Judge Mark Davidson

Multi District Litigation Asbestos Judge

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June 11, 2014

Ms. Leslie Henry (via email at leslie.henry@ariaw.com)

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Re Cause No. 2011-60473; Babin v. Rohm & Haas Company, et al

Dear Counsel:

The Court has taken under advisement the Motion for New Trial in the above case. This letter is the ruling of the Court. It is my intent to state my specific reasons for the granting of the new trial, in the event it is possible to seek appellate review of the granting of a new trial after the granting of a summary judgment.

This is a case brought by Margaret Babin, the widow of a deceased employee of the Defendant Rohm and Haas Company. Because the Defendant carried workers' compensation insurance on the Plaintiff, the Plaintiff's relief is limited to a claim for punitive damages leading to death. In order to be entitled to that, the Plaintiff must prove negligence, causation, and gross negligence.

I granted the Motion for Summary Judgment on the belief that *Exxon Mobil Corp. v. Altimore,* 256 S. W. 3rd 415(Tex. App.--Houston [14th Dist.] 2008, no pet.), foreclosed the Plaintiff from establishing malice, which is an element of gross negligence. In *Altimore*, the wife of an employee contracted mesothelioma from exposure to asbestos that was allegedly brought home on her husband's work clothing. 256 S.W.3d at 416. A pretrial settlement with other defendants had resulted in a substantial settlement credit that offset all actual damages awarded by the jury.*Id.* at 416-17. However, a substantial punitive damage award was not offset, and the

trial court entered judgment on the punitive damage award only. *See id.*On appeal, the Court of Appeals took up the issue of whether there was sufficient evidence of malice, which is a necessary element of any punitive damage award. *Id.* at 418-19.

The Court's focus was whether the Plaintiff had met the first prong of the definition of malice that was in effect at the time. It was codified to require the Plaintiff to prove that the Defendant had committed an act or omission "which, when viewed objectively from the standpoint of (the Defendant), at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others . . . ." *Id.* at 418.:

The opinion makes it clear that there was sufficient evidence to support the finding that the Defendant knew of the risk to its *employees*. *Altimore*, 256 S.W.3d at 420-423. However, the Court of Appeals held that there was no evidence that Exxon knew of the risk to its employees' families at the time Mrs. Altimore was allegedly exposed to asbestos by means of her husband's work clothes. *Id.* at 425. Hence, the Court ruled, the award of punitive damages was not supported by evidence of malice.

The *Babin* case before this Court has similarities and differences with the facts of *Altimore*. Both cases must be decided on the basis of whether thePlaintiff has shown, in the light most favorable to it, any evidence of malice. In both cases, the Defendant agreed to general knowledge of some of the dangers of asbestos during some of the years of exposure. Knowledge of some dangers of asbestos, such as asbestosis, does not show actual knowledge of an extreme degree of risk to its employees for mesothelioma.

Where the parties part company, and the narrow question before this Court, is whether *Altimore's* holding, which distinguishes between knowledge of harm to an employee versus knowledge of harm to an employee's family member, requires in turn a distinction between knowledge of harm as between different job titles assigned to employees, even when all the employees at issue had exposure to asbestos. In other words, if it is shown that an employer knows that there is extreme risk to its insulators being exposed to asbestos, are they insulated from liability to members of other job titles that they employ? Defendant asks me to extend the *Altimore* holding to require a Plaintiff to show actual knowledge of the risk of asbestos to each job classification within its own work force.

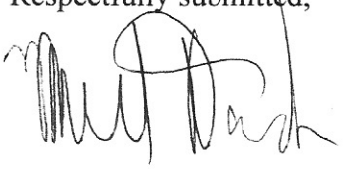
Defendant Rohm and Hass acknowledges that there is no Texas case that so holds. Further, as a policy matter, the implementation of such a rule is questionable. It means that a company can create job titles with different names and thereby be immune for deaths its employees suffer from working with toxic materials. It would allow a company to provide protection only to those employees whose job titles have epidemiological studies showing danger from a toxic substance and ignore risks to other employees with different job titles yet also exposed to the same substance.

On the other hand, the Texas Supreme Court has held that applying different types of protection to exposed employees is grossly negligent. *See Mobil Oil Corp. v. Ellender,* 968 S.W.2d 917, 922-25 (Tex. 1997). Therefore, to hold that job titles alone create an exemption from liability is a step I cannot take in the absence of a clear change of law.

Because *Altimore* and its progeny contains no such language, I must hold that there is a fact question as to whether the Defendant in this case acted with intentional disregard of an extreme degree of risk to its employees. I misread the original record to be one in which the Plaintiffs were asking me to limit the holding of *Altimore*. Instead the Defendant was asking me to extend it. I erred in granting the Motion for Summary Judgment.

The Motion for New Trial is granted. I would ask counsel to forward an order to me that sets forth the above reasons for granting the new trial.

Respectfully submitted,



MARK DAVIDSON

MD/ms