

**Supreme Court of Texas**  
**December 4, 2015**

*In re RSR Corp. & Quemetco Metals Ltd., Inc.*

No. 13-0499

Case Summary written by Mariah Mauck, Staff Member.

JUSTICE DEVINE delivered the opinion of the Court.

Inppamet S.A., a Chilean manufacturer of anodes, licensed anode-production information from RSR Corporation and Quemetco Metals Limited, Inc. (RSR) in 2003. As a result, Inppamet promised RSR would be paid a fee for every anode sold. In 2008, RSR sued Inppamet in Texas for (in addition to other things) breaching their contract and misappropriating trade secrets. In this underlying case, Bickel & Brewer represent RSR. Inppamet also sued RSR in Chile in 2008. In the Chilean litigation, the law firm of Bofill Mir & Alvarez Jana (BMAJ) represents RSR.

When Hernan Sobarzo, former Inppamet finance manager, resigned in April 2010, he took with him about 2.3 gigabytes of data—which consisted mostly of emails. The emails included both Sobarzo’s personal communications, as well as communications between Inppamet’s managers, directors, and lawyers. Months after Sobarzo resigned, an attorney with BMAJ reached out and requested Sobarzo to contact him. The two ultimately met to discuss Inppamet and the dispute with RSR. Several meetings followed and often involved Bickel & Brewer. According to the trial court’s findings, Sobarzo met with attorneys and consultants from Bickel and Brewer at least nineteen times.

Though the parties disputed what transpired during the meetings, it was apparent that Sobarzo supplied important information concerning Inppamet, accusing the company of underpaying RSR under the 2003 agreement. Sobarzo showed Bickel & Brewer attorneys Inppamet documents on his computer. Additionally, BMAJ possessed many Inppamet documents on a pen drive. The parties disputed the privileged and confidential nature of the documents—as well as the number of documents—reviewed by Bickel & Brewer. Furthermore, Sobarzo insisted on compensation for his meetings with Bickel & Brewer and BMAJ.

However, Sobarzo quit consulting with Bickel & Brewer and BMAJ two months after he signed a consulting agreement formalizing the terms of his compensation. After quitting, Sobarzo signed an affidavit withdrawing his accusations against Inppamet and claiming that Inppamet never underpaid RSR.

Inppamet moved to disqualify Bickel & Brewer as RSR's counsel because of concerns with the attorneys' exposure to Sobarzo and his documents. The trial court appointed former Texas Supreme Court Justice Deborah Hankinson as a special master and she denied the motion to disqualify. Following Inppamet's appeal on the disqualification ruling, the trial court ordered Bickel & Brewer's disqualification, relying primarily on *In re American Home Products Corp.* The court of appeals later denied RSR's petition for mandamus relief.

Issue: Whether the trial court abused its discretion in disqualifying RSR's counsel.

The Court held that the trial court abused its discretion by improperly disqualifying RSR's counsel under *American Home Products*. That case concerned the disqualification of counsel for hiring the opposing counsel's former legal assistant. RSR argued that since Sobarzo was a fact witness, a different standard applies. The Court agreed and held that the factors test from *In re Meador* provided a better standard for evaluating whether Bickel & Brewer should be disqualified in this case. The factors test also properly balanced Inppamet's desire to protect confidential information against RSR's interest in retaining counsel.

*Meador* provides factors for a trial court's consideration of whether disqualification is required when attorneys "receive[] an opponent's privileged materials outside the normal course of discovery." The six factors from *Meador* relevant for the trial court's consideration include: (1) if the attorney knew or should have known the privileged nature of the materials; (2) the timeliness of the attorney notifying the opposing side that its privileged information has been received; (3) the degree to which the attorney reviews and processes the privileged information; (4) the importance of the privileged information; (5) the degree to which the movant might be to blame for the unauthorized disclosure; and (6) the degree to which the nonmovant will be

prejudiced from the disqualification of his or her counsel. The Court found that the trial court applied the wrong standard in ordering Bickel & Brewer's disqualification in that it neither contemplated the *Meador* factors nor settled the factual disputes required to do so.

