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Our newsletter reviews the following opinions recently issued by the Texas Supreme Court: *Borg-Warner Corp. v. Flores* which establishes a strict standard of proof of causation in asbestos related litigation but which will also apply in all toxic tort litigation; *F.F.P. Operating Partners, L.P. d/b/a Mr. Cutrate # 602 v. Duenez* which holds that a Dram Shop is not vicariously liable for the acts of an intoxicated driver; *Low v. Thomas J. Henry* which determines that sanctions are available against an attorney who filed a suit in which the attorney knew he could not prevail at the time he filed the suit; and finally, in *In Re Christus Spohn Hospital* where the Court established when privileged material given to an expert witness can be returned.

I. PLAINTIFFS MUST NOW PROVE THAT A SPECIFIC DEFENDANT'S PRODUCT RELEASED A QUANTIFIABLE AMOUNT OF ASBESTOS IN ORDER TO PREVAIL IN ASBESTOS CLAIMS

The Court in *Borg-Warner Corp. v. Flores* (decided on June 8, 2007) rendered a decision that many

commentators claim is the death knell to asbestos litigation. The Texas legislature in 2005 enacted specific criteria establishing medical standards for determining an asbestos related injury (see Chapter 90, Civil Practice and Remedies Code). The *Borg-Warner* decision now establishes a strict standard for proving causation not only in asbestos related litigation but also in all toxic tort litigation.

A. FACTS OF CASE

Arturo Flores was a retired brake mechanic who worked for 35 years in the automotive department at Sears in Corpus Christi. He testified that he handled several brands of brake pads including those manufactured by Borg-Warner. Mr. Flores used Borg-Warner pads on five to seven of the approximately 20 brake jobs he performed each week during the three year period from 1972 to 1975.

Borg-Warner brake pads contained asbestos fibers that comprised anywhere from 7% to 28% of the pad's weight. The brake pads had to be ground which Mr. Flores testified generated clouds of dust that he inhaled. Mr. Flores sued Borg-Warner as well as three other manufacturers of brake pads claiming that

his exposure to asbestos in brake pads caused his asbestosis. The other three manufacturers settled prior to trial.

Mr. Flores presented the testimony of a board-certified pulmonologist who diagnosed him with asbestosis based on his work as a brake mechanic. The Plaintiff also presented the testimony of a toxicologist, Barry Castlelan, Ph.D., who testified that brake repairmen were exposed to asbestos in performing brake repair jobs.

Borg-Warner produced a pulmonologist, Dr. Katherine Hale, who testified that Mr. Flores did not have “any asbestos disease.” She also concluded based upon her review of the medical literature that auto mechanics did not suffer an increased risk of lung cancer or mesothelioma as compared to the rest of the population.

The jury found that Mr. Flores sustained an asbestos related injury that was proximately caused by Borg-Warner’s negligence. The jury apportioned 37% of the causation for Mr. Flores’ asbestos related injury to Borg-Warner with the remaining 53% equally apportioned to each of the three settling Defendants. The jury awarded \$124,000 in actual damages and \$55,000 in exemplary damages against Borg-Warner.

THE PLAINTIFF IN AN ASBESTOS CLAIM MUST NOW PROVE THAT A DEFENDANT’S PRODUCT WAS A “SUBSTANTIAL FACTOR” IN CAUSING THE PLAINTIFF’S INJURIES

The Court acknowledged that the most common standard for proving causation in asbestos cases is the “frequency, regularity, and proximity” test established in *Lohrman v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). Under this

standard plaintiffs in the past have proven their exposure to asbestos by testifying that they worked frequently and regularly near products that contained asbestos. The Texas Supreme Court refused to adopt this standard in proving causation in asbestos related cases. The Court instead held that a plaintiff must prove:

...whether the asbestos in the defendant’s product was a substantial factor in bringing about the plaintiff’s injuries.

The Court stated that any toxicological analysis requires a determination of the dose of the toxic substance as “the dose makes the poison.” The Court then noted that scientists have concluded that “the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect” is the amount of the dose. While acknowledging that mechanics in the brake industry could be exposed to asbestos fibers, this testimony was insufficient to show that the Borg-Warner brake pads at issue were a “substantial factor” in Mr. Flores’ asbestosis related injury:

...absent any evidence of dose, the jury could not have evaluated the quantity of respirable asbestos to which Mr. Flores might have been exposed or whether those amounts were sufficient to cause asbestosis.

