

Supreme Court of Texas
May 8, 2015

City of Dallas v. TCI West End, Inc.

No. 13-0795

Case summary written by Samantha Kelly, Articles Editor.

Per curiam.

TCI West End, Inc. demolished a building in a historic overlay district in Dallas. A city ordinance requires building owners, before demolition, to apply for a determination over whether buildings in a historic overlay district are subject to strict demolition requirements. The City of Dallas sued TCI for civil penalties for violation of this ordinance under section 54.017 of the Local Government Code, which authorizes civil penalties for ordinance violations, and as authorized by § 54.012 of the code, which lists the types of ordinances a municipality can enforce through a civil lawsuit.

The trial court rendered a judgment awarding the city \$750,000 in civil penalties, but the court of appeals reversed. The court of appeals held that §§ 54.012 and 54.017 only apply to health and safety ordinances, not general zoning ordinances like the one that TCI violated. Beyond that, the court found that even if these sections do apply to general zoning ordinances, § 54.017 requires that the property owner be informed of the ordinance before demolition, and the city presented no evidence that TCI had proper notice.

Issues: The Court had to decide (1) whether §§ 54.012 and 54.017 of the Local Government Code apply only to the enforcement of health and safety ordinances and not to general zoning ordinances related to the use of the land, and (2) whether § 54.017 requires that a property owner have actual notice of an ordinance before the owner is in violation of that ordinance.

The Court reversed the court of appeals decision, holding that § 54.012 is not limited to health and safety ordinances because that reading is contrary to the plain language of the statute and renders the rest of the section meaningless. Section 54.012(3) authorizes municipalities to enforce ordinances “for zoning that provides for the use of land or classifies a parcel of land according to the municipality’s district classification scheme.” TEX. LOC. GOV’T CODE § 53.012(3). The

language expressly encompasses the city's zoning ordinance, and the words "health" and "safety" are not included anywhere in the section. Furthermore, three other subsections of § 54.012 limit the kinds of ordinances that are enforceable to those involving health and safety. For example, § 53.012(1) applies to ordinances "for the preservation of public safety relating to [building construction]." The court of appeals' construction undermines the carefully chosen words of the legislature.

The Court also addressed the court of appeals' alternative holding. Section 54.017 allows civil penalties for violations of ordinances after the property owner received notice of the provisions *or failed to take action to comply with the ordinance after receiving the notice*. TEX. LOC. GOV'T CODE § 54.017(a). The court of appeals concluded there was no evidence that TCI had actual notice of its violation, but it did not consider whether TCI could have complied with the ordinance had it received notice. Therefore, the court of appeals erred by failing to consider whether the penalty awarded by the trial court could have been upheld under this section of the statute.

For these reasons, the Court overturned the court of appeals and remanded the case for findings consistent with its holding.

Abutahoun v. The Dow Chem. Co.

No. 13-0175

Case summary written by Samantha Kelly, Articles Editor.

JUSTICE GREEN delivered the unanimous opinion of the Court.

Dow Chemical Company contracted with Win-Way Industries to install pipelines in Dow's facility. Between 1967 and 1968, Robert Henderson, an employee of Win-Way, helped insulate pipes with a material containing asbestos. He was also exposed to asbestos by the actions of Dow employees who were installing, sawing, and removing asbestos insulation within feet of Henderson's work area. After Henderson was diagnosed with Mesothelioma, he sued Dow under various negligence and product liability theories of recovery.

At trial, the jury returned a verdict finding that Dow's negligence was 30% responsible for Henderson's injuries. The judgment against Dow amounted to \$2.64 million. On appeal, Dow argued that Chapter 95 of the Civil Practice and Remedies Code does not draw a distinction

between a property owner's liability for the actions of contractors, and the property owner's liability for the actions of the property owner's own employees. The court of appeals agreed with this interpretation, meaning that Henderson needed to establish Dow's liability under the requirements of § 95.003 of the statute, which they failed to do. The court of appeals reversed the trial court, issuing a take nothing judgment in favor of Dow.

Issue: Does Chapter 95 of the Civil Practice and Remedies Code apply to an independent contractor's claims against a property owner when the claim is based on an injury stemming from the property owner's negligence, not the negligence of the independent contractor?

The Court affirmed the court of appeals, finding in favor of Dow. Section 95.002 explains that Chapter 95 applies to claims against a property owner that arise from the condition or use of an improvement to property where the employee of a contractor modifies the improvement. TEX. CIV. PRAC. & REM. CODE § 95.002. Section 95.003 limits the property owner's liability to an employee of a contractor so that the property owner is not liable for personal injury or death arising from the failure to provide a safe workplace, unless the property owner exercises control over the work performed and the property owner had actual knowledge of the dangerous work conditions. *Id.* § 95.003.

The Court noted that Chapter 95 is unambiguous. As a result, it looked to the plain meaning of the statute, setting aside statutory construction techniques specific to ambiguous statutes. That statute lists who a claim may be asserted against, but it says nothing about the actor who is responsible for the existence of the negligence claim and it makes no distinction between injuries caused by the contractor's actions and injuries caused by someone else's actions. The Court also looked to its jurisprudence under the Texas Tort Claims Act for guidance in defining the other terms in the statute. Given this body of case law, the Court found that the Legislature intended for Chapter 95 to apply to all negligence claims arising from the negligence of a property owner.

Accordingly, the Court held that Chapter 95 applies to a claim against a property owner for a contractor's death caused by the property owner's negligence. This being the proper interpretation of § 95.002, Henderson had to prove the evidentiary burdens set out in § 95.003 in order to show the causal link between Dow's negligence and

Henderson's injuries. He did not do so at trial, and therefore Dow could not be subject to liability under Chapter 95.

Gene E. Phillips v. Carlton Energy Group, LLC

No. 12-0255

Case summary written by Nirav Patel, Executive Managing Editor.

CHIEF JUSTICE HECHT delivered the unanimous opinion of the Court.

