

Supreme Court of Texas
July 3, 2014

Brookshire Brothers, Ltd. v. Aldridge

No. 10-0846

Case Summary written by Kevin Smith, Staff Member.

Justice Lehrmann delivered the opinion of the Court, in which Chief Justice Hecht, Justice Green, Justice Johnson, Justice Willett, and Justice Boyd joined. Justice Guzman filed a dissenting opinion, in which Justice Devine and Justice Brown joined.

Plaintiff, Jerry Aldridge, sued defendant, Brookshire Brothers, Ltd., for damages related to injuries sustained during a slip-and-fall accident in a Brookshire Brothers grocery store. Video of the incident was only partially captured on a security camera as a table obscured the view of the area where the slip-and-fall occurred. Brookshire Brothers decided to retain a taped copy of only eight minutes of the video, and they allowed the original video to be automatically erased a month later. Because a key component to premises liability is that the defendant must have actual or constructive knowledge of the condition that led to the injury, Aldridge alleged that allowing the video to be deleted amounted to the spoliation of evidence. The lower court allowed the jury to hear evidence about the alleged spoliation, provided a spoliation jury instruction, and allowed the jury to make a determination on the spoliation evidence while also deciding the lawsuit's merits. The jury awarded \$1,063,664.99 in past and future damages. The court of appeals affirmed the jury's verdict.

Issue: Did the trial court abuse its discretion by allowing the jury to hear evidence related to the spoliation of evidence while simultaneously hearing evidence regarding the merits of the case, which ultimately may have allowed a judgment based on the conduct of the parties versus a judgment based on the facts?

Borrowing the reasoning from standards adopted by the Texas Court of Appeals, the Court established a framework for determining whether spoliation occurred and the appropriate remedy including the standard by which a spoliation instruction can be given to the jury. The Court held that the framework includes a two-part analysis: (1) the trial court, not the jury, must determine whether evidence was spoliated, and (2) the trial court, not the jury, must determine the appropriate remedy. In order to determine that evidence was spoliated, the trial court must determine that the spoliating party had a duty to preserve the evidence and that they breached that duty intentionally or negligently. The trial court will then have wide discretion in determining the remedy for spoliation, although the remedy must be proportionate to the violation and balance the spoliating party's culpability with the nonspoliating party's degree of prejudice. At the heart of the framework is the rule that all direct evidence pertaining to the alleged spoliation may not be presented to the jury. Additionally, a spoliation jury instruction will only be warranted in situations where a party acts with the specific intent to conceal

discoverable evidence, or the party that negligently failed to preserve evidence caused the nonspoliating party to be completely deprived of presenting a claim or defense. Accordingly, the Court held that the trial court abused its discretion by allowing the spoliation jury instruction adverse to Brookshire Brothers.

Guzman, J., Dissenting

In her dissenting opinion, Justice Guzman disagrees that the Court developed its reasoning from Texas spoliation jurisprudence and actually significantly departs from it. She emphasizes that the Court of Appeals had established several methods to handle sanctions including four distinct instances where a jury instruction was warranted. Justice Guzman argues that although the Court is worried that spoliation evidence will shift the jury's focus from the merits to spoliation, the Court offers no evidence to support this is a real issue and she cites the Texas Rules of Evidence as the appropriate set of rules, established by the Court, to protect litigants from irrelevant evidence. Finally, Justice Guzman attacks the Court's framework by alleging that the Court's application of the facts calls into question whether "willful blindness" is included in its analysis, which, in today's ever-advancing technological environment, threatens to weaken a trial court's ability to administer justice.

Union Carbide Corp. v. Synatzke

No. 12-0617

Case Summary written by Ross Smith, Staff Member.

Justice Johnson delivered the opinion of the Court, in which Chief Justice Hecht, and Justices Green, Willett, and Brown joined.

Joseph Emmite was employed as an insulator at Union Carbide for nearly forty years before he began receiving disability in 1979. Joseph Emmite last received a pulmonary impairment test towards the end of his employment with Union Carbide. He died in June 2005 after being hospitalized in May where final hospital tests showed lung calcifications that were probably due to asbestos exposure. In June 2007, the Emmite estate filed a wrongful death suit against Union Carbide and others. Chapter 90 of the Texas Civil Practice and Remedies Code, which requires plaintiffs to obtain a report containing information that, among other things, "...pulmonary function testing has been performed on the exposed person and the physician making the report has interpreted the pulmonary function testing..." was enacted by the Legislature in 2005 and signed by the Governor in May 2005 to be effective on September 1. In addition, Chapter 90 imposes a timing limitation that requires claimants to serve the physician report within thirty days after the defendant's answer or appearance.