The Court furthermore stated that in order to prevail in an asbestos claim that a plaintiff must not only show the quantity of the asbestos that was inhaled but must also show that a particular defendant’s product produced a sufficient quantity of asbestos to cause the claimed injury:

Mr. Flores did not introduce evidence regarding what percentage of that indeterminate amount [of asbestos

which] may have originated in Borg-Warner products. We do not know the asbestos content of other brands of brake pads or how much of Flores' exposure came from grinding pads as exposed to blown-out old pads.

The Court therefore concluded that:

Proof of mere frequency, regularity, and proximity is necessary but not sufficient, as it proves none of the quantitative information necessary to support causation under Texas law. As a result, in order to prove causation in an asbestos related injury the plaintiff must prove a quantifiable exposure "threshold" caused by a particular product.

C. ASSESSMENT OF OPINION

The "substantial factor" causation standard adopted by the Supreme Court is applicable not only in asbestos related litigation but also in toxic tort litigation. The plaintiff must now prove causation of the injury in question by proving that a particular defendant's product released a quantifiable amount of the alleged toxic product that surpassed the toxic "threshold."

II. A BAR IS NOT VICARIOUSLY LIABLE UNDER THE DRAM SHOP ACT FOR THE ACTS OF A PATRON WHO CAUSES AN ACCIDENT AFTER LEAVING THE BAR

The Court in *F.F.P. Operating Partners, L.P., d/b/a Mr. Cutrate # 602 v. Duenez* (decided on May 11, 2007) reversed its prior decision of September 3, 2004, and held that a Dram Shop is not

"...automatically responsible for all of the damages caused by an intoxicated person, regardless of a jury's determination of the Dram Shop's proportion of responsibility." The liability of the Dram Shop is now determined according to the percentage of liability assessed by the jury against the Dram Shop. Therefore, under Chapter 33 of the Civil Practice and Remedies Code (the Proportionate Responsibility Statute) a Dram Shop is not liable for the percentage of liability assessed against the drunk driver unless the jury finds the Dram Shop jointly and severally liable for the acts of the drunk driver by assessing more than 51% of the liability against the Dram Shop.

A. FACTS OF CASE

Carol Soliz, an assistant store manager for F.F.P. Operating Partners, L.P., d/b/a Mr. Cutrate, sold a 12-pack of beer to Roberto Ruiz. Mr. Ruiz had spent the entire day cutting firewood and had consumed three 12-packs of beer during the day at the time that Ms. Soliz sold the 12-pack of beer to him.

After Mr. Ruiz left Mr. Cutrate he opened a beer from the recently purchased 12-pack and drove onto a nearby highway where witnesses testified that he swerved into the oncoming lane on several occasions. Approximately 1½ miles from the Mr. Cutrate store Mr. Ruiz again swerved into an oncoming lane in which he hit the vehicle occupied by five members of the Duenez family. All five members of the Duenez family suffered severe injuries. Mr. Ruiz was subsequently convicted of intoxication assault and sentenced to prison.

The Duenez's brought a civil suit against the intoxicated driver, Roberto Ruiz, F.F.P., and the store clerk, Carol Soliz. Other Defendants were also sued but were subsequently non-suited by the Duenez family. F.F.P. filed a cross-action against Mr. Ruiz. The trial court granted a partial summary judgment holding that the proportionate responsibility statute, Chapter 33 of the Civil Practice and Remedies Code,

did not apply in a Dram Shop case where the claimants were not at fault in causing the accident. The Court then severed F.F.P.'s cross-action against Ruiz which resulted in F.F.P. as the only Defendant in the case. The case was therefore tried without the jury being able to determine the negligence of Ruiz or to assess the proportionate responsibility between Ruiz and F.F.P.

The jury found that when the store clerk sold the beer to Ruiz that it was "apparent to the seller that he was obviously intoxicated to the extent that he presented a clear danger to himself and others..." The jury returned a verdict of \$35 million against F.F.P.

B. THE DRAM SHOP ACT

The Court first reaffirmed that the Dram Shop Act was passed by the Texas Legislature as the exclusive means of providing a cause of action against licensed providers of alcoholic beverages who sell alcoholic beverages to individuals who are "obviously intoxicated." Section 2.02 of the Alcoholic Beverage Code provides that a statutory cause of action exists against a licensed provider of alcoholic beverages upon proof that:

- (1) At the time the provision (of alcoholic beverages) occurred it was apparent to the provider that the individual being sold, served, or provided with an alcoholic beverage was obviously intoxicated to the extent that he presented a clear danger to himself and others; and
- (2) The intoxication of the recipient of the alcoholic beverage was a proximate cause of the damages suffered.

