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SUPREME COURT OF TEXAS
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No. 18-0056

In the Supreme Court of Texas

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

v.

VICKI LYNN ROGERS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF CARL ROGERS, NATALIE ROGERS, AND COURTNEY DUGAS,
Respondents.

On Petition for Review from the
Fifth Court of Appeals at Dallas
Court of Appeals No. 05-15-00001-CV

REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

The court of appeals has undone Chapter 41 to salvage this lone verdict, leaving the law worse off for all future cases. The court of appeals:

(1) eliminated probability from the definition of gross negligence,

(2) refused to review all of the evidence; and

(3) conflated the objective and subjective prongs of gross negligence.

It moved the clock back to 1985. Small wonder that amici want reversal.

Not coincidentally, the Dallas court's opinion here casts a long shadow over a pending appeal to be argued there on Nov. 6, 2018. *See Bell Helicopter Textron, Inc. v. Dickson*, 05-17-00979-CV. The briefing in *Bell* debates our opinion on the gross negligence liability issues (where the plaintiffs cheer the opinion) and the damage capping issues (where the plaintiffs boo it and want it overruled).

Making matters worse, the waiver holding runs afoul of Appellate Law 101. In holding that a JNOV motion containing a no-evidence point somehow failed to preserve a no-evidence point, the court of appeals repeats the very mistake that it was reversed for making in the Arkoma litigation. *Arkoma Basin Expl. Co. Inc. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 387 (Tex. 2008). Finally, in holding that issues decided by a pretrial MDL judge must be **RE**-preserved at trial, the court of appeals pushed bad law to new levels. If MDL rulings count for nothing, who needs them? Reversal is appropriate.

ARGUMENT IN REPLY

This dispute in this case was the inevitable result of two legal developments: (1) the **dose** requirement in toxic tort law and (2) the requirement to review **all** the evidence in gross negligence cases.

The dose requirement came out of *Borg-Warner*, which did away with the old "any exposure" idea and forced plaintiffs to quantify exposure with real numbers. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007). Once the Court crossed that bridge, it was only a matter of time before numerical evidence would come up in gross negligence law, because the clear and convincing burden of proof means that courts must review "all" the evidence. *See Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 609 (Tex. 2004) ("look at all the evidence").

I. There is no evidence of gross negligence.

The court of appeals got gross negligence law wrong as to both prongs. This petition highlights the objective prong because the flaw is so clear. The subjective prong has insurmountable problems too and offers an independent path to reversal, but debates about subjective awareness quickly get into factual details, so Goodyear has deferred the subjective prong for merits briefing, should the Court request it.

The plaintiffs' approach to the objective prong is simple. They basically argue that death cases get a pass when it comes to proving gross negligence. That is bad toxic tort law.

A. The 1 in 45,000 miniscule risk cannot be ignored.

The plaintiffs do not deny that a 1 in 45,000 chance of getting a disease is miniscule. But they ask the Court not to focus on probability to the "exclusion" of all else. Resp. at 3-5. Their solution? Ignore probability entirely. They follow in the court of appeals' footsteps by failing to consider "all" evidence in reviewing punitive damages for clear and convincing evidence.

But Chapter 41 commands that probability be considered when determining an extreme degree of risk. *See* TEX. CIV. PRAC. & REM. CODE § 41.001(11). The statutory words "considering the probability" could not be any clearer. A probability of 1 in 45,000—or 0.0022%—can fairly be called microscopic. As a matter of law, such a small probability does not amount to an extreme degree of risk of anything. Daily life entails fatal risks more common than mesothelioma (such as heart disease and household accidents), yet no one considers those risks to be extreme.

The plaintiffs call the 1 in 45,000 figure a result of "contrived numbers." Resp. at 8. Hardly. It comes directly from the plaintiffs' own experts, who had the job of proving dose and an increased risk of mesothelioma. 7 RR 40-43; 16 RR 17-18. The fact that the plaintiffs dislike their own statistical evidence is no reason to ignore it. In clear and convincing review, "all" the evidence must be considered. That is the point of *Garza* and the *J.F.C.* decision on which it rested. *See In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002).

