Judge Mark Davidson
Multi District Litigation Asbestos Judge
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Houston, Texas 77002

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January 16, 2009

Ms. Deborah Hankinson

Ms. Denyse Clancy

In re: Cause No. 2004-03964, *In re: Asbestos Litigation*

You will recall that a global summary judgment hearing was held on the subject of responsible third party practice in asbestos cases. This letter is a ruling on those matters.

This issue was first raised in the *Bailess* case when the Plaintiff brought a no evidence motion for summary judgment under Rule 166a(i), TRCP. He sought to have all Responsible Third Party (hereinafter "RTP"), allegations plead by all Defendants dismissed. I made a preliminary ruling in that case, but announced that I would prefer to make a final ruling applicable in all asbestos cases at a time in which the matter had been more comprehensively briefed, and once I had been afforded the time to devote to the complexities of the issue. The quality of the briefing and argument in this case justify that decision. It turned what I originally thought was an easy ruling into a very complex set of rulings. I am setting out my reasoning for each ruling I make both to encourage appellate review and to inform all counsel of the reasoning for my rulings for future motion practice involving similar cases.

The issues presented are both numerous and complex. I will address each in turn.

Is summary judgment practice applicable to a RTP designation?

At the outset, the Defendants object to any consideration of the Motions for Summary Judgment on the grounds that RTPs may only be struck by means of the procedure set forth in 33.004(l), TCPR. In other words, Defendants argue that a Plaintiff may not seek a summary judgment as to RTP designations.

It is clear that Section 33.003(b), TCPR places the burden of proof on the Defendant to produce sufficient evidence to support submission of a RTP designation at trial. It is also clear that a RTP designation must be affirmatively raised by the Defendant in order for any evidence

to be presented to the finder of fact. Finally, it is clear that jury findings of responsibility concerning a properly plead and proven RTP has the effect of reducing a plaintiff's recovery who obtains a jury finding of negligence, causation, and damages against a defendant.

Defendants argue that a RTP designation is not an affirmative defense since it is solely a creature of statute. Hence, Defendants argue procedural mechanisms applicable to all other matters that must be plead are not applicable to RTP designations. They argue that special exceptions challenging whether sufficient facts have been plead are not allowed and are subsumed by the objection to designation practice set out in Section 33.003(g), TCPR.

I am unable to accept this argument. In adding RTPs as an entity to which responsibility is allocated, the statute treats claimants, defendants, settling parties and RTPs equally. *See* Section 33.003(a), TCPR. If something about that statute is interpreted to prohibit summary judgments it would have to apply to all entities listed in that statute. If that is the case, the dozens of summary judgments I grant every week are all erroneous.

Second, I am unable to find any statement of legislative intent, either within the four corners of the statute or in the legislative journals, that would allow me to preempt well established rules of procedure. Surely, if it was a wish of any lawmaker to limit the pretrial activity of a trial court to the fifteen day period for objecting to a designation, he or she could have written it in the statute or stated it on the floor of either house or in a committee.

Third, by the terms of the statute, a RTP designation is something that must be plead by a Defendant (see Section 33.003(a)(4)) and for which sufficient evidence must be presented. This would therefore appear to be an affirmative defense governed by Rule 94, TRCP. Defendants argue that it is not an affirmative defense, but a "responsibility allocation device." Those two phrases are not mutually exclusive. Comparative negligence is an affirmative defense and is a responsibility allocation issue. It is clearly something that falls within the language of Rule 166a(i) as being, "a defense on which an adverse party would have the burden of proof at trial."

I acknowledge the correctness of the argument made by counsel for Defendants that there are differences between the summary judgment standard set forth in Rule 166a(i), TRCP and the dismissal practice standard in Section 33.004(l).[i] It is argued that, given the mandate of the Code Construction Act to harmonize and give full effect to the intent of the statute, only the statutory standard is applicable to dismissal of RTPs. I would agree with that position if the difference in verbiage was a meaningful one, or could result in different rulings in the same case.

Although not briefed by either side, or even raised by any party in argument, I am also concerned with whether an interpretation of the statute along the lines raised by the Defendant could raise a challenge under the "Open Courts" provision of the Texas Constitution. If the statute has the effect of allowing a person's access to courts to be limited based on a different standard from that of un-served entities, it could give rise to a challenge of the procedure.