After the Emmites brought suit in September 2007, Union Carbide filed a motion to dismiss claiming that the physician report did not comply with the pulmonary function testing required by Chapter 90. The trial court orally denied

the motion, but did sign an order. Union Carbide then moved for reconsideration and the trial court responded by allowing the Emmites six weeks to obtain an amended death certificate for Joseph Emmite that listed asbestosis as the cause of death. Following that six week period, the Emmites' served Union Carbide with a new physician report that they claim complied with Chapter 90 but did not obtain the amended death certificate. Union Carbide then requested to depose Dr. Suzanne McClure, who had signed Joseph's death certificate. Due to an automobile accident, she could not be deposed until September 2009. In the deposition, she stated that Joseph most likely had pulmonary asbestosis and was impaired from it. Union Carbide then again filed a motion to dismiss in December 2009 which was denied. Union Carbide then filed an interlocutory appeal stating that the trial court abused its discretion by allowing evidence other than the 2007 reports because the Emmites never ask for a time extension to file additional reports under Chapter 90.

Issue: (1) Did the trial court err in considering the Dr. McClure's deposition which was after the period of time allowed by Chapter 90? (2) Did the plain language of Chapter 90 require that the pulmonary function test relate to the physicians determination of impaired pulmonary function? (3) Is Chapter 90, in regards to the Emmites case, being retroactively applied so as to create an issue under the Texas Constitution?

On the first issue, the court held that the trial court did not err in considering the Emmites' reports there were filed after initial hearing in September 2007. The court found that because the trial court never gave a written order on the motions to dismiss, the motions were still pending before the court. While the motions were pending, the Emmites' asserted that Dr. Britton's report was compliant with 90.010(f) which did not have the same timing requirements as a 90.003 report, therefore the trial court did not abuse its discretion by considering the subsequent Emmites' reports.

On the second issue, the court holds that physician reports must relate the pulmonary function test required under Chapter 90 to the diagnosis of functional pulmonary impairment. Although the plain language of the chapter does not require a relation, it is the intent of the legislature for there to be a relation because not doing so would lead to arbitrary procedural hurdles instead of limiting asbestos claims to those actually functionally harmed by the disease. The legislature enacted Chapter 90 to deal with a perceived crisis in the amount of asbestos litigation brought in Texas courts, and that by requiring a relation between the test and impairment asbestos claims would be limited to those who were actually impaired by the disease. Because the pulmonary function test performed on Joseph Emmite was completed 40 years ago and did not relate to the pulmonary function impairment he suffered at the time of death, the Emmites' claim must be dismissed.

The court finds that the law is not unconstitutional as retroactively applied to the Emmites' and therefore their claim must be dismissed. The court determines that a wrongful death action accrues at the time of death and so the changes to Chapter 90 are being retroactively applied to the Emmites, but that alone does not make a statute unconstitutional. The court finds there is not a bright line rule, but

a three factor analysis articulated in *Robinson v. Crown Cork & Seal Co.* should be used to determine if the Emmites should be protected by the Texas Constitutions requirement that no retroactive law shall be made. The *Robinson* test requires courts to “consider three factors in light of the prohibition’s dual objectives: the nature and strength of the public interest served by the statute as evidenced by the Legislature’s factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment.” The court finds that it is a compelling public interest to limit the amount of asbestos litigation that seems to be clogging up the Texas courts, and at the same time make sure that litigants who have actually been functionally impaired by asbestos find their day in court. The court additionally find that because the Emmites had a grace period in between Joseph’s death and the date that Chapter 90 took effect, the nature of the Emmites right is not very strong. The court finally finds that although the extent of impairment is great because it precludes a recovery for asbestos related injury, the impairment does not outweigh the public interest in liming the amount of asbestos litigation in general, so the application of the law to the Emmites “does not violate the Texas Constitution’s prohibition against retroactive laws.”

Justice Lerhmann, dissenting.