C. PROPORTIONATE RESPONSIBILITY APPLIES IN DRAM SHOP CASES

The Supreme Court held that the Dram Shop Act only provides for the proportionate liability of the Dram Shop and does not make the Dram Shop vicariously liable for the actions of the intoxicated driver. As a result, a provider of alcoholic beverages is entitled to offset its liability against the liability of the intoxicated driver.

D. ASSESSMENT OF OPINION

This controversial case shows the division of opinion within the Texas Supreme Court on who should be liable for the acts of an intoxicated driver. The opinion also shows the extreme time delays involved in the Court making decisions on controversial issues. The Court originally issued an opinion on September 3, 2004, holding that the Dram Shop Act provided for the vicarious liability of bars. The Court then granted a rehearing and after waiting three years finally issued its new opinion which reversed the prior opinion.

Unless the Supreme Court decides to change its mind again the law in Dram Shop cases will be that a Dram Shop is entitled to offset its liability against the liability of the intoxicated driver.

III. AN ATTORNEY WHO FILES A PLEADING CERTIFIES THAT THERE IS OR WILL BE A FACTUAL BASIS TO SUPPORT THE CLAIMS AND DEFENSES RAISED IN THE PLEADING

Low v. Thomas J. Henry (decided on April 20, 2007), set the parameters for establishing sanctions against an attorney who files a pleading that either does not have factual support at the time the pleading is filed or will not have factual support after discovery in the case is completed.

A. FACTS OF CASE

Low v. Thomas J. Henry involved product liability claims brought against several product manufacturers including Johnson & Johnson, Inc., as well as medical malpractice claims against Coastal Bend Hospital and eight physicians. The suit was based on the use by Henry White of the drug Propulsid which is used for the treatment of gastric reflux. The suit was brought by Mr. White's widow claiming that the prescription of the drug Propulsid by the doctor Defendants resulted in Mr. White's death.

The Plaintiff's attorney, Thomas J. Henry, filed the suit against all the Defendants. On the same day that the Plaintiff's attorney filed the suit he also filed a Motion to Withdraw from representation of the Plaintiff. The simultaneous filing of the suit along with the Motion to Withdraw was interpreted by the Supreme Court as an obvious indication that the Plaintiff's attorney did not feel that he would be successful in the case.

The Plaintiff's attorney was allowed to withdraw from the case by the trial court. The widow, Joyce White, who was then representing herself *Pro Se*, non-suited all the claims. However, before she non-suited the claims two of the physicians, Robert Low, D.O. and Stephen Smith, M.D., filed a Motion for Sanctions against both Mrs. White and the Plaintiff's attorney, Thomas J. Henry, claiming that neither Dr. Low nor Dr. Smith ever prescribed Propulsid to Henry White nor treated him while he was taking Propulsid prescribed by another physician.

The medical records showing that neither Dr. Low nor Dr. Smith prescribed Propulsid or treated Mr. White while he was taking Propulsid had been provided to the Plaintiff's attorney prior to the time suit was filed. Dr. Low and Dr. Smith filed the

Motion for Sanctions against Thomas J. Henry and Joyce White claiming that there was no basis in law or in fact, nor would there likely be a basis in law or fact, of the claims against them. The trial court agreed with Dr. Low and Dr. Smith and awarded \$50,000 in penalties and sanctions against Thomas J. Henry for filing the suit against them.

B. THE USE OF "GROUP PLEADINGS" OR "SHOTGUN PLEADINGS" DOES NOT ALLEVIATE THE NEED FOR AN ATTORNEY TO BASE CLAIMS ON FACTS THAT ARE ESTABLISHED OR THAT WILL POTENTIALLY BE ESTABLISHED

The Motion for Sanctions against the Plaintiff's attorney was based under Chapter 10 of the Civil Practice and Remedies Code which provides that the signing of a pleading by an attorney certifies that after conducting a "reasonable inquiry" the attorney believes that:

Each claim, defense, or other legal contention in the pleading or motion is warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

Each allegation or other factual contention in the pleading or motion has evidentiary support or, for a specifically identified allegation or factual contention, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

The Supreme Court held that a party cannot use a “group” or “shotgun” pleading to circumvent the requirement that there be some basis for the claims made in the pleading or motion. Furthermore, the practice of pleading claims “in the alternative” also requires that there be a “reasonable basis” in law or in fact of the claim or defenses asserted in the alternative. The Court stated that:

Each allegation and factual contention in a pleading or motion must have, or be likely to have, evidentiary support after a reasonable investigation.