Instead, the trial court agreed with Inppamet that Sobarzo's position as a paid consultant and his extensive interaction with Bickel & Brewer necessitated the application of *American Home Products*. Under that case, two presumptions by the court ensured that any law firm hiring opposing counsel's former paralegal was disqualified (unless the firm has screening measures in place): (1) the conclusive presumption that a paralegal who has worked on a case received confidential information and (2) the presumption that the paralegal revealed the confidential information with the new employer. The Court noted that it has only applied the presumptions from *American Home Products* to legal assistants, paralegals, or other non-attorneys who are supervised by lawyers and retained to assist with litigation. Nonetheless, the Court concluded *American Home Products* does not apply to fact witnesses like Sobarzo because he—while employed at Inppamet—was not hired for litigation purposes and was not directly supervised by lawyers.

Thus, the Court held that the trial court abused its discretion by disqualifying RSR's counsel under *American Home Products*. The Court, however, did not determine whether disqualification would have been appropriate under *Meador* because the trial court neither addressed the issue, nor determined all fact issues pertinent to a *Meador* analysis. The Court conditionally granted mandamus relief, only to be issued if the trial court fails to vacate its order granting Inppamet's disqualification motion.

***Kingsaire, Inc. v. Melendez***

No. 14-0006

Case Summary written by Alicia McCullar, Staff Member

JUSTICE LEHRMANN delivered the opinion of the Court

Kings Aire, Inc. (Kings Aire), a family owned HVAC company, hired Melendez, first as a “helper tradesman” and then promoted him to “apprentice lead man” after five years of employment. While working a demolition job, Melendez suffered severe injury to his wrist, requiring surgery. An agent for Kings Aire assisted Melendez with his workers’ compensation claim, and a claim was subsequently filed on Melendez’s behalf. Further, Melendez was informed that he qualified for unpaid Family and Medical Leave Act (FMLA) leave and was placed on such leave on the first day Melendez was absent from work due to his injury. Following the allotted time of twelve weeks for FMLA leave, Melendez could not return to work and he was terminated as a result. Melendez was informed that he was invited to apply for open positions with Kings Aire as soon as a physician cleared him to return to work.

Following this action, Melendez sued Kings Aire for breach of contract and for wrongful discharge, claiming he was fired for filing a workers’ compensation claim in good faith. At trial, the jury found in favor of Melendez and awarded damages. Kings Aire appealed only the portion of the judgment related to the retaliation claim and challenged the sufficiency of the evidence presented at trial. The court of appeals affirmed the trial court’s decision.

Describing the background for retaliation claims against employers, the Court cited TEX. LAB. CODE § 451.001(1), which says in relevant part, “A person may not discharge or in any other manner discriminate against an employee because the employee has . . . filed a workers’ compensation claim in good faith.” Employers who violate this provision are subject to retaliation claims because the statute provides an exception to “employment at will.”

The evidence necessary to constitute a retaliatory finding is likened to the causation standard applied to claims brought under the Whistleblower Act. Essentially, employees must prove that the action would not have occurred when it did absent the employee’s protected conduct. Employees may rely on circumstantial causation evidence that may include an abundance of factors. Citing precedent, the Court concluded that evidence of

termination for filing a workers' compensation claim and remaining on leave is not necessarily retaliatory when the employer applies a reasonable policy and the policy is applied uniformly against all employees.

The Court applied a "more than a scintilla of evidence" standard to determine if the evidence presented by Melendez was legally sufficient to sustain a retaliation claim. Because the Court surmised that termination upon expiration of a company's leave policy is not inherently retaliatory when reasonable and applied uniformly, the Court sought to determine if Kings Aire's policy met these requirements. It looked first to Kings Aire's written personnel policies, which outlined the length of time requirements for specific leaves, including FMLA leave and workers' compensation. The written policy indicated that employees are subject to termination if they cannot return to work following twelve weeks of allowed leave, regardless of the type or reason. The Court further concluded that the leave/termination policy was applied uniformly. Namely, the Court took note that four other employees were terminated prior to Melendez under similar circumstances and in compliance with the policy. Moreover, employees who returned to work prior to the twelve-week expiration were permitted to retain employment in accordance with the company's policy.