Justice Lerhmann, although joining in Justice Boyd’s dissenting opinion, writes separately to add that Chapter 90 as applied in this case violates the Texas Constitution’s prohibition on retroactive laws. He argued that the Robinson test should be applied to determine if Chapter 90 was unconstitutionally retroactive, as the majority did, but found that it was unconstitutional as applied to the Emmites. In analyzing the first prong of the Robinson test, Lerhmann found the majority correctly decided there is an important public interest in limiting asbestos cases to those who are truly impaired by the disease, but concluded that because Joseph Emmite was shown to be substantially impaired by the disease, the public interest was not served by applying the statute to his case. Along the same lines, when Lerhmann applied the second prong of the Robinson test, he found that because the Emmites would most likely recover damages from the suit the nature of their right was considerable. Finally, Lerhmann concluded that because the Emmites’ cause of action accrued before the change to Chapter 90 was signed into law, and the previous law did not require a plaintiff to produce evidence of pulmonary function testing, their case was impaired by the application of the new law. Lerhmann also notes that the new change to Chapter 90 could prevent future litigants who are too sick to be able to have a pulmonary function test performed on them from being able to recover. For all these reasons, Lerhmann would affirm the Court of Appeals and find the change to Chapter 90 unconstitutional as retroactively applied to the Emmites.

Justice Boyd, dissenting, in which Justices Guzman, Lerhmann, and Devine join.

Justice Boyd dissents by finding the statutory construction of Chapter 90 by the majority incorrectly interprets the Chapter to require a pulmonary function test

be tied to the physician's diagnosis of asbestos-related functional pulmonary impairment. He finds that the reading the plain language of the statute, which does not require there to be a relation between the test and diagnosis, does not cause absurd results, ignore the legislatures purpose in enacting Chapter 90, and does not attribute an arbitrary intent to the legislature. Boyd argues that because functional pulmonary impairment test would still be required it would prove that the individual was still sick enough to think they needed the test done. Additionally, the Chapter as written might not be very good, but that does not make it unreasonable enough to ignore its plain meaning because it is not the courts role to "make statutes 'more reasonable.'" Boyd continues by stating that it is very difficult to determine a legislature's purpose and intent in enacting a statute, which could be different for each member of the legislature and could be affected by the general needs for a legislature to compromise on language before enacting a statute. Because the unambiguous language of the statute still requires a pulmonary function test, the plain language of the statute does not require an absurd result, the court should use the plain meaning to hold that the pulmonary function test performed on Joseph Emmite toward the end of his employment at Union Carbide and well before he died, satisfied the requirement in Chapter 90.

Porretto v. Texas Gen. Land Office

No. 12-0483

Case Summary Written by Sara Thornton, Staff Member.

Chief Justice Hecht delivered the opinion of the Court. Justice Boyd did not participate in the decision.

The Plaintiffs-Petitioners, owners of private beachfront property, filed suit against the Texas General Land Office (GLO) and its Commissioner to establish ownership of their property and for damages from a compensable taking of the property under Tex. Const. art. I, § 17(a). The Porrettos own 27 acres property on Galveston beach that is located both on the wet line and the dry line, and on both sides of the sea wall. Included in this property is Porretto Beach West, the property at issue. From 1994 to 2008, the GLO recharacterized the requirements that constitute government-owned beachfront property. The Plaintiffs-Petitioners claim that these multiple recharacterizations resulted in confusion and in the Porrettos' ultimate failure to sell their property.

Until the mid-1990s, the well-established law for the taking of beachfront property in Texas was that the State owned all land submerged in water up to the mean higher high tide line (MHHT). In 1994, the GLO leased the submerged beach and land up to the line of highest annual tide, which is well landward of the MHHT, to the City of Galveston. The sole purpose of this lease was to replenish and restore the beach quality sand. This leased property included all of Porretto Beach West. The GLO attorneys also sent out a letter explaining that there were no private ownership rights in front of the sea wall, which was more landward than the

MHHT. Ownership on the tax rolls changed with this recharacterization, and the State of Texas was listed as the owner of part of Porretto Beach West. But the Porrettos continued to pay taxes on the property, though the GLO said they had no private ownership claims to it. The tax roll changes were reversed in 2004 and the District re-listed the Porrettos as the sole owners of Porretto Beach. In 2001, the GLO Commissioner stated that there was no claim to the Porretto's property past the MHHT. Since the GLO conceded that the Porrettos own the property landward of the MHHT line, the GLO argued that no controversy remained, and thus the trial court lacked jurisdiction.

Issues: (1) Whether the state of Texas's repeated recharacterization of private beachfront property constitutes a compensable taking under Article I, Section 17(a) of the Texas Constitution; (2) Whether the Open Beaches Act's requirement of a permit before sand scraping or removal is constitutional since the Act operates ex post facto; and (3) Whether the Court of Appeals erred by reversing the trial court's award of \$19, 349.52 in attorney fees and discovery sanctions.