CBM Energy Limited (CBM) obtained the right to explore and develop a coalbed methane field in Bulgaria. CBM made an arrangement with Carlton Energy Group, LLC (Carlton) to provide financial backing for the venture. Carlton's contract with CBM entitled Carlton to obtain an interest—up to 48% total—in the project based on how much it invested. Carlton needed help in providing the investment backing for CBM. Carlton offered Gene Phillips (Phillips) 10% of its interest in exchange for an \$8.5 million investment. Phillips and Carlton, however, failed to execute a final contract and Phillips became more interested in replacing Carlton rather than helping Carlton fulfill its contract with CBM. CBM declared Carlton in default and moved quickly to enter into a new investment agreement with EurEnergy Resources Corp. (EurEnergy), a company controlled and partly owned by Phillips.

Carlton sued Phillips and EurEnergy, alleging breach of contract and tortious interference with the Carlton–CBM contract. Carlton argued it was entitled to recover the market value of the interest it would have obtained in the Bulgarian project. Its measure for market value was the profits it lost from the project. The jury awarded Carlton \$66.5 million in actual damages, but the trial court refused to render judgment for that amount. Carlton accepted a remittitur to \$31.16, reserving its right to argue a higher amount on appeal. The court of appeals awarded the full \$66.5 to Carlton and Phillips, which EurEnergy appealed to the Supreme Court of Texas.

After determining there was enough evidence to support the jury's guilty verdict for tortious interference, the Court addressed Phillips' and EurEnergy's main argument regarding calculation of damages. The appellants argued that the fair market value of the project was too speculative to support an award of damages. The Court first noted that

fair market value is what a willing buyer pays a willing seller, neither of whom are under any compulsion to act. Next, the Court recognized that in normal lost profits cases—where lost profits are sought to be recovered as consequential damages—the damages must be proven with reasonable certainty.

The question in this case, however, was whether the reasonable certainty requirement should be extended to cases where “lost profits are not sought as damages themselves but are used to determine the market value of property for which recovery is sought.” The Court held that the reasonable certainty requirement should be extended to such cases, because the purpose of the requirement is to prevent recovery based on speculation and there was no reason why the requirement should not apply equally to lost profits and lost market value. Applying this rule to the case, the Court determined that two of Carlton’s damage models were merely conjectural and based on “sweeping assumptions.” Specifically, Carlton’s experts made unsupported projections about the value of gas in the ground and the amount of gas actually recoverable. One damage model the Court found favorable was based on market indicators, such as offers made during negotiations between willing buyers and willing sellers. Specifically, the Court looked to Phillips’ agreement to pay Carlton \$8.5 million in exchange for a 10% in the project. The issue was ultimately remanded to the court of appeals to apply the appropriate damage model.

Finally, the Supreme Court of Texas addressed whether two Phillips-controlled entities were liable as alter egos of Phillips and EurEnergy. Applying Nevada law, where the two affiliated entities were incorporated, the Court held that Nevada’s alter ego statute did not replace common law alter ego liability. The Court also held that the affiliated entities were alter egos, as a matter of law, because there were overlapping corporate directors and because the companies shared office spaces, letterheads, and email addresses. The evidence also showed that EurEnergy’s pursuit of the Bulgarian project was directed by Phillips and that the affiliated companies were used to pursue the project.

Life Partners, Inc. v. Arnold

No. 14-0122

Case Summary written by Ross Smith, Articles Editor.

JUSTICE BOYD delivered the opinion of the Court

This case was two consolidated cases, one class action lawsuit wherein Michael and Janet Arnold along with others brought claims against Life Partners, Inc. for violating the Texas Securities Act “by selling unregistered securities and materially misrepresenting to purchasers that they were not, in fact securities” and one from the State of Texas claiming that Life Partners, Inc., with other defendants, had committed fraud through the sale of the securities. Both cases required the courts to determine if the interests in “life settlement agreements” sold by Life Partners, Inc. were in fact securities under the Texas Securities Act.

The trial courts held that Life Partner’s had not sold any type of security, and therefore was not liable under the Texas Securities Act. The cases were reversed in part, and affirmed in part, by the Dallas Court of Appeals, which held that life settlement agreements were securities under the Texas Securities Act.

Life Partners, Inc. operates by purchasing life insurance policies from those willing to sell them, and then offering its own investors a chance to purchase an interest in the specific person’s life insurance. Life Partners offers a person a cash amount that is less than the policy pays out, but that the person can then use immediately, and Life Partners assumes the monthly payments of the life insurance policy. In return, the person will appoint Life Partners as the beneficiary under the policy. Life Partners calculates how much the cash payment will be based on when Life Partners believes the person will die. If Life Partners accurately guess’s that the person will die before the calculated date, then Life Partners and in turn its investors will make a profit on the deal. If the person lives longer than Life Partners has calculated for the cash payment, then Life Partners and its investors will lose money.

Issue (1): Are the life settlement agreements offered by Life Partners investment contracts under the Texas Security Act?

Under the Texas Security Act, “securities” are broadly defined “to include such things as ‘any limited partner interest in a limited

partnership, share stock, treasury stock, . . . investment contract, or any other instrument commonly known as a security, whether similar to those herein referred to or not.” The Texas Supreme Court only considered whether the life settlement agreements would be considered investment contracts under the statute. The court had noted in a previous case that the Texas Security Act was almost an exact copy of the definition from the Federal Securities Act of 1933. The court stated its intention to look to other state courts and federal courts which had sought to determine the meaning of investment contracts, along with its own precedent. In doing so, the Texas Supreme Court defined an investment contract as “(1) a contract, transaction, or scheme through which a person pays money (2) to participate in a common venture or enterprise (3) with the expectation of receiving profits (4) under circumstances in which the failure or success of the enterprise, and thus the person’s realization of the expected profits, is at least predominately due to the entrepreneurial or managerial, rather than merely ministerial or clerical, efforts of others, regardless of whether those efforts are made before or after the transaction.”

