



CTH & G Quarterly

A quarterly newsletter presented by the law firm of Craig, Terrill, Hale & Grantham L.L.P., P. O. Box 1979, Lubbock, Texas 79408 or 1500 Broadway, Suite 400, Lubbock, Texas 79401 (806) 744-3232 telephone, (806) 744-2211 facsimile, www.cthglawfirm.com.

WELCOME TO THE C T H & G QUARTERLY!

Happy Holidays from Craig, Terrill, Hale, and Grantham L.L.P.!

In this edition of the *CTH&G Quarterly*, we are pleased to announce our newest associate attorneys, Marcy Erwin and Andrew Curtis. Ms. Erwin's practice focuses primarily in the area of insurance litigation. Mr. Curtis's practice focuses primarily in the area of business litigation.

We also would like to take this time to remind you that in addition to our Lubbock location in the Wells Fargo Bank Building, Craig, Terrill, Hale, and Grantham L.L.P. has opened a satellite office in Odessa, Texas to better serve our clients in the Midland/Odessa area. At both locations of CTH&G, the law firm will continue to provide legal work of superior quality.

In this issue of the *Quarterly*, we spotlight three recent decisions in the areas of asbestos exposure litigation, premises liability, and insurance. If we have overlooked an area that may be of particular interest to you, please inform us! We welcome any comments, suggestions or questions that you might have regarding the newsletter.

SOME IS NO LONGER ENOUGH: PLAINTIFFS WERE REQUIRED TO PRODUCE EVIDENCE OF "DOSE" OF RESPIRABLE ASBESTOS TO WHICH PLAINTIFF WAS EXPOSED IN ASBESTOS CASES

Borg-Warner Corp. v. Flores, 232 S.W.3d 765 (Tex. 2007)

Arturo Flores ("Flores") sued Borg-Warner, and several others, for negligence and strict liability, alleging he developed asbestosis from his life-long work as an automobile mechanic. Flores presented evidence that he used asbestos-containing Borg-Warner brake pads on at least twenty-five percent of the brake jobs he performed during a three year period. Flores's job involved grinding brake pads which generated dust that could have contained an indeterminate amount of asbestos that Flores inhaled while working in an eighty square-foot room.

Flores's experts testified that brake mechanics *could* be exposed to respirable asbestos fibers when grinding the brake pads. The record revealed that Flores was exposed to "some asbestos" on a regular basis for an extended period of time; however, the record did not indicate how much asbestos Flores inhaled while grinding the brake pads over the course of his career.

The jury returned a verdict for Flores finding negligence on the part of Borg-Warner related to the asbestosis of Flores. The Court of Appeals affirmed, citing, among other things, Flores's expert testimony that mechanics can be exposed to respirable asbestos fibers through the

process of grinding brakes and brake dust can cause asbestosis. Borg-Warner appealed, challenging, in part, the legal sufficiency of the evidence supporting causation.

Holding: In asbestos cases, Plaintiffs must prove the asbestos in a defendant's product was a substantial factor in causing their injuries. In that regard, a person's exposure to "some" respirable fibers is insufficient to show that a product containing asbestos was a substantial factor in causing asbestosis.

By their opinion in *Borg-Warner*, the court adopted the "substantial factor" test for causation. Under this test, it is not enough to show that the defendant supplied any of the asbestos to which the plaintiff was exposed. Rather, plaintiffs must provide defendant-specific evidence showing the "approximate" dose to which the plaintiff was exposed. Such exposure must further be shown to be a "substantial factor" in causing the disease. Hence, the evidence that Flores had "some" exposure to asbestos is legally insufficient to prove causation.

The Court noted that proof of causation, in cases involving exposure to asbestos may differ depending on the product at issue, since generally, the asbestos contained in some products is embedded, while in other products, the asbestos is friable. Based upon the Court's holding in *Borg-Warner*, plaintiffs alleging injury for any asbestos related disease must provide evidence of the dose of their exposure to the respirable fibers from a defendant's product and that the dose was a "substantial factor" in causing plaintiff's asbestos-related injury.

IN SLIP AND FALL CASE, "DANGEROUS CONDITION" OF WHICH DEFENDANT MUST HAVE KNOWLEDGE WAS PRESENCE OF UNEXPECTED SUBSTANCE OR OBJECT ON FLOOR, NOT SOME ANTECEDENT CONDITION OF PROPERTY THAT RESULTS IN SUBSTANCE OR OBJECT BEING ON FLOOR.

Brookshire Grocery Co. v. Taylor, 222 S.W.3d 406 (Tex. 2006)

Taylor sued Brookshire Grocery Company ("Brookshire") for her injuries following a slip on a piece of partially melted ice near a self-serve drink dispenser. The trial court denied Brookshire's

summary judgment motion and subsequently granted partial summary judgment for Taylor on the issue of premises liability and further awarded her damages as found by the jury. The court of appeals affirmed. The Supreme Court, without oral argument, reversed and rendered judgment for Brookshire and Taylor took nothing.

Holding: The court found that the machine was not set up so as to create an unreasonable dangerous condition. One of Brookshire's employees had testified that Brookshire could have provided more floor mats around the ice dispenser; the supreme court, however, held that even though more precautions could have been taken, that evidence was insufficient to show that the actual conditions were unreasonably dangerous. The court found that the only unreasonable dangerous condition was the partially melted ice that Taylor slipped on, and the evidence was lacking to prove that the ice had been on the floor for an extended period of time so as to cause Brookshire to have constructive knowledge of its presence.