To avoid the 1 in 45,000, the plaintiffs contend that their dose evidence must be ignored in gross negligence review, on the theory that it was "conservative." Resp. at 9. Wrong. The plaintiffs were not at all conservative with the evidence of Rogers' dose (*i.e.*, how much asbestos he encountered). But even if they had been, it would not matter. Being conservative is not an excuse for a lack of better proof. The proof in this record—the dose evidence—allows calculation of increased risk. It reveals the gross negligence finding as indefensible.

In another effort to repeal the statutory phrase "considering the probability," the plaintiffs say that this Court has not required statistics as a prerequisite to showing gross negligence. Resp. at 6-7. But that misses the point. Some trials will not have statistical evidence of probability. But if a trial has such evidence, as toxic tort cases usually do, courts must take it into account. Otherwise, the phrase "considering the probability" would disappear from Chapter 41.

Take *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917 (Tex. 1998), which went to trial before Chapter 41's requirements took effect in 1995. That case did not involve statistical evidence of probability. Nor did such evidence of probability exist in *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001), or *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238 (Tex. 2008). The reality is that the trials after *Borg-Warner* will typically involve evidence that once would not have been available to review on appeal.

Finally, to sidestep the 1 in 45,000 evidence, the plaintiffs cite a 2007 study to suggest (wrongly) that the odds of Tyler plant employees getting mesothelioma may have been 1 in 750. Resp. at 9. But the study itself proves otherwise. The Tyler employees in the study had differing work histories; some of the employees even worked around asbestos insulation at other sites. Thus, the study warns about the danger of comparing apples to oranges. So apart from the fact that 1 in 750 still would not qualify as extreme, the study does not even prove that figure. As the study says in its final sentence, any increased number of mesothelioma cases "may be due to employment outside the Tyler tire plant." CX-7 at 689.

B. Death cases should not be treated as gross negligence per se.

According to the plaintiffs, Chapter 41's phrase "extreme degree of risk" has three components: (1) probability, (2) magnitude, **and** (3) "severe" acts and omissions or conduct. Resp. at 6-8. But this rewrites the statute. The statute does not use the term "severe" in defining gross negligence.

In the plaintiffs' world, death overrides everything. To them, death always translates to an extreme degree of risk, no matter how improbable the death may be. *See* Resp. at 5 ("cancer-causing"); *id*. at 6 ("severe" and "magnitude of potential harm is great"); *id*. at 7 ("severity of the conduct" and "magnitude"); *id*. at 8 ("sufficiently severe" and "consequences sufficiently severe"); *id*. at 11 ("death"). They make death into the Ace of Trumps.

One in a billion? One in a hundred billion? One in a trillion? The plaintiffs do not care. Under their logic, a risk as small as 1 in a trillion will always be extreme if the result happens to be loss of life. Contrary to their view, probability matters. The Legislature could have made death a *per se* trigger for punitive damages recovery in all cases if it so desired, but it did not do so.

Nobody denies the seriousness of mesothelioma. In cases where the risk of contracting mesothelioma happens to manifest, the result is indisputably serious. Nonetheless, it cannot be the law that every mesothelioma case passes muster as a gross negligence case. The plaintiffs do not openly admit that they would treat all mesothelioma cases that way, but their argument leads inevitably to that conclusion. That odd view should not become Texas law.

C. Conflating the objective and subjective prongs does not equal an extreme degree of risk.

Like the court of appeals, the plaintiffs conflate the objective prong with the subjective prong of gross negligence. They list things that Goodyear supposedly knew about asbestos causing mesothelioma and call that an "extreme degree of risk." Resp. at 11-12. But anything that Goodyear supposedly knew about asbestos goes to subjective awareness, not extreme degree of risk.

If the Court finds no evidence of gross negligence, it can stop the analysis there. But the Court can also reach the same result on causation grounds, because of the Rogers huge exposure to radiation—a known cause of mesothelioma.

II. The plaintiffs failed to prove causation.

A. Goodyear preserved its causation point; this is *Arkoma* again.

The JNOV motion preserved the no-evidence complaint that the causation proof is inadequate because the plaintiffs failed to rule out other plausible causes of mesothelioma. CR 1160, 1171; *see Arkoma Basin Expl. Co. Inc. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 387 (Tex. 2008). In fact, Goodyear took the extra step of incorporating its MDL pre-trial arguments in its JNOV motion. CR 1159 n.2. That was more than adequate.