After defining an investment contract, the Texas Supreme Court analyzed the Supreme Court’s test, also known as the *Howey/Forman* test, to determine if an item claimed to be a security would fit the definition of an investment contract. From analyzing the relevant Supreme Court case law, the Texas Supreme Court found three important factors for applying the test: (1) a court should protect the public as the securities acts intended by broadly construing the definition of investment contract; (2) a court should “focus on the ‘economic realities’ of the transaction”; and (3) if the economic realities meet the requirements of the test, a court should find the transaction to be an investment contract, “regardless of the labels or terminology the parties used to describe it.”

After giving investment contracts a definition and determining the factors behind the *Howey/Forman* test, the Texas Supreme Court expanded on its reasons for using the definition and the factors, providing a very thorough review of relevant federal jurisprudence regarding what constitutes an investment contract. Following the review of authority, the court began to determine if the life settlement agreements offered by Life Partners, Inc. were investment contracts.

The court found that Life Partner's, Inc. retains at least entrepreneurial or managerial efforts throughout the transaction. Life Partner's is the sole party to determine the value of potential persons life insurance policies, and how large a cash payment should be made to them. After the purchase of the life insurance policy, Life Partners must make payments on the policy, or it will lapse, and Life Partners is the only party that can continue to tract the insured so as to know when they die and the life insurance policy becomes payable. Since investors enter into the contracts with Life Partners to purchase interests in the life insurance policies with the expectation of making a profit, during which time Life Partners retains the required degree of control over the venture, the transaction is an investment contract and therefore a security under the Texas Securities Act. Finally, the Texas Supreme Court had to determine if its holding would only apply prospectively, or retroactively to Life Partners activities.

Issue (2): Will this holding apply retroactively or only prospectively?

The Texas Supreme Court had previously adopted the *Chevron* standard issued by the Supreme Court for determining if a case would have only prospective relief. The *Chevron* standard has three factors that a court must analyze: (1) does the decision address a question of first impression or overrule precedent; (2) after looking to the merits of the specific situation, will retroactive application further or limit the operation of the rule; (3) how inequitable would a retroactive application be? In this case, the court decided that because it had previously broadly construed investment contract under the Texas Securities Act and the decision only interpreted an old law instead of creating a new one, the decision should be applied retroactively. That decision would not work inequity upon Life Partners, Inc.

In re Longview Energy Company

No. 14-0175

Case Summary written by Ross Smith, Articles Editor.

CHIEF JUSTICE HECHT delivered the opinion of the Court.

Longview Energy Company is an exploration and production company that was pursuing prospects in the Texas Eagle Ford Shale. Huff Energy Fund owned 39% of Longview's stock in 2009. Huff Energy

also controlled two seats on Longview's board of directors, which were occupied by William R Huff and Rick D'Angelo. Despite their relationship, Huff Energy created Riley-Huff Energy Group LLC to compete with Longview in the Eagle Ford. After discovering that Riley-Huff was acquiring some of Longview's prospects in the Eagle Ford, Longview sued Riley-Huff along with four other defendants for breach of fiduciary duty.

A jury found that Riley-Huff breached its fiduciary duty by "wrongfully obtain[ing] assets in the Eagle Ford shale." The defendants were ordered, along with other damages, to pay \$95.5 million to Longview. The defendants posted a \$25 million bond to prevent the enforcement of the judgment while an appeal was pending per TEX. CIV. PRAC. & REM. CODE § 52.006. After Longview moved, the court required each of the five defendants, except for Riley-Huff, to post "the lesser of \$25 million or 50% of [their] net worth." Additionally, Huff was required to produce documents it created on a monthly basis that related to the Eagle Ford shale operations. Huff appealed both rulings.

The court of appeals reversed the trial court and only required the defendants to post a total of \$25 million in bonds, but affirmed the post-judgment discovery order.

Issue: (1) Was the trial court's award of damages punitive, so as not to require the defendants to post a security bond, or were the damages compensatory?

TEX. CIV. PRAC. & REM. CODE § 52.006 requires a debtor to post security only for a trial court's award of compensatory damages, interest, and costs, but limited to 50% of the judgment debtor's net worth or \$25 million, whichever is lesser. In this case, Longview was to receive all of Huff's future production revenues in production from the Eagle Ford shale in addition to the \$95.5 million. The Texas Supreme Court was uncertain of how the jury arrived at the additional \$95.5 million, but it appeared to be revenues from production prior to the suit minus the acquisition costs of those assets. Because the damages were based on gross production, not net, they exceeded compensatory, which can only be limited to net gains.

However, Longview argued that the money judgement was awarded based on disgorgement, which is "an equitable forfeiture of benefits wrongfully obtained[.]" Because disgorgement is an equitable forfeiture it cannot be measured as damages. Therefore, the Texas

Supreme Court held that disgorgement is compensatory in some sense, but the money awarded through it is not damages. As a result Huff was not required to post bond under TEX. CIV. PRAC. & REM. CODE §52.006. However, Longview was also awarded costs of \$66,645, which the defendants are required to post security for.

Issue: (2) Did the trial court abuse its discretion in requiring Huff to submit to post-judgment discovery of its documents relating to Eagle Ford shale operations?

Huff argued that Tex. R. App. P 24.1(e), which allows a court to issue “any order necessary to adequately protect the judgement creditor against loss or damage that the appeal might cause[,]” must be read in light of Texas Rule of Civil Procedure 621a that allows discovery only “for the purpose of obtaining information to aid in the enforcement” of a judgment. The Supreme Court of Texas held that 621a does not limit 24.1(e), but “to the contrary, Rule 621a permits discovery relevant to Rule 24 motions.” Therefore, the Texas Supreme Court held that because the trial court determined the discovery order was reasonable, they did not abuse their discretion.