In a concurring opinion, Justice Johnson addressed the confusion that had been created by *Corbin v. Safeway*, 648 S.W.2d 292 (Tex. 1983). *Corbin* was a premises defect case that had perhaps blurred the distinction between premises defect and negligent activity. Comparable to Taylor, Corbin had slipped and fallen on a grape at a grocery store. *Corbin* held that, even absent evidence that the premises owner had actual or constructive knowledge of the specific condition, a premises defect case could still succeed. Justice Johnson, while noting that the parties in *Brookshire* had not asked the court to look at *Corbin*, felt that *Corbin* should be reexamined at a future time; it should be reexamined to further review either "*Corbin's* use of negligent activity language or its holding that a claim based on a dangerous premises condition can be asserted without showing the premises owner had actual or constructive knowledge of the specific condition causing the plaintiff's injuries."

The dissent, Justices O'Neill and Medina, also looked to *Corbin* and felt that Taylor had presented some evidence that the manner of the display created an unreasonable risk; they believed this was evidenced by the fact that the mat only extended to one side of the machine and the ice could have fallen and bounced to either side. The dissent felt that if Brookshire had knowledge that the setup of the machine was unreasonably dangerous, it did not need to have knowledge of the actual piece of ice on

the floor, especially in light of the testimony by a Brookshire employee that water, or ice, frequently fell on the floor. The dissent felt that this created a question of fact concerning Brookshire’s knowledge.

INSURER WAS LIABLE FOR WRECKED VEHICLE TOWING AND STORAGE FEES UNDER TEXAS OCCUPATIONS CODE SECTION 2303.0156(B) FOR VEHICLES WHICH THE INSURER HAD PAID A CLAIM OF TOTAL LOSS

Canal Ins. Co. v. Hopkins, 2007 Tex. App. LEXIS 8398 (Tex. App. Tyler 2007)

Henry Sweeney (“Sweeney”) operated and wrecked a tractor-trailer rig, owned by Mullinax and insured by Canal Insurance Company (“Canal”). Sweeney was pulled from the wreckage and taken to a local hospital after briefly speaking with a highway patrolman. Following the interview, the highway patrolman ordered that Hopkins wrecker service tow the tractor and trailer. Hopkins had to seek the services of a subcontractor to assist in removing the rig because of its position. The tractor and trailer were subsequently towed to Hopkins’s storage facility. Hopkins submitted a bill of \$12,690.00 to Mullinax for the work performed to remove the tractor trailer and for the work performed by the subcontractor. When Mullinax refused to pay, Hopkins sought reimbursement from Canal, who also refused.

Hopkins thereafter filed a lawsuit against both Mullinax and Canal based upon section 2303.156(b) of the Texas Occupations Code, which requires insurance companies to pay for towing and storage when there is a “total loss” on a vehicle. Judgment was entered against both defendants, holding them jointly and severally liable.

Holding: The Court considered whether the trial court erred in their interpretation of “total loss. The trial court, citing prior authority, held that “property is a total loss if a reasonably prudent uninsured owner, desiring to restore the property to its pre-incident condition, would not utilize that property for such restoration.” Under § 2303.156(b), a “total loss” occurred whenever the repair costs of a vehicle exceeded the vehicle’s pre-incident fair market value. In this case, the cost to repair the tractor and trailer would have been greater than their fair market value, thus the court found that there was a total loss.

The Court further concluded that the statute is not unconstitutionally vague and ambiguous, nor does it require title transfer of the vehicle from the owner to the insurance company before the statute applies. In this case, Mullinax still had title to the vehicle. However, the court held that the statute does not exempt insurers who fail to obtain title to the vehicle.

Canal attempted to attack the statute as a violation of the “takings clause” of the Fifth Amendment of the U.S. Constitution. The court held, however, that the insurance industry, being a highly regulated field of law, enjoys the privilege of offering insurance – a right which has been provided by the states for the benefit of private companies. Canal Insurance could choose to not operate in Texas, but by doing so, must submit to their laws and regulations – of which Section 2303.156(b) is one of many. Thus, there is no unconstitutional “taking” in this instance.

CRAIG, TERRILL, HALE & GRANTHAM L.L.P.

Robert L. (Bob) Craig, Jr., P.C.

H. Grady Terrill

Kent D. Hale

Terry L. Grantham

Hugh N. Lyle *

Leonard R. (Bud) Grossman *

Bennett G. Cook, III

Gary Bellair †

Brad J. Davidson

Barbara Bauernfeind

Angelia B. Lee

Holly Haseloff

Ryan J. Bigbee

Andrew Curtis

Marcy M. Erwin

* BOARD CERTIFIED, PERSONAL INJURY TRIAL
LAW

TEXAS BOARD OF LEGAL SPECIALIZATION

† BOARD CERTIFIED, CIVIL APPELLATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

CTH & G Quarterly

Published by the law firm of
Craig, Terrill, Hale & Grantham, L.L.P
1500 Broadway, Suite 400
P.O. Box 1979
Lubbock Texas 79408
Phone: (806) 744-3232
Fax: (806) 744-2211
www.cthglawfirm.com

Craig, Terrill, Hale, and Grantham, L.L.P. provides legal services and specialized assistance in the areas of Insurance Defense and Tort Litigation, Professional Liability, Business and Commercial Litigation, Medical/Health Related Industry, Construction Law, Corporate and Business Law, Banking, Bankruptcy and Creditors' Rights, and Consumer Law, Real Estate, Estate Planning, Probate and Trusts, Appellate Advocacy, Agricultural and Commodities Litigation

Based in Lubbock, the largest city on the South Plains, the Firm's attorneys represent a broad range of clients, from local companies and individuals to large national and international corporations, in all levels of state and federal courts, and is dedicated to providing its clients with the highest caliber of legal representation at fair and reasonable rates.

The *CTH&G Quarterly* reviews recent decisions by the Texas courts and current trends in civil litigation. It should not be construed as legal advice or opinion and is not a substitute for the advice of counsel.