This is *Arkoma* all over again. There, the Dallas court of appeals held that Arkoma had failed to preserve its no-evidence challenge to damages, holding that the no-evidence points were not "specific enough to call the court's attention to the precise lack of sufficiency asserted on appeal." 118 S.W.3d at 445, 457. This Court disagreed, reiterating the normal rule that a "no-evidence objection directed to a single jury issue is sufficient to preserve error without further detail." 249 S.W.3d at 387. This Court should correct this error. Again.

Goodyear's pretrial motion to exclude preserved the right to attack the expert testimony on causation. The whole point of an MDL is to secure rulings that let the trial go more efficiently. *See* TEX. R. JUD. ADMIN. 13. There is no requirement for a litigant to have to preserve the same arguments and objections again before the trial court. In fact, the opposite is true. *See* TEX. R. JUD. ADMIN. 13.6.

The court of appeals wants a **RE**-preservation requirement, but that would just waste resources. The pretrial motion objected to the expert testimony just as validly as would have been the case with a hearsay objection, Rule 403 objection, or Daubert objection made during a trial. With that objection properly lodged before the evidence coming in, the JNOV motion properly preserved the no-evidence point for review on appeal. Goodyear fully preserved error.

B. The MDL court's summary judgment did not decide that radiation was an implausible cause of mesothelioma.

The plaintiffs claim that Goodyear failed to challenge the MDL judge's summary judgment that ruled out radiation as a cause. Resp. at 16-17. But Goodyear did not need to challenge this order because it is irrelevant to Goodyear's argument that the plaintiffs failed to rule out radiation as a plausible cause.

To prove causation, the plaintiffs were required to exclude other plausible causes of Rogers' mesothelioma in order to prevail on their claim against Goodyear. *See Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997). In this context, plausibility means that Goodyear's scientific studies show a relative risk between 1.0 and 2.0. Despite the plaintiffs' protestations, Goodyear produced evidence showing that radiation was a plausible cause of mesothelioma. In the pretrial MDL, Goodyear moved to exclude the plaintiffs' expert testimony because the experts failed to negate radiation as a plausible cause. 1 SCR 667-68. That alone preserved Goodyear's ability to challenge the reliability of experts' testimony.

In contrast, the plaintiffs moved for a no-evidence summary judgment on the ground that Goodyear failed to prove that radiation doubled the risk of mesothelioma. *See* 1 SCR 183 ("sole cause" and "doubling"); 1 SCR 186 ("sole causative agent" and "doubles"); 1 SCR 192 ("sole cause"); 1 SCR 194 ("doubles"); 1 SCR 195 ("double"); 1 SCR 200 ("sole cause"); 1 SCR 205 ("sole cause"); *see also* CR 28-29 ¶ VI (Goodyear's pleading of "sole cause").

The MDL judge's order reflected that ground by rejecting Goodyear's defense that radiation was a sole cause of the mesothelioma, finding "no scientifically valid epidemiology to create a causal relationship between therapeutic radiation for lung cancer and mesothelioma." 8 SCR 4826. The judge rejected the sole cause defense because he perceived a lack of scientific studies with a 2.0 showing. *See* 18 RR 180. But the judge was not asked (and did not decide) whether radiation was an implausible cause of Rogers' mesothelioma.

PRAYER FOR RELIEF

The court of appeals warped the rules to uphold recovery by these plaintiffs, but the consequences of the decision go far beyond these litigants. "Litigation is a zero-sum game, and bending the rules to help one party inevitably hurts another." *Edmond v. U.S. Postal Serv. Gen. Counsel*, 953 F.2d 1398, 1401 (D.C. Cir. 1992) (Silberman, J., concurring). This Court should reverse and render.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2018, a true and correct copy of the above and foregoing Reply in Support of Petition for Review was forwarded to all counsel of record, via efiling, as follows:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. P. 9.4 because it contains 2,212 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(2)(B).

2. This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

Dated: October 22, 2018.

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