Gonzalez v. Ramirez

No. 14-0107

Case Summary written by Ross Smith, Articles Editor.

Per Curiam.

Cuahutemoc Gonzalez owned Gonzalez Farms. He contracted multiple companies, including 3R/Garcia Trucking, which was owned by Robert Garcia, to transport silage from Chester Farms to the Littlefield Feed Yard. Garcia hired Raymond Ramirez to drive a tandem truck, and on his first trip to the feed yard one of his tires blew out. Ramirez lost control of the truck and it traveled into oncoming traffic, killing Ramirez and the two occupants of the truck he hit, Tammy Jackson and Rexee Jo. Samuel Lee Jackson, Rexee Jo’s father, claimed Gonzalez was vicariously liable for Garcia and Ramirez’s actions based on federal and state motor carrier regulations. Ramirez’s family also filed claims against Gonzalez based on “common-law theories of retained control over an independent contractor and joint enterprise.” Jackson subsequently obtained a judgment against Garcia, but that is not at issue.

Gonzalez filed motions for summary judgment as to both Ramirez and Jackson's claims, which were granted. Ramirez and Jackson both appealed. The court of appeals reversed "Jackson's claim under the Texas Regulations and on the Ramirez's negligence claims based on retained control."

Issue: (1) Can Gonzalez "be held liable as a motor carrier under either the Federal Motor Carrier Safety Regulations (Federal Regulations) or their Texas counterparts (Texas Regulations)[?]"

The Motor Carrier Safety Regulations impose duties on motor carriers that classify their drivers as independent contractors to avoid liability. However, the federal regulations did not apply here because Gonzalez did not hire Garcia to move property between states. Under Texas regulations, Gonzalez could only be a motor carrier if he "control[led], operate[d], or direct[ed]" the truck operation. TEX. TRANSP. CODE § 643.001(6). The court analyzed the contract between Gonzalez and Ramirez to determine how much control Gonzalez had over the transportation. The court held that Gonzalez only directed the drivers where to load and where to unload. Gonzalez did not verify the driver's license or insurance of the drivers and had no control over the route they took. Therefore, the court found that Gonzalez was only a shipper and was not a motor carrier under the statute.

Issue: (2) Was there sufficient evidence to show that Gonzalez had sufficient control over the truck driving to owe the truck driver a common-law duty?

Generally, "a contractor can be held vicariously liable for its independent contractor's actions if the owner retains some control over the manner in which the contractor performs the work that causes the damage." The court found that in this case, Gonzalez did not require Garcia to bring a tandem truck, he only suggested it. Also, Gonzalez could refuse a load, but he did not know of the condition of the tandem truck prior to the accident. That evidence showed that Gonzalez did not prevent Garcia from exercising his own judgment in how to perform the work, he only had a "general right to refuse to load an unsafe truck." That situation did not create a common-law duty between Gonzalez and Ramirez. The court reversed the court of appeals on the Motor Carrier Regulation and breach of common-law duty claims, but remanded the case on an additional claim Jackson brought for negligent hiring.

Andrews Cnty. v. Sierra Club

No. 14-0214

Case Summary written by Allison Grayson, Online Edition Editor.

PER CURIUM.

In this case, the court of appeals concluded that the Texas Citizens Participation Act’s “clear and specific evidence” requirement “indicated an elevated evidentiary standard that did not permit the use of circumstantial evidence or reasonable inferences to support the plaintiff’s *prima facie* case.” Further, the court of appeals concluded that Andrews County failed to meet its burden under the Act and that the trial court erred by not granting Sierra Club’s motion to dismiss.

In response, the Supreme Court of Texas determined that the court of appeals’ decision contradicted the decision made in *In re Lipsky*. The Court explained that “the phrase ‘clear and specific evidence’ neither imposes a heightened evidentiary burden nor categorically rejects the use of circumstantial evidence when determining the plaintiff’s *prima-facie-case* burden under the Act.” Based on the Court’s decision in *Lipsky*, the Court remanded the case back to the court of appeals for further consideration.

Molina v. Alvarado

No. 14-0536

Case Summary written by Allison Grayson, Online Edition Editor.

PER CURIUM.

Elias Alvarado filed a lawsuit against the City of McCamey for negligence and negligence per se after an accident with Jesus Molina. Alvarado claimed that Molina “was driving a city vehicle under the influence of alcohol when he struck Alvarado’s vehicle.” In suing the City, Alvarado argued that Molina was working within the scope of his employment with the City when the accident occurred. Furthermore, Alvarado argued that the city operated the vehicle in a negligent manner through its employee.

Alvarado’s petition did not describe how Molina’s actions connected with his employment duties. Moreover, the City argued that it was immune from suit because the Texas Tort Claims Act (TTCA) did not waive the City’s immunity. When the trial court denied “Alvarado’s

special exceptions requesting that the City state the factual and legal basis of its immunity defense, Alvarado filed a first amended petition naming Molina as an additional defendant.” After including Molina, Alvarado argued that Molina should be liable in his individual capacity, should the court not find that Molina was furthering the affairs of the City.

In response, “Molina filed a general denial and requested summary judgment, seeking dismissal under subsection (a) of the TTCA’s election-of-remedies provision.” Molina argued that Alvarado was barred from suing him after making an irrevocable election to sue the City. The trial court denied the motion, which the court of appeals affirmed. The court of appeals explained “that subsection (a) ‘is correctly read as barring suit against an employee only where that employee is being sued in his official capacity[.]’” Further, the “court of appeals concluded that the existence of material fact questions regarding whether Molina was ‘actually driving the City of McCamey vehicle within the scope of his employment or under the influence of alcohol . . . prevent[ed] a grant of summary judgment.’”

The Court explained that the TTCA’s election-of-remedies provision “conditions the immunity waiver on the plaintiff’s forfeiture of any negligence claims against the employee in his individual capacity.” Additionally, when the plaintiff decides between suing the employee in his individual capacity or the City, “subsection (a) or (b) will ‘immediately and forever’ bar him from subsequently electing to sue the other regarding the same subject matter.”