Melendez argued that he was not terminated in accordance with the policy because the policy is ambiguous. He argued that he should have been granted a fifteen-day grace period allowing a physician to clear him for work before Kings Aire decided to terminate Melendez. Although the court of appeals agreed that the policy provision was ambiguous and decided that Melendez rightfully relied on the fifteen-day grace period, the Court disagreed with this conclusion finding that the issue is whether the termination policy is applied uniformly. The Court found that application of the fifteen-day grace period caused "a departure from [the] uniform enforcement" of Kings Aire's policy. Essentially, the Court found that it made no difference whether Melendez was terminated immediately following expiration of his leave or fifteen-days later.

Additionally, Melendez argued that he was terminated three-weeks into his leave when he was required to turn in his uniforms. The Court rejected this argument because the uniform turn in measure was nothing more than “meager” circumstantial evidence. Kings Aire testified that employee uniforms are rented and are turned in to account for those rentals. This practice occurred often and did not indicate termination. Lastly, Melendez argued that he was placed on FMLA leave without his consent so that Kings Aire could terminate him at the expiration of twelve weeks. The Court also rejected this argument finding that Kings Aire is federally required to place an employee on FMLA leave when they discover that the employee qualifies for that type of leave. Further, employees are afforded greater protection under FMLA and Kings Airs complied with its notice requirements. This evidence was insufficient to support a claim that Melendez was fired for filing a workers’ compensation claim in good faith.

The Court held that the presented evidence could not have supported the jury’s verdict. The Court reversed the court of appeals’ judgment and rendered a take-nothing judgment in favor of Kings Aire.

JUSTICE GUZMAN, concurring.

Seeking to clarify the burden of proof relevant to this opinion, Justice Guzman wrote that the burden of persuasion compelled the result in this case. Notably, the uniform enforcement of a reasonable leave policy is an inferential rebuttal defense as opposed to an affirmative defense. A burden-shifting scheme exists because the employee initially bears the burden of proving that they were terminated for engaging in a protected activity. The inferential rebuttal defense operates to necessarily rebut an essential element of the plaintiff’s case. Proof that the leave policy was reasonable and uniformly applied provided proof contrary or inconsistent with the plaintiff’s case.

***Galvan v. Mem'l Hermann Hosp. Sys.***

No. 14-0410

Case Summary written by David Miles, Staff Member.

PER CURIAM.

Sylvia Galvan was visiting a relative at Memorial Hermann Southwest Hospital when she slipped and fell on water on the floor. Galvan sued the hospital, alleging that the hospital was negligent in not cleaning up the water or providing a warning sign. She slipped while walking from the pharmacy to her relative's room.

The hospital filed a motion to dismiss, alleging that Galvan's claim should have been brought as a health care liability claim (HCLC), and that she failed to provide an expert report as required by the Texas Medical Liability Act. The trial court denied the hospital's motion, but the court of appeals reversed, holding that "because Galvan's claim was based on an alleged departure from accepted standards of safety, it was an HCLC."

The Supreme Court of Texas, however, reversed. The Court rejected the contention that the hospital's failure to clean up water from a bathroom was covered by federal regulations requiring certain standards, such as "providing a sanitary environment and having an active program for preventing, controlling, and investigating infections and communicable diseases." The Court found that the record did not show that the spill in question implicated infection-control standards.

Additionally, the Court rejected the argument that health and safety standards were implicated because the Texas Board of Health requires hospitals to use microfiber mops rather than conventional wet loop mops. The Court could not find a substantive relationship between that requirement and Galvan's claim.

The Court held that, given all the facts in the record, "no substantive nexus is shown to exist between the safety standards Galva alleges the hospital violated and the provision of health care."

***BNSF Ry. Co. v. Phillips***

No. 14-0530

Case Summary written by Molly Neace, Staff Member.

PER CURIAM.

In 1974, Phillips began working for BNSF in New Mexico as a railway yard switchman. After four or five years on the job, he began to ride locomotives as a brakeman. Phillips continued to ride locomotives with his 1984 promotion to conductor and his 1994 promotion to engineer. After many years of riding on rough locomotives with poorly maintained seats, Phillips alleged an occupational injury, which caused him to suffer long-term vibratory exposure. Consequently, Phillips filed a lawsuit against BNSF under the Federal Employers' Liability Act (FELA) and the Locomotive Inspection Act (LIA) on April 13, 2007.