The GLO's assertions, the GLO lawyers' erroneous statements of property ownership, and the GLO's request to list the State as the owners of Porretto Beach West did not constitute a taking under Tex. Const. art. I, § 17(a). The property lease also did not constitute a taking because the lease was limited only to improving the property, and thus the Porrettos benefitted from the lease. Most importantly, the State did not attempt to exercise control over the Porrettos' property. Though the Court finds the GLO's assertions of ownership troubling, the GLO's abandonment of all claims to ownership, combined with its lack of action to control the property did not rise to the level of action required for a compensable taking under Tex. Const. art. I, § 17(a).

The Court agreed with the court of appeals that the second issue was not ripe since the Porrettos did not prove that they had been denied the required permit for sand scraping or removal. Lastly, the Court reversed the court of appeals decision to deny the plaintiffs' discovery sanctions. The defendants only partially produced the requested documents and admittedly did not search for others. As a result, the plaintiffs were forced to make a second trip to the GLO offices to review the requested documents. In addition, the defendants did not respond to plaintiffs' motion for attorney fees and expenses as sanctions.

In sum, the Court reversed the court of appeals' dismissal of the Porrettos' title claims and denial of discovery sanctions. The Court found that the Porrettos were not entitled to prevail on their taking claim under Tex. Const. art. I, § 17(a). The judgment was affirmed in all other respects.

Jaster v. Comet II Const., Inc.

No. 12-0804

Case summary written by Kristen Vander-Plas, Staff Member.

Justice Boyd announced the Court's decision, and delivered the plurality opinion in which Justices Johnson, Willett, and Devine joined. Justice Willett delivered a concurring opinion, in which Justice Devine joined and in which Justice Lehrmann joined in part. Chief Justice Hecht delivered a dissenting opinion, in which Justices Green and Guzman joined. Justice Brown joined Chief Justice Hecht's dissent in all but Part II.

In this case, a homeowner sued a construction company (Comet) for a variety of claims, including negligence and breach of contract, for a defective foundation to the home. Comet then asserted third party claims against the design firm (Austin Design Group) and the engineer who designed the foundation (Jaster). Austin Design then filed cross-claims against both Comet and Jaster, seeking to indemnify both parties for any damages. Jaster moved for dismissal of all claims brought against him by Comet and Austin Design, claiming that chapter 150 of the Texas Civil Practice and Remedies Code required both parties to provide an expert affidavit with their claims, which both failed to do. The trial judge denied the motion to dismiss and Jaster filed an interlocutory appeal. The court of appeals affirmed, and the Texas Supreme Court granted Jaster's petition for review.

Issue: Does the statute requiring an expert affidavit in proceedings claiming damages from a professional, licensed provider of services apply to a defendant or third-party who becomes a "plaintiff" via a cross-claim or third-party claim against a design professional?

The Court held that the statute's requirement for an expert affidavit only applied to the original plaintiff bringing the suit, and upheld the ruling of the trial court and the judgment of the court of appeals, denying Jaster's motion to dismiss.

Since the statute does not define the terms "the plaintiff" or "any action," the Court focused on the common, ordinary meaning of the words. The Court then determined that typically the word plaintiff refers to the party bringing the suit, not a third-party plaintiff or a defendant asserting a cross-claim. Then, the Court found that the term "any action" was more synonymous with the term "lawsuit" than with the term "claim," as Jaster argued. The Court held that context did not favor Jaster's arguments either, as the Legislature did not clearly demonstrate that the affidavit requirement was meant to apply to any party with a claim against a professional. Rather, when the Legislature intended for a requirement to apply to all parties in an action, the term "claimant" was typically used instead of the word "plaintiff."

Lastly, the Court found that construing the statute as it did would not lead to an absurd result, as Jaster argued. Instead, the Court found that though an ambiguity existed in the statute, it was more "odd" to require a defendant to file an affidavit which supports the merits of the plaintiffs' claims by applying the chapter 150 requirement to their third-party claims and cross-claims. In response to the dissent's argument that the purpose of the statute was to protect professionals from frivolous claims, the Court found that design professionals could seek protection against meritless claims by brought against them by defendants and third-party plaintiffs through traditional summary judgment motions means.