Discussing subsection (f), the Court stated that the suit is considered to be against the employee in his official capacity if the plaintiff files a suit against an employee working within the scope of his employment, when the plaintiff could have brought the suit against the governmental unit. A suit based on conduct falling within the scope of employment is virtually a suit against the governmental unit in question. Contrastingly, a suit against an employee working outside the scope of his employment constitutes a suit against the employee in his individual capacity.

In this instance, the Court determined that Alvarado made an irrevocable election to sue the City and “the TTCA [barred] him from later filing suit against Molina.” The Court explained that if Alvarado required more information in deciding whether Molina’s actions were

within the scope of his employment, “the prudent choice would have been to sue Molina, and await a factual resolution on that question.” Therefore, the Court reversed the court of appeals’ decision and rendered judgment for Molina.

RSUI Indem. Co. v. The Lynd Co.

No. 13-0795

Case summary written by Samantha Kelly, Articles Editor.

JUSTICE BOYD delivered the opinion of the Court, in which JUSTICE JOHNSON, JUSTICE WILLETT, JUSTICE GUZMAN, JUSTICE LEHRMANN, and JUSTICE DEVINE joined.

The Lynd Company manages the insurance needs of over 100 commercial properties located in multiple states. Lynd purchased the following two insurance policies to cover the properties: a primary policy from Westchester Fire Insurance Company (covering up to \$20 million per occurrence) and an excess policy from RSUI Indemnity Company (covering losses exceeding \$20 million, up to \$480 million per occurrence).

Before the excess policy became effective, RSUI required Lynd to provide RSUI with a list of the properties to be covered and their values, referred to as the “Statement of Values.” The Scheduled Limit of Liability endorsement on RSUI’s policy conditioned the policy’s premium on the values that Lynd reported in the Statement of Values. In effect, Lynd controlled the premium amount it owed to RSUI through the values it reported in the Statement of Values. Lynd estimated its highest-valued property at \$22.3 million. This meant that a single occurrence could result in losses greater than the \$20 million limit of Westchester’s primary policy and therefore trigger RSUI’s excess policy. Besides this one property, Westchester’s primary policy was sufficient to cover single occurrence losses at any one property. Under the terms of the excess insurance policy, RSUI’s liability was limited to the lesser of the adjusted loss or 115% of the stated value of the property.

In 2005, Hurricane Rita, in a single occurrence, caused Lynd to sustain over \$24.5 million in losses between the fifteen properties affected. Westchester paid its \$20 million, but RSUI paid only \$750,000 instead of the \$4.5 million remaining. RSUI calculated the amount by including the actual adjusted amounts of the losses incurred at thirteen

of the properties because they were less than 115% of the values listed in the Statement of Values. One of the remaining properties sustained \$5 million in losses (\$2 million more than the total insured value Lynd had listed), and the other sustained \$11 million in losses (\$3.5 million more than the listed value). RSUI paid 115% of the reported values for these properties, not the actual adjusted amount of the loss.

Issue: Whether RSUI's policy limited its liability to 115% of the reported values of the properties that sustained losses greater than the amount listed in the policy, rather than requiring RSUI to pay the actual adjusted amount of the loss incurred at those properties.

The trial court granted summary judgment in favor of RSUI and ordered that Lynd take nothing. The court of appeals agreed with Lynd's construction of the policy and entered judgment awarding Lynd \$7.5 million, which included the disputed coverage, interest, penalties, and attorney's fees. The Supreme Court affirmed the decision of the court of appeals.

The majority set out general contract principles particular to insurance policies. It noted that it must first analyze the language of the policy itself and the result that various contract principles dictate if the court finds the policy is ambiguous. RSUI and Lynd proposed conflicting constructions of the Scheduled Limit of Liability provision in the policy. If one party's construction was reasonable, then the policy was unambiguous and the court would have had to adopt the construction that was reasonable. If both constructions were reasonable, then the court would have had to conclude that the policy was ambiguous. Where there is ambiguity, precedent dictates that the uncertainty must be resolved by adopting the construction that is more favorable to the insured. The court cited precedent concluding that this holds true even if the insurer's construction more accurately reflected the intention of the parties.

After parsing the language of the Scheduled Limit of Liability, the majority concluded that both parties presented reasonable constructions and the policy was therefore ambiguous. The term "scheduled" in the heading provided support for RSUI's construction—a "scheduled" policy provides "scheduled coverage," that is, coverage that is limited on an item-by-item basis. The Court noted that headings are not determinative and that it must examine the operative language in the policy. It cited to several other sections of the policy that did not support

either party's construction. Rather, these provisions referred to "the loss" sustained by Lynd, but the policy defined "loss" to mean either a loss *or* a series of losses. For example, the first alternative limit on the policy limited RSUI's liability to "the actual adjusted amount of the loss, less applicable deductibles and primary and underlying excess limits." Because the limit referred to "the loss," it could have referred to \$11 million (the actual adjusted amount to repair one of the properties that Lynd listed in the Statement of Values at \$7.5 million) or it could refer to \$24.5 million (the actual adjusted amount of the entire series of losses at issue).

For these reasons, the majority determined that the policy was ambiguous, and it resolved the uncertainty in favor of the insured, Lynd. The majority qualified its conclusion that RSUI's policy was a blanket policy, clarifying that insurers may still offer scheduled policies that limit their liability on an item-by-item basis. The holding only demands that when insurers do offer scheduled policies, they must use language that unambiguously asserts they are doing so.

CHIEF JUSTICE HECHT, joined by JUSTICE GREEN and JUSTICE BROWN, dissenting.