Finding for Phillips, a jury awarded him \$1.9 million in costs and damages. BNSF appealed, primarily arguing that the evidence did not support the jury's finding that Phillips' lawsuit was timely filed. The statute of limitations for an FELA claim is three years, and the LIA claim must be brought as part of that claim, not independently. Ultimately, the court of appeals affirmed, holding that the record's conflicting evidence of when the injury occurred allowed the jury to weigh that evidence and find that Phillips' lawsuit was timely. With the same argument, BNSF petitioned the Supreme Court of Texas for review.

ISSUE: Whether Phillips' FELA and LIA claims against BNSF were timely filed according to the statute of limitations.

Phillips bore the burden of proving that his FELA lawsuit accrued no earlier than April 13, 2004. He could rely on the discovery rule refined by the Fifth Circuit stating that "a claim accrues when a plaintiff knows or should know that his injury is work related, that is, when a plaintiff is aware of the critical facts concerning his injury and its causation." Further, the Court will only review the evidence that supports the jury's verdict and disregard all evidence to the contrary.

In reviewing the evidence, the Court first looked to Phillips' testimony that over his twenty-six year tenure of riding locomotives, he frequently reported the rough-riding conditions

and poorly maintained seats to railroad management over the radio. Second, in 1998, the Court noted that Phillips sought chiropractic treatment for spinal issues. On the intake form for preparation of treatment, Phillips cited the rough-riding conditions as cause for his aggravation. Third, in 2003 after Phillips was not responding to the chiropractic adjustments, his doctor ordered him to get an MRI. Subsequently, Phillips was diagnosed with minor bulging discs, intravertebral hemangiomas, and degenerative spinal disorder, spondylolysis. These diagnoses are the same injuries Phillips based the lawsuit on. Lastly, in 2005, the Court noted that a neurologist confirmed Phillips' diagnoses.

Phillips claimed that the 2005 confirmation signified the accrual date of his claims because it was then that he was "properly diagnosed by a neurologist." The Court found this claim to be unsupported by the evidence because as early as his chiropractic treatment in 1998, his injuries had begun to manifest themselves. By 2003, Phillips had received a concrete diagnosis. All of the evidence combined established that Phillips was aware of the facts surrounding his injury and its causation. Consequently, he should have known that his injury was work related. The evidence ultimately supported the finding that his claim accrued no later than the 2003 diagnosis. Therefore, the Supreme Court of Texas reversed the court of appeals' judgment and held that Phillips' 2007 lawsuit was untimely, awarding him nothing.

***Tex. Dep't of Pub. Safety v. Bonilla***

No. 14-0694

Case Summary written by Adam J. Ondo, Staff Member.

PER CURIAM.

The facts leading up to this case began with a Texas Department of Public Safety (DPS) trooper pursuing a speeding truck that was recklessly weaving in and out of traffic. During the chase, the officer ran a red light, causing an accident that resulted in Merardo Bonilla sustaining injuries. Bonilla then sued DPS, asserting that the Texas Tort Claims Act's sovereign immunity

waiver was applicable to his case. DPS moved for summary judgment on the basis that it retained immunity due to the trooper's official immunity and the emergency-response exception. The trial court denied DPS's motion.

DPS made an interlocutory appeal, but the court of appeals affirmed the trial court's decision to deny the motion. The court of appeals held, "(1) DPS failed to conclusively establish the good-faith element of its official-immunity defense, (2) DPS's summary-judgment evidence was incompetent to establish good faith because it failed to address whether the trooper considered alternative courses of action, and (3) Bonilla raised a fact issue regarding applicability of the emergency-response exception." DPS appealed the decision to the Texas Supreme Court, which reversed the court of appeals' judgment and remanded the case, signaling to the court of appeals that it needed to use a different legal standard when evaluating the "good faith" element of DPS's official-immunity defense.

The Court explained that official immunity, when invoked as an affirmative defense, protects government employees from personal liability, but also preserves the employer's sovereign immunity if the plaintiff attempts to sue under the theory of vicarious liability. One of the elements of the official immunity defense is good faith. The Court described the good faith standard as not analogous to a general negligence test, but rather an abuse-of-discretion standard.

For purposes of this case, the Court instructed the court of appeals to use this test: "whether any reasonably prudent officer possessed of the same information could have determined the trooper's actions were justified." According to the Court, the court of appeals erred by requiring DPS to show that all reasonably prudent officers would have responded in the same manner as the officer in this case. This test of whether *any* reasonably prudent officer—rather than *all* reasonably prudent officers—would have assessed the situation in the same way stems from *City of San Antonio v. Ytuarte*. 229 S.W.3d 318, 321 (Tex. 2007).