It could not have been a surprise to the Legislature that Texas has a seventy year old practice of summary judgments. I prefer to assume the law was intended to give an independent and parallel standard of trial court review of the merits of RTP allegations prior to trial. I am comforted by the fact that the Texas Legislature is about to go into its biennial session. If I have distorted their intent, it is something that can be quickly addressed.

The summary judgment question – Setting the stage

All lawyers learned in their first semester in law school that to be liable in tort, a plaintiff must show negligence, causation, and damages. The focus of the Plaintiff's motion is that the Defendants cannot prove the second of that jurisprudential trilogy – causation. Prior to June 8, 2007, I routinely denied Motions for Summary Judgment brought by Plaintiffs seeking dismissal of RTP designations. In doing so, I was applying the same standard of causation to RTP allegations that I applied to Plaintiff's allegations against Defendants. On that day, the Texas Supreme Court issued its opinion in *Borg Warner v. Flores,* 232 S.W.3d 765 (Tex. 2007).

Borg Warner placed on Plaintiffs an obligation, as part of a prima facie case, to show Defendant-specific evidence of the dose of an asbestos containing product to which an injured person was exposed. It is clear from the opinion that broad non-numeric descriptions of dose, like "lots" or "real dusty," will not suffice to allow a Plaintiff to survive a no evidence summary judgment. Similarly, prior case law has rejected the contention that exposure to any amount of asbestos from a Defendant is sufficient to make the source a "substantial contributing cause" of the disease. This court has ruled numerous times on motions brought by the Defendants that the Supreme Court of Texas meant what it said in *Borg Warner*, and has granted hundreds of motions for summary judgment in which Plaintiffs were challenged to present evidence of causation through a Rule 166a(i) motion for summary judgment. The question before the Court now is whether the same standards apply to RTP claims made by Defendants. If so, Defendants must present evidence of a numeric dose to which a claimant was exposed for each RTP they have plead. If that is the case, and if a Defendant cannot present such evidence, the RTP pleadings cannot survive a motion for summary judgment.

The difference between responsibility and liability

Defendants argue that because they are only required to prove responsibility, as opposed to liability, they are required to prove neither negligence nor causation. Because of that lessened standard they suggest a more appropriate standard is a "nexus" between the claimant and a RTP's conduct, and a "Tie-in" between the nexus and the injury. Plaintiffs argue that since Section 33.003(a), TCPR mandates determination of a percentage of responsibility between Plaintiffs, Defendants, settling person, and RTPs, the standards should be the same. This argument begs the question: "What is the difference between liability and responsibility?"

Some differences are clear – an entity that has not been named as a Defendant and served with citation cannot be liable for damages regardless of their conduct. An entity can be found responsible for all or part of a claimant's injury without any notice of the pendency of the lawsuit. The existence of affirmative defenses, such as bankruptcy, limitations, lack of jurisdiction, or statutory immunity (i.e. the conduct of the Federal Government) that bar a finding of liability, do not preclude a finding of responsibility. Under some circumstances a RTP can even be named as "John Doe."

Each of these differences is set forth in detail by the Legislature in their enactment of Chapter 33 of the TCPR. The difference the Defendants urge this court to adopt – a lesser burden of causation – is one on which the statute is silent. That silence is instructive, although not determinative.

The Legislature's intent on this issue is not clear. Plaintiffs present testimony presented to a House committee by an advocate for the enactment of the bill[ii], suggesting that the standards for submission of RTPs should be the same as that for all other entities. This is neither dispositive nor is it very instructive. Statements of a lobbyist for an interest group, even one as learned and distinguished as the gentleman in question here, are not a statement of legislative intent.

The conclusion I have come to is based on a literal, and probably hypertechnical, reading of Section 33.003(a), TCPR. The statute states in relevant part:

> The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility ... for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, by any combination of these:
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> (1) Each claimant;
> (2) Each defendant;
> (3) Each settling person; and
> (4) Each responsible third party who has been designated under Section 33.004.