The dissenting Justices contended that the contract was not ambiguous, and that the majority's analysis of the policy's text revealed that RSUI's position was consistent with the language of the provisions. Furthermore, the dissent noted that reading the policy in line with Lynd's aggregate approach resulted in a "glaring peculiarity." If it was a blanket policy and not a scheduled policy, the provisions of the policy required RSUI to pay more of the losses for one property if other properties were also damaged at the same time. However, insurers should not be required to pay more just because multiple properties are damaged in the same event rather than separate events. The dissent emphasized that under a scheduled policy, the insured states the value of a property and pays only for insurance to cover the loss of the stated value that the insured chose. The insurer's liability is then capped at 115% of that amount. Lynd paid for this arrangement, a scheduled policy, but under the majority's holding, it received a blanket policy, which ordinarily costs much more than a scheduled policy and covers all losses. Because of these "nonsensical consequences," the dissent would have held that Lynd's construction was unreasonable.

Gharda USA, Inc. v. Control Solutions, Inc.

No. 12-987

Case Summary written by Aaron Powell, Staff Member.

JUSTICE GREEN delivered the opinion of the Court.

This case centered on a defendant's legal sufficiency challenge of the evidence based on the alleged unreliability of expert testimony. The issue was "whether interdependent opinion testimony from a series of four experts was reliable." The unanimous Court held that while under proper circumstances one expert may rely on the testimony of a second expert, in this case "the testimony of all four experts [was] unreliable because the individual opinion testimony of at least two experts was unreliable and the remaining two experts based their opinions on the first two experts' unreliable opinions." Accordingly, there was no reliable expert testimony—an essential element of the plaintiffs' case. Because the rules of evidence required expert testimony to support the verdict in this highly technical case, the Court affirmed the trial court order that the plaintiffs take nothing.

The dispute arose out of a warehouse fire at a facility leased by Control Solutions, a pesticide manufacturer. As a part of the pesticide manufacturing process, drums of a key ingredient known as chlorpyrifos were heated in an oven known as the "hot box." On the morning of March 9, 2004, a Control Solutions employee heard a loud boom followed by the fire alarm. The ensuing conflagration destroyed a large portion of the warehouse.

Based on burn patterns, two fire origin investigators, Russo and Rice, testified that the fire began in the hot box, but they identified neither the chemical source of the fire nor the source of ignition. They based their conclusions on the theories of two chemists, Armstrong and Cheremisinoff. These chemists concluded that, after test results confirming the existence of EDC (a contaminant) in some of the barrels, the EDC could have caused the fire. However, Armstrong only assumed that a sufficient amount of EDC existed in the drums to cause the fire, and he did not test or research this assumption. Similarly, Cheremisinoff simply assumed that sufficient levels of EDC existed to cause an explosion, and he even admitted that there was no evidence to support that conclusion. He also speculated that Gharda's manufacturing process might have resulted in the requisite levels of

EDC, but he admitted that he was unable to test the EDC levels in the hot box.

After the jury returned an \$8,370,000 verdict in favor of the plaintiff Control Solutions, the trial court granted JNOV to Gharda, the chlorpyrifos manufacturer, concluding that the experts' testimony was unreliable and sustaining a no-evidence challenge. The court of appeals reversed, and Gharda petitioned the Court.

The Court noted that "no evidence exists when there is a complete absence of evidence of a vital fact" or when "the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact." The Court explained also that in highly technical cases of this nature, "[e]xpert testimony is required when an issue involves matters beyond jurors' common understanding." Expert testimony is unreliable "if there is too great an analytical gap between the data on which the expert relies and the opinion offered." Further, "a claim will not stand or fall on the mere *ipse dixit* [(i.e. conclusory assertion)] of a credentialed witness." Finally, the Court explained that expert testimony must deal in probability, not mere possibility.

Here, Cheremisinoff ultimately concluded that it was only possible that the requisite levels of EDC existed in the drums. His critique of Gharda's manufacturing process merely set out circumstances that were consistent with his overall conclusion. Essentially, Cheremisinoff was assuming the very issue Control Solutions tasked him with accomplishing: determining whether EDC caused the fire.

Armstrong's testimony suffered from the same defects. He never sought to quantify the levels of EDC present in the drums, much less determine whether sufficient levels to start a fire existed. The Court concluded that "Armstrong's testimony is a bare opinion that is connected to existing data only by the *ipse dixit* of the expert."

Because Russo and Rice both relied on Armstrong and Cheremisinoff to complete their factual accounts of the fire, and because Armstrong and Cheremisinoff's testimony ultimately proved unreliable, the Court concluded that no reliable expert testimony existed as to the cause of the fire. The Court reiterated the requirement in highly technical cases that the verdict find a basis in expert testimony. Accordingly, the trial court did not err by ordering the plaintiff Control Solutions to take nothing.

Genie Indus., Inc. v. Matak

No. 13-02042

Case Summary written by Zirwa Sheikh, Staff Member.

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE JOHNSON, JUSTICE WILLETT, JUSTICE GUZMAN, and JUSTICE BROWN joined.

Genie Industries, Inc. is in the business of manufacturing and distributing aerial lifts worldwide. The aerial lift giving rise to this particular products liability suit is referred to as the Aerial Work Platform-40' SuperSeries (AWP-40S). This lightweight portable airlift is mostly suited for indoor work and is designed for the purpose of allowing people to reach a variety of heights by being raised on a platform. Although the machinery is relatively easy to use, it requires that the "outriggers" attached to the base of the machine be placed on the ground for stability. The outriggers prevent the machine from tipping over. Once the work is complete, the outriggers can be removed, and the lift can be rolled around to travel through tight spaces. In addition to the manual's descriptive warnings that caution users from removing the outriggers while the platform is raised, there exists an image depicting a man moving the lift while the platform remains elevated with an alerting inscription that warns people of the "tip-over hazard."