Before remanding the case, the Supreme Court of Texas addressed another issue. The court of appeals had determined that DPS's summary judgment evidence failed to establish good

faith because the evidence did not explore whether the officer considered alternative courses of action before chasing the subject. The Court determined that the trooper did not have to expressly identify alternative courses of action because his statement that he believed immediate action was necessary to catch the driver suggested that he discounted other alternatives.

After underscoring, once again, that the good faith standard used by the court of appeals was inaccurate, the Court remanded the case for reconsideration.

***U.S. Metals, Inc. v. Liberty Mutual Group, Inc.***

No. 14-0753

Case Summary written by Laura Parton, Staff Member

CHIEF JUSTICE HECHT delivered the opinion of the Court.

U.S. Metals provided ExxonMobil Corp. with 350 flanges for use in non-road diesel units. The flanges were welded to pipes and covered with a special coating and insulation. After instillation, several flanges leaked during testing, causing a risk of fire and explosion and requiring that they be replaced. The process to replace each flange required stripping and destroying the insulation, cutting out the flanges, removing and destroying the gaskets, and replacing the flanges, gaskets, and insulation.

This process suspended operation of the diesel units for several weeks. ExxonMobil settled its suit with U.S. Metals for \$2.2 million. In indemnifying its insurer, U.S. Metals claimed that its liability for the delay and replacement costs was covered by its standard-form commercial general liability policy, which it held with Liberty Mutual Group. This policy covered “physical injury’ to property and the lost use of property that could not be restored by replacing the flanges.”

The United States Court of Appeals for the Fifth Circuit raised two issues in certifying four questions to the Supreme Court of Texas. The first issue was whether installing the defective flanges into the diesel units physically injured them. The second issue was whether the diesel units were restored to use when the flanges were replaced, which destroyed some of the property.

Exclusion M of the policy “d[id] not cover damages to property, or for the loss of its use, if the property was not physically injured or if it was restored to use by replacement of the flanges.” Since the defect was discovered during testing, the only harm suffered was the risk of dangerous leaks. The Court granted that the inclusion of defective products could certainly injure the property on which it was installed. The policy, however, required *physical* injury, implying the possibility of non-physical injuries. Thus, a physical injury must be a tangible one (the actual harm theory) and not merely the installation of defective products (the incorporation theory). Because they were replaced to avoid the risk of fire or explosion, the flanges in the instant case never caused an injury.

In rejecting the incorporation theory, the Court recognized the adverse policy consideration to its decision—Liberty Mutual Group’s policy would have covered U.S. Metals if ExxonMobil had not prudently tested the flanges and actual explosion or fire had resulted. Regardless, the Court found the policy patent: the diesel units were not physically injured by the mere instillation of the defective flanges.

Next, the Court considered whether the property was restored to use by replacing the defective product. Recognizing that the replacement process for the defective flanges was rather difficult, the Court nonetheless found that the degree to which the product to be replaced was defective was immaterial. The loss of use was excluded by the policy because “the diesel units were restored to use by replacing the flanges and were therefore impaired property.”

Still, the insulation and gaskets that were destroyed during the restoration of the flanges required complete replacement. Exclusion M did not apply, as they were not impaired property that was restored to use by replacing U.S. Metal’s defective product. The Court found that the policy covered the cost of replacing the insulation and gaskets.

***White v. Davis***

No. 15-0176

Case Summary written by Aaron Powell, Staff Member.

PER CURIAM.

In this two hundred word opinion, the Court vacated the Second Court of Appeals' judgment in light of *Zorrilla v. Aypco Construction II, LLC*—a decision handed down by the Court after entry of judgment in the court of appeals decision. *See* 469 S.W.3d 143 (Tex. 2015). The Court of Appeals had held that the exemplary damages cap in § 41.008(b) of the Civil Practice and Remedies Code was an affirmative defense that must be pleaded, in derogation of *Zorrilla*.

Under Texas Rule of Appellate Procedure 60.2(f), the Court vacated the court of appeals' judgment and remanded for further proceedings consistent with new law under *Zorrilla*.