C. SANCTIONS UNDER CHAPTER 10

The trial court concluded that the allegations against Dr. Smith and Dr. Low did not have evidentiary support when the suit was filed and were not likely to have evidentiary support after engaging in discovery. As such, the trial court awarded \$50,000 in sanctions against the Plaintiff’s attorney. However, the Supreme Court reversed and remanded the award of \$50,000 in sanctions.

The Court first noted that the sanction of \$50,000 was “severe.” The Court then acknowledged that it had not established the appropriate guidelines for a trial court to follow in awarding sanctions. The Court stated that a trial court must provide an explanation for the basis of an award of sanctions.

The Supreme Court held that the starting point for determining the amount of sanctions should be the attorney’s fees and costs incurred as a result of responding to the frivolous pleading. The court should then review the relevant factors decided by the American Bar Association as recognized in *TransAmerican Natural Gas Corporation v. Tow*, 811 S.W.2d 913 (Tex. 1991) in determining the amount of the sanctions to be awarded.

D. ASSESSMENT OF OPINION

Based on this opinion we anticipate more motions for sanctions for filing a frivolous suit or frivolous pleading will now be filed. The standard for determining a frivolous pleading applies to both a claim that is asserted as well as a defense alleged against a claim.

IV. PRIVILEGED DOCUMENTS WHICH ARE INADVERTENTLY DISCLOSED TO AN EXPERT CANNOT BE “SNAPPED BACK” FROM THE EXPERT UNLESS THE EXPERT’S DESIGNATION IS WITHDRAWN

The Court *In Re Christus Spohn Hospital* (decided on April 27, 2007) reconciled the conflict between the rule of civil procedure which allows a party to “snap back” privileged material that has been inadvertently produced to an adverse party and the rule dealing with the scope of discovery of experts. The Court held that if privileged material is inadvertently disclosed to an expert then the privileged material cannot be “snapped back” unless the expert witness is de-designated and withdrawn as an expert.

A. FACTS OF CASE

This case involves a medical malpractice case against Christus Spohn Hospital arising out of the death of Brandi Lee Palmer. After Spohn Hospital was advised of the notice of intent to file a health care liability claim the hospital’s internal administrator conducted an investigation. The investigation reports were inadvertently turned over to the hospital’s expert witness after suit was filed. The disclosure of the privileged material was made during the course of the deposition of the expert witness. The hospital then filed a motion pursuant to the Texas Rules of Civil Procedure requesting the return of the privileged documents under the “snap back” provision of Rule 193.3 (d) of the Texas Rules of Civil Procedure. The

trial court refused to order the return of the privileged material because the material had been produced to the expert witness.

B. DISCOVERY OF MATERIAL FROM EXPERT WITNESSES AND THE “SNAP BACK” PROVISION

Texas Rule of Civil Procedure 192.3 (e) provides that the following information regarding an expert witness can be obtained:

(6) All documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of a testifying expert’s testimony.

The Supreme Court first concluded that even though the documents provided to Christus Spohn’s expert were privileged that “...the work product privilege does not protect them unless the snap-back provision requires their return.”

The Court then analyzed Texas Rule of Civil Procedure 193 which provides that:

A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the rules of evidence if ...within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made...the producing party amends the response, identifying the material or information produced and stating the privilege asserted.

The competing interests of discovery of material provided to experts and the “snap back” of privileged material that was inadvertently produced collided in this case. The Court concluded that if a party chooses to “snap back” the privileged documents produced to the expert witness then the expert at issue must be de-designated as an expert witness. If the expert is not de-designated as an expert witness then the privileged documents are discoverable. The expert witness rule therefore “trumps” the snap back provisions of the Texas Rules of Civil Procedure; however, the Court provided a “safe harbor” by allowing the de-designation and withdrawal of expert witnesses to whom the privileged material has been produced.

C. ASSESSMENT OF OPINION

The Supreme Court took a middle road in allowing a party to retain privileged material that has been inadvertently produced if the expert witness to whom the privileged material has been produced continues to be designated as an expert witness.

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