Gulf Coast Electric employed the deceased, Walter Matak, to install fiber optic cables in the ceiling. The process of moving the aerial lift proved far too time consuming due to the lowering of the platform so Mr. Matak could step down, and the periodic deploying, uninstalling, and then redeploying of the outriggers. James Boggan, shortly thereafter, took the advice of John Adams both colleagues of Mr. Matak, and attempted to move the lift with Mr. Matak being fully elevated on the platform. The aerial lift tipped over, crashed to the floor and caused fatal injuries to Mr. Matak's head. This suit for wrongful death and survivor damages resulted.

The trial court rendered in favor of Mr. Matak, and the court of appeals affirmed.

Justice Hecht explained that products liability law protects consumers from unreasonably dangerous and defective products. It does not, however, guarantee that the product will be free from any risk. To

have a successful claim for products liability based on a design defect, plaintiffs are required to show that not only was the product defectively designed making it unreasonably dangerous, a safer alternative to this design exists, and the defect was the cause for the plaintiff's injury.

Issue #1: Did a safer alternative design for AWP-40S exist?

The Court evaluated four designs to determine whether these models would have prevented or reduced the risk of injury without impairing the utility of the product and whether these designs were economically and technologically feasible at the time. The four designs consisted of the Automatic Drop-Down, Pothole Protection, Chain and Padlock, and Block design.

The Automatic Drop-Down model allows the platform to automatically descend if the outriggers that are meant to stabilize the lift are released. Justice Hecht contended that there was little evidence to indicate whether this design would have lowered the platform enough or would have stabilized the lift to prevent Mr. Matak's fall. Additionally, Justice Hecht concluded that this design had the potential to increase the risk of injury if the platform began to suddenly descend.

The Pothole Protection design required the existing outriggers to be permanently attached to the lift to prevent the machine from tipping over if one of the wheels entered into the pothole. Justice Hecht contended that the placement of the outriggers would add to the lift's weight and size, which would reduce the lift's versatility—a key utility factor. Furthermore, there was little support from the evidence to suggest that the design would have proved to be safer.

The third design, Chain and Padlock required that the leveling jack handles on the machine be chained and padlocked once the outriggers were set by a key. Justice Hecht concluded that the need for a key does little to increase the safety, and the lift would remain susceptible to misuse by anyone having access to the key. In contrasting the current design to the Chain and Padlock, Justice Hecht concluded that locking and unlocking the jack handles to move the lift would prove to be more inconvenient.

The Block design required the replacement of two out of the four wheels on the lift with a block so movement of the machine would only be possible if the machine was tilted similar to a dolly, off of its block, and then rolled. Justice Hecht contended that tipping over a 1,000

pound lift would prove to be more difficult and would impact the utility of the machine.

The court rejected Genie's argument that the plaintiff failed to present evidence of an alternative design that reduced the risk of injury, didn't increase the risk to other users, didn't impair the lift's utility and was economically and technologically feasible. The Court held that although there was **weak** evidence to a safer alternative design such evidence was not less than a scintilla.

Issue #2: Was there evidence to suggest that the AWP-40S was unreasonably dangerous?

Whether a defective design causes a product to be unreasonably dangerous depends on whether the product's risks outweigh its utility. The Court held that AWP-40S was not unreasonably dangerous.

In reaching the decision, the Court made five factor determinations. First, the Court held that the likelihood of injury from the airlift did not outweigh its utility. Second, the Court concluded that there was no evidence of a substitute that would meet the same need but be reasonably priced and be safer. Third, the Court reiterated its previous observation and contended that there was only slight evidence of a safer alternative design. Fourth, the Court held that the risk of a tip over was both obvious and readily avoidable. And lastly, the Court concluded that the danger of misusing the airlift was obvious to someone who may not even be trained in operating the airlift.

In conclusion, the Court rendered judgment in favor of Genie, contending that AWP-40S was not unreasonably dangerous, and even though there existed evidence of a safer alternative design, the evidence was only slight.

JUSTICE BOYD delivered a dissenting opinion, in which JUSTICE LEHRMANN and JUSTICE DEVINE joined.

Justice Boyd contended that the determination of whether a product is unreasonably dangerous is a question of fact for the jury, and should not be decided by the Court. He adamantly disagreed with the Court's decision to replace the jury's judgment with its own as a matter of law. He argued that the duty of the Court is to accept the jury's findings, that Genie lift's risks outweighed its utility and therefore the lift was unreasonably dangerous *unless* reasonable minds could not

differ. As long as reasonable minds can differ, the jury's judgment trumps.

Justice Boyd agreed with the Court with respect to evidence in the record that indicated a safer alternative design. His primary disagreement was with the Court's judgment regarding the lift's safety. Justice Boyd contended that a reasonable jury could have found that the lift designed by Genie was unreasonably dangerous.

In rejecting the Court's holding that the AWP-40s was not unreasonably dangerous because its risks were both obvious and cautioned against, Justice Boyd contended that such factors can not be conclusive in barring defective design liability. Furthermore, Justice Boyd conceded to the utility of the lifts, and accepted its advantages but contended that even though the lift may be substantially useful, it may still be accompanied by risks that may outweigh its utility.

Regarding assessing the risk related to the lift, Justice Boyd sided with Genie, holding that "the risk was [that] the operators would raise the leveling jacks and attempt to move the lift when the platform is elevated and occupied, despite the warning and the allegedly obvious and open dangers." While the Court and Genie contended that the risk of misuse was slight, the risk was unforeseeable despite the warnings, and the lift was not unreasonably dangerous because of a small number of cases, Justice Boyd contended that this conclusion ran contrary to precedent. Justice Boyd contended that a small number of accidents compared to the number of machines that are used without such accidents worldwide did not conclusively establish that the lift's risk was slight. Furthermore, he proceeded to argue that a reasonable juror could conclude that the relevant risk was high despite the small number of actual cases where accidents occurred. Additionally, Justice Boyd contended that based on evidentiary findings a reasonable juror could conclude that the lift's risk outweighed its utility. Moreover, Justice Boyd stated that reasonable jurors could have different views regarding: (a) awareness of the risks/dangerousness present in product; (b) whether the dangers were avoidable (c) consumer expectation; and (d) "gravity and likelihood of injury" from the use of the product.

