2007
One mandamus petition granted oral argument in today's orders

LINKS TO FULL-TEXT OPINIONS FOLLOW SUMMARIES.
NOTE: ***Summaries are prepared by the Court's staff attorney for public information and reflect his judgment alone on facts and legal issues. These summaries are not part of the Court's opinion in the case.*** Links are to Adobe's PDF format (duplication of the document) and to HTML documents (rendition). Click here to download a free Adobe Reader.

JUNE 8 ORDERS (in HTML)
Decisions in cases (motions, requests, etc.) from May 31 through Wednesday (PDF)

OPINIONS

05-0189
Borg-Warner Corp. v. Arturo Flores
from Nueces County and 13th District Court of Appeals, Corpus Christi/Edinburg
For petitioner: Deborah G. Hankinson, Dallas
For respondent: Brent M. Rosenthal, Dallas
REVERSED AND JUDGMENT RENDERED, opinion by Chief Justice Jefferson:

The principal issues in this asbestosis case is whether legally sufficient evidence established asbestos as cause-in-fact of a mechanic's lung scarring when he was a smoker for the years he installed asbestos brakes. In this case Flores sued after he was diagnosed with asbestosis. Borg-Warner contested the diagnosis, contending his symptoms could be related to his smoking, and argues in part that Flores did not prove that Borg-Warner's brake pads could cause his alleged injury. A jury found Borg-Warner negligent and acted with malice. The court of appeals affirmed and rejected Borg-Warner's challenge on the damages amount because it concluded the company had not adequately briefed the review standard for challenging excessive damages.

The Supreme Court HOLDS that exposure to "some respirable" asbestos fibers is not sufficient to show a product containing asbestos was a substantial factor in causing asbestosis. The *Lohrmann* test for proving causation – frequency, regularity and proximity of asbestos exposure – is appropriate, but does not capture the emphasis of Texas law on causation as an essential predicate to liability. No question exists, on this record, that mechanics in the braking industry could be exposed to respirable asbestos fibers. But without more, this testimony is insufficient to establish that the Borg-Warner brake pads were a substantial factor in causing Flores's disease. The record reveals nothing about how much asbestos Flores might have inhaled. He performed about 15 to 20 brake jobs a week for more than 30 years, exposed to "some asbestos" on a fairly regular basis for an extended time. But absent any evidence of dose, for a toxic material dangerous according to its dosage, the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts were

sufficient to cause asbestosis. A literal application of *Lohrmann* leaves questions unanswered in cases like this. The evidence showed that Flores worked in a small room, grinding brake pads composed partially of embedded asbestos fibers, five to seven times per week over a four-year period—seemingly satisfying *Lohrmann*'s frequency-regularity-proximity test. Implicit in that test, however, must be a requirement that asbestos fibers were released in an amount sufficient to cause Flores's asbestosis. In a case like this, proof of mere frequency, regularity and proximity is necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law. Substantial-factor causation, which separates the speculative from the probable, need not be reduced to mathematical precision. Defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease, will suffice.
Opinion in HTML
Opinion in PDF
Briefs

05-0558
Reliance National Indemnity Co., et al. v. Advance'd Temporaries Inc.
from Nueces County and the 13th District Court of Appeals, Corpus Christi/Edinburg
For petitioners: H. Victor Thomas, Houston
For respondent: J. Bennett White, Tyler
AFFIRMED, opinion by Justice Medina:

The principal issue is whether a temporary-employment agency supplying laborers to a construction subcontractor "furnishes labor" for purposes of the Texas mechanic's lien statute. Advance'd sued the subcontractor for more than $200,000 in unpaid invoices and the construction-bond surety after the subcontractor was fired from the project. The subcontractor was paid for all work by the contractor but paid Advance'd less than a quarter of what Advance'd had billed the subcontractor. The trial court ruled that Advance'd was not entitled to a mechanic's lien. The court of appeals reversed.

The Supreme Court HOLDS that the temporary-employment firm furnished labor as defined by the mechanic's lien statute. Reliance argues that Advance'd did not "furnish labor" because it did not control or supervise the temporary workers and was not responsible for the quality of their work, but the contract clearly identifies the temporary workers as Advance'd's employees. Advance'd was responsible for recruiting and screening these workers, responsible for hiring, firing, paying and insuring them and had the final word on whether they could be exposed to certain working conditions. The borrowed-employee doctrine does not provide otherwise. That tort doctrine, concerned with vicarious liability and apportionment of responsibility for employees who have more than one master, has no application in this case because this is one of contract with responsibilities outlined in the parties' agreement.
Opinion in HTML
Opinion in PDF
Briefs

05-0870
T. Michael Quigley v. Robert Bennett
from Starr County and the Fourth District Court of Appeals, Corpus Christi/Edinburg
Justice Green did not participate
REVERSED AND REMANDED, opinion by Justice Johnson:

The issue is whether, absent a written agreement, the value of a royalty interest can determine a geologist's compensation for his services. Bennett, the geologist, sued Quigley for lease analysis and maps for a sales presentation. Bennett initially stepped in to help a sick colleague, but when Quigley asked for extra work, Bennett agreed when Quigley assured him "I'll take care of you." After Quigley sold the leases, securing a royalty interest, Bennett sued him for quantum meruit, conversion and fraud, offering evidence at trial that "generating" geologists usually are paid by taking royalty interests in

projects. A jury awarded him $2,500 on the quantum meruit claim, $1 million for fraud and $1 million for conversion. Bennett elected to recover for fraud. The court of appeals affirmed, holding that Quigley failed to object to an improper fraud damages question.