I am ruling that the statute treats all of the listed entities as being subject to the same applicable standard, and therefore, causation is a prerequisite for entitlement to submission of a RTP to the jury. First, there is no distinction raised between the parties in the statute. Second, the last phrase of the statute refers to "an applicable legal **standard.**" The Legislature could have raised the potential that there could be different standards. The making the last word of that phrase singular instead of plural is some indication there should be one legal standard applicable to all. Finally, after substantial independent research, I was unable to find any comment in any committee hearing or floor debate that contained the phrases the Defendants are asking me to adopt – "nexus" and "tie-in" instead of "negligence" and "causation." If it was anyone's intention to jettison well-known legal concepts for something new, and even if there was no wish to set those standards out explicitly (for reasons I cannot divine), surely it would have been mentioned at some point in the process of a comprehensively debated bill.

Defendants argue further that they should be entitled to separate submissions on negligence/causation (in which only Defendants and Plaintiffs are evaluated) and responsibility (in which Defendants, Plaintiffs, settling parties, and RTPs are named.) They have submitted a proposed jury charge splitting the issues. Their charge has not been submitted by any court, and prior to the hearing on this motion, had not been requested by any party in any case in any court. While not authoritative, it had not been reviewed, to my knowledge, by any committee of the Pattern Jury Charge program of the State Bar.[iii] Since all parties are required in the statute to be judged by a single legal standard, and in the absence of any indication from the legislature of what the elements of responsibility are, as opposed to the well-established elements of liability, I have concluded they are the same. Since RTPs are a creature of statute, the only differences between responsibility and liability are those set forth in the statute.

Trust fund applications

We are now approaching the fortieth anniversary of asbestos litigation in our country. A number of companies who were early Defendants in asbestos litigation have filed for relief in the bankruptcy courts. Most, but not all, of the companies that went into bankruptcy as the result of asbestos claims resolved their cases by creating bankruptcy trusts. In those cases a negotiated amount of money was placed into a trust fund in the hopes that income generated from the corpus would be sufficient to provide for future (and unknown) claimants. To date, most trusts have met their obligations to individuals who file a claim with the trusts. Implicit in the filing of these bankruptcies is that the amount of future claims, added to the costs of defense, were greater than the assets of the companies. Thus, the amount paid each claimant was calculated to be less than they would receive if each tried their cases to juries. The certainty of payment and the promptness with which payment is made is a benefit each claimant gets from the bankruptcy trusts which offsets the reduced amount of compensation

In order to receive compensation from these trusts, a claimant must file an application with each entity. The requirements of each trust as to what statements must appear in the application vary widely. Most of the bankruptcy trust forms, (herein "BTF"), contain statements alleging exposure to the product of the bankrupt party. Many apparently do not require a statement of causation. Those forms are discoverable, although sometimes only with a subpoena or letters rogatory.

I have consistently received into evidence BTFs (when offered by the Defendants over the objection of the Plaintiffs) as a statement of a party opponent as proof of exposure to the product of an alleged RTP. Before the pronouncement of *Borg Warner*, the fact of exposure to a product in any amount was considered prima facie evidence of causation. The Plaintiff's Motion for Summary Judgment is predicated on the proposition that unless a BTF has a specific statement alleging a causative link between the bankrupt's conduct and an asbestos related injury, the BTF is, by itself, insufficient evidence of causation under the party-specific dose rule set forth in *Borg Warner*. Therefore, Plaintiffs argue, unless Defendants produce some evidence of dose (such as Plaintiff's have attempted to do, and, in some cases have done) in response to a 166a(i) motion for summary judgment, they are entitled to dismissal of the defense of RTP.

Defendants take a different position. While they acknowledge that few of the BTFs have an explicit statement of causation, one should look both at Section 524(g) of the Bankruptcy Code and at the Court orders setting up the trusts. A number of them (the number is in dispute) require a statement by the claimant that they have a valid claim under law. Since a valid claim includes a causative link, by incorporating the Court order into the BTF, they claim that they have met their burden of proof on the issue of causation without showing dose as to the RTP status of a bankrupt's entity by offering the BTF signed by the Plaintiff or his attorney.