Consequently, Justice Boyd argued that since some evidence supported the jury's findings, the Court was obligated to respect its decision. Even though Justice Boyd conceded that he, himself, would have voted in favor of Genie as a jury member, he contended that the

presence of evidentiary findings to support the jury's verdict should be acknowledged, and the jury's determinations should be affirmed.

Ventling v. Johnson

No. 14-0095

Case Summary written by Frances Tubb, Staff Member.

JUSTICE LEHRMANN delivered the opinion of the Court.

Wayne Ventling filed for divorce in January 1995. He sought to end his common law marriage to Patricia Johnson. The court issued the divorce decree the following April. The decree awarded Johnson a lump sum payment and an additional \$210,000 in alimony to be paid in monthly installments. In 1997, Ventling ceased making alimony payments, arguing that they were never married. He claimed the alimony agreement was invalid. His refusal to fulfill his contractual obligations led Johnson to initiate this claim. Johnson first sought to enforce the original judgment, and she asked for the lump sum payment, the remaining alimony payments, interest, attorney's fees, and costs. After a failed mediation attempt, the trial court ruled in Ventling's favor by granting his motion for nonsuit. It found that Ventling and Johnson were never married.

Johnson appealed, and in 2004, the court of appeals ruled, in *Johnson I*, that the divorce decree was a final judgment. Johnson then attempted to enforce the entire judgment against Ventling in Iowa where he was living, but the Iowa court determined the contractual alimony payments were not a valid, final judgment. Johnson filed another motion in Texas courts, in October 2007, to turn the alimony agreement into a final, enforceable judgment. She included a request for post-judgment interest in her motion. On June 16, 2009, the trial court concluded the contractual alimony payments were unenforceable. Johnson appealed again, and the court of appeals held, in *Johnson II*, that the contractual alimony payments were enforceable as part of a valid divorce decree. The court of appeals ruled on *Johnson II* on October 21, 2010 and remanded the case to the trial court so that it could enter a judgment in favor of Johnson.

On remand Johnson requested \$145,935.62, which included unpaid alimony, prejudgment interest, postjudgment interest, attorney's fees, and conditional attorney's fees for a possible appeal. Johnson

argued that the court should award prejudgment interest from September 23, 1997 through December 19, 1997. She claimed post-judgment interest began accruing on December 20, 1997, the date of the final judgment, and it would continue to accrue until Ventling paid the judgment in full. Ventling contested the claim, arguing that the court of appeals only ruled on prejudgment interest and not post-judgment interest. On February 21, 2012, the trial court awarded Johnson alimony, prejudgment interest, past attorney's fees, court costs, and post-judgment interest, beginning to accrue on that date. The court denied retroactive post-judgment interest and conditional attorney's fees. Johnson filed her third appeal. In *Johnson III*, the court of appeals awarded post-judgment interest from January 9, 1998, the date the trial court should have ruled on her enforcement motion, and remanded the case for determination of conditional attorney's fees. The court of appeals entered the judgment in *Johnson III* on December 19, 2013. Ventling filed an appeal, arguing that the final judgment occurred in 2012 and conditional attorney's fees were not appropriate.

Issues:

1. When, during the course of the case, did post-judgment interest begin to accrue?
2. Did the trial court properly deny prejudgment and post-judgment interest on a part of Johnson's proceedings?
3. Did the court err in denying Johnson's request for conditional appellate attorney's fees?

First, the Supreme Court of Texas reasoned that the amount of both prejudgment interest and post-judgment interest depended on the date the trial court entered a final judgment. This date has an impact on the amount of money the trial court awards. The date of final judgment depends on whether or not the court must hear more evidence in the case after remand. The Court held that the court of appeals entered the final judgment, in *Johnson II*, on June 16, 2009 when it ordered the trial court to enter a final judgment regarding the alimony payments. Accordingly, the post-judgment interest on the conditional alimony payments began accruing on that date. The court of appeals also ordered the trial court to determine the amount of conditional attorney's fees. The trial court entered that ruling on March 21, 2012, so post-judgment interest on the conditional attorney's fees began accruing on that date.

Second, the Court addressed the issue of prejudgment interest. The trial court awarded Johnson \$3,435.62 because that was the amount she stipulated in her original motion, which covered the period from September 1997 to December 1997. Ventling argued the court could not award Johnson more money than she originally stipulated. The Court acknowledged that Johnson stipulated a specific sum of money, but it also noted that Johnson always argued her prejudgment interest should accrue until the date of the final judgment. The Court held the trial court erred by not awarding Johnson prejudgment interest for the full period from the date she filed her first enforcement motion to June 16, 2009.

Lastly, the Court addressed Johnson's request for conditional attorney's fees. Ventling claimed Johnson could not recover conditional attorney's fees for subsequent appeals because an award of attorney's fees depends on the successful defense of a judgment. Though Ventling was correct that most case precedent dealt with successful defenses of judgments, the Court reasoned that nothing in the case law required those conditions. The Court also noted that the purpose of awarding attorney's fees was to discourage frivolous litigation, and this purpose supported awarding Johnson conditional attorney's fees. Though her appeal was not successful on all claims, she did establish she was entitled to more prejudgment interest. The post-judgment interest on conditional attorney's fees does not begin to accrue until the court enters a final judgment on appeal. As long as the trial court does not admit new evidence on the issue, the Court held that post-judgment interest would accrue from December 19, 2013, the date the court ruled in *Johnson III*.

The Court affirmed the court of appeals regarding its ruling on conditional attorney's fees, but the Court reversed regarding the court of appeals ruling on post-judgment interest for the attorney's fees and the amount of prejudgment interest. The Court severed and remanded the case to the trial court in order to determine if it would need more evidence regarding Johnson's conditional attorney's fees. The Court delivered its opinion unanimously on May 8, 2015.