The Supreme Court HOLDS that the Statute of Frauds bars consideration of royalty interest as a damages measure. An overriding royalty interest in a mineral lease is considered an interest in real estate that falls within the statute. Absent a writing, an agreement to transfer such an interest is unenforceable. Allowing recovery of the value of a royalty interest when the interest itself could not be recovered would circumvent protections of the statute. The only damages evidence was testimony as to the cash value of a geologist's work. That is some evidence of the value of Bennett's work, but it is legally insufficient to support the entire $1 million fraud- damages finding.
Opinion in HTML
Opinion in PDF
Briefs

Justice Brister CONCURRING AND DISSENTING, joined by Justices Hecht and Willett:

The jury's million-dollar verdict must be set aside, but no reason supports setting aside the jury's quantum meruit verdict. As the jury answered that question and no one challenges its factual or legal sufficiency, an appellate court cannot set it aside on the possibility that another jury might award a higher or lower figure.
Brister concurrence/dissent in HTML
Brister concurrence/dissent in PDF

05-1069
Bay Area Healthcare Group Ltd., et al. v. Deborah Sue McShane and James Patrick McShane
from Nueces County and the 13th District Court of Appeals, Corpus Christi/Edinburg
REVERSED AND JUDGMENT RENDERED, per curiam opinion:

In this medical-malpractice case involving a child's birth injuries, the issue is whether the trial court abused its discretion by admitting evidence of superseded pleadings, that two doctors were originally sued but non-suited before trial. The Supreme Court HOLDS that the trial court did not abuse its discretion in part because no requirement exists that a statement from superseded pleading by inconsistent with the party's position at trial. In contrast to case law before adoption of evidentiary rules in 1983, the Rules of Evidence no longer require inconsistency to admit superseded pleadings. Statements from pleadings potentially could be excluded as irrelevant or unfairly prejudicial, depending on their content. But plaintiffs' attorney opened the door by first alluding to the doctors' party status.
Opinion in HTML
Opinion in PDF
Briefs

06-0050
State of Texas v. Barbara Oakley
from Travis County and the Third District Court of Appeals, Austin
consolidated with 06-0172, State of Texas v. Barbara Oakley
For petitioner: Philip A. Lionberger, Austin
For respondent: Scott Ozmun, Austin

In these wrongful-imprisonment cases involving settlements and a claim assignment, the principal issues are (1) whether a claim assignment is valid for an action under the wrongful-imprisonment statute and (2) whether such a claimant may recover damages from the state when damages have been recovered from a county, the state's political subdivision. Oakley, as guardian, sued Austin, Travis County and the state over severe head injuries suffered by a prisoner who was wrongfully convicted, based in part on another prisoner's coerced confession. That other prisoner, Christopher Ochoa, also sued and settled with the city and county. Ochoa then assigned to Oakley his rights against

the state in part to settle a suit that Oakley filed against him for the false confession. The trial court denied the state's jurisdictional plea and the court of appeals affirmed.

The Supreme Court HOLDS that damage claims for false imprisonment against governmental entities are not assignable but that settlement with entities than the state does not bar recovery from the state. Civil Practices and Remedies Code chapter 103, the statute at issue here, does not mention assignment, but it expressly prohibits survival of claims, apparently the only statute in Texas that expressly prohibits survival. Oakley urges application of the general rule allowing sale and assignment of causes of action, but assignment and survival, though sometimes distinct, have long been linked in American and Texas law. When the two have been separated (in Texas or elsewhere), assignment has almost always been more narrowly restricted than survival, as the sale or assignment of a claim is more likely to distort the litigation process than the normal laws of inheritance. Given this background, declaring a claim assignable when the Legislature has said it does not survive would be an historical anomaly. While chapter 103 plainly prohibits those who receive compensation from the state from then suing local government entities or employees, however, it limits this provision to a person who "receives" compensation from the state. The Legislature barred other suits only by those who have chapter 103 money in hand, not those who may be entitled to them in the future. The statute does not purport to bar duplicate recoveries. Had that been the aim, legislators could have said simply that no one can recover both.
Opinion in HTML
Opinion in PDF
Briefs in 06-0050
Briefs in 06-0172

ISSUES SUMMARIES FOR CASES GRANTED ORAL ARGUMENT IN TODAY'S ORDERS

06-0952In re Eduardo "Walo" Gracia Bazan
from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg
Oral argument date pending

The issue is whether is a constable may be removed from office and suspended pending appeal for conviction of a crime that occurred years before his re-election.
Briefs
Court of appeals opinion