Willet, J., Concurring, joined in whole by Justice Devine and in part by Justice Lehrmann

Justice Willett focuses on the context of the statute in order to conclude that third-party plaintiffs and defendants are exempt from the statutory requirement. Since the requirement refers to “*the* plaintiff,” Justice Willett concludes that the language pinpoints the only party initiating the entire suit: the original plaintiff and none other. Another important point is that claims for indemnity are not claims for *damages* under the statute. Justice Willett warns against putting too much emphasis on the purpose of a statute, as going down that road can sometimes lead to revising the law instead of interpreting it. Unfair or odd outcomes are not enough to trigger the application of the absurdity doctrine, according to Justice Willett. And in this case, Jaster is asking the Court to equate oddity with absurdity, which it ought not do. Perhaps, posits Justice Willett, the Legislature even intended such an unequal outcome, so that defendants are not placed in a position where they have to provide helpful evidence to the plaintiff via an affidavit of a design defect. It is not the Court’s place then, to rewrite the statute.

Hecht, C.J., Dissenting, joined in whole by Justices Green and Guzman and by Justice Brown as to all but Part II

Chief Justice Hecht’s dissent focuses on the fact that the plurality and concurring opinions do not focus, at least enough, on the intent of the Legislature. The Chief Justice writes that it is the duty of the Court to interpret difficult statutes in a way that gives effect to the intent of the drafters; the majority of the Court has not succeeded on this front, in his opinion. The Chief Justice points to a place within the Civil Practice and Remedies Code where the words “plaintiff” and “claimant” are used interchangeably, in order to negate the plurality opinion’s argument that the Legislature’s intent was to refer only to the original plaintiff.

The dissent argues that since the meanings of the words plaintiff and action *are* ambiguous, it is disingenuous to state with certainty what the intent of the Legislature was in respect to the terms. Therefore, Chief Justice Hecht argues, the purpose of the statute should rule. Since the statute was intended to protect design professionals from frivolous suits, then third-party plaintiffs and defendants leveling cross-claims should be considered plaintiffs under the statute, in order to carry out the objective of the statute.

In re Ford Motor Company, Realtor

No. 12-0957

Case Summary written by Ryan Wiscombe, Staff Member.

Justice Willet delivered the opinion of the Court, in which Chief Justice Hecht, Justice Green, Justice Guzman, and Justice Lehrmann joined.

Juan Tueme Mendez, his brother Cesar Tueme Mendez, and two other passengers were traveling in a Ford Explorer in Mexico when the left rear tire burst and the vehicle careened off the road. Juan, the driver, was injured, and Cesar was killed. Juan, who is not a legal resident of Texas, sued Cesar's estate in Hidalgo County, Texas, where the estate was being administered. Cesar's estate filed a third party claim against Ford and Michelin claiming defective design and negligence. The administratrix, and three other beneficiaries filed claims against Ford and Michelin for wrongful death damages.

Ford motioned to dismiss the claims under the forum non conveniens. The trial court denied the motion and Ford appealed. The Court of Appeals denied relief, holding that the wrongful death beneficiaries are plaintiffs that can take advantage of the Texas-resident exception, since at least one of the beneficiaries is a legal resident of Texas.

Issue: Did the trial court abuse its discretion by denying Ford's motion to dismiss the case under forum non conveniens, where Ford claimed that the intervening beneficiaries are not "plaintiffs" within the meaning of the Texas-resident exception.

The forum non conveniens allows a party to move a case outside of Texas jurisdiction, in order to be more convenient for both parties. However, the Texas-resident exception allows plaintiffs who are legal residents of Texas to keep their cases in the state. Ford argued that none of the wrongful death beneficiaries qualify as plaintiffs under the statutory definition because the beneficiaries are third party plaintiffs, and because the beneficiaries should be combined with the decedent into one single plaintiff. The Court ruled the wrongful death beneficiaries were not third party plaintiffs because they cannot be properly characterized as defendants. The Court also stated that just because the beneficiaries' claim mirrors that of the plaintiff and the beneficiaries stand in the decedent's legal shoes does not make them third party plaintiffs. Further, the Court held that wrongful death beneficiaries are distinct plaintiffs whose own residency can satisfy the Texas-resident exception.

Justice Johnson filed the dissenting opinion in which Justice Devine and Justice Brown joined.

The dissent argued the Court erred in two ways. First, it erred by reading language into the statutory definition of plaintiff. The Court held that only defendants can be third party plaintiffs, and so the beneficiaries here cannot be considered third party plaintiffs because they are not defendants. The statute does not define third party plaintiffs, and the Court was wrong to attempt to define the term. Second, the Court erred by misapprehending the interests of the beneficiaries. The beneficiaries were completely aligned with the defendant estate, and should be precluded from being plaintiffs under the Texas-resident exception. As such the case should be dismissed in Texas and moved to Mexico.