I am unable to accept either side's argument *in toto*. As previously stated, I will continue to find a written statement by a Plaintiff to a bankruptcy trust as evidence of exposure. If a BTF claim form has any statement that alleges causation, or any phrase that can be interpreted to be words to that effect (i.e. "led to", "resulted in", "is partially responsible for") I will find that to be sufficient evidence to defeat a summary judgment motion. A bare application that alleges exposure is not sufficient to be any evidence of causation under *Borg Warner* standards.

The Defendants' argument that incorporation of Bankruptcy Act standards incorporates an element of causation also misses the mark. First, I cannot receive the applications as a

statement of a party opponent and incorporate something that was not a statement, or even referenced within the four corners of the claim form, as a statement of party opponent. Secondly, if statements of the validity of a claim are seriously reviewed by bankruptcy trusts to require a fully valid claim, they probably would have incorporated a requirement that dose be alleged by Texas Plaintiffs in the BTF in the aftermath of *Borg Warner*. I am therefore assuming that there is no causation element considered necessary by the bankruptcy trusts in their applications.

Can estoppel bar a plaintiff who has received BTF proceeds from denying causation?

Defendants argue that judicial estoppel and equitable estoppel bar plaintiffs from seeking a summary judgment or denying causation of bankrupt entities with which they have filed BTFs. This statement is certainly true if there is a statement of causation in the BTF or if a Bankruptcy trust unequivocally requires causation as an element of a proper claim. The closer question comes if it does not.

Bankruptcy trusts do not require proof of negligence or causation as a prerequisite of receiving money. The trade off for the reduced burden of proof is the reduced amount of money they are paid for the application, compared to what juries might pay were the entities still solvent. The terms and conditions of payment were apparently negotiated and are subject to change, with permission of the bankruptcy courts. Hence, any trust could start requiring a statement of causation at any time it wished to do so, subject to court approval. They have not chosen to do so.

Defendants divide their argument into judicial estoppel and collateral estoppel. I will consider each.

Defendants are correct in stating that, since bankruptcy trusts are subject to the approval of the bankruptcy court, statements made in a BTF is subject to the provisions of judicial estoppels. Where the judicial estoppels argument fails is on the element of inconsistency. Plaintiffs cannot be estopped from denying causation if they made no statement of causation in the prior proceeding. Most bankruptcy trusts apparently have either a relaxed causation requirement, or a nonexistent one. None of them have anything that approaches *Borg Warner* standards. Unless a BTF requires a statement of causation, there can be no judicial estoppel.

I am also unable to find that collateral estoppel bars Plaintiffs from seeking summary judgments as to RTP claims. In addition to the requirement of inconsistency being missing, so also is the requirement that the identity of the parties in the prior proceeding is known. Since the Defendants seeking application of collateral estoppel (and res judicata) were not parties to the bankruptcy trust, it cannot bar the seeking of a summary judgment.

Conclusion

I have given a lot of reasons and done a lot of work over a ruling that could have been decided by citing the Doctrine of Poultry Equivalence.[iv] *Borg Warner*'s causation standards were not in existence in any state when the bankruptcy trust forms, the defense of responsible third party and Chapter 90 of the TCPR were created. I am confident that if I have misapplied either the statutes, the cases, or the bankruptcy trust provisions, I will be corrected by, respectively, the Texas Legislature, the appellate courts and the bankruptcy courts.

My ruling is that RTP's are subject to summary judgment practice, and that proof of causation that is consistent with *Borg Warner* must be presented in order for a defendant to avoid dismissal of its RTP claims. Bankruptcy trust fund applications are admissible to create a fact question on statements made within the four corners of the document. They will make a prima facie case of causation if they allege causation, but not otherwise.

Respectfully submitted

MARK DAVIDSON

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[i] Rule 166a(i) mandates dismissal unless "respondent produces summary judgment evidence raising a genuine issue of material fact" on "one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." Section 33.003 TCPR mandates dismissal "unless a defendant produces sufficient evidence to raise a genuine issue of material fact regarding the designated person's responsibility for the claimant's injury or damage."

[ii] See Alan Waldrop's testimony before the House Civil Practices Committee. The testimony was given before his becoming a Justice on the Third Court of Appeals.

[iii] The author of this letter was on one such committee at the time of the announcement of *Borg Warner*, and was on the committee for another year after that.

[iv] "What's good for the goose is good for the gander."