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TEXAS COURTS EMBRACE THE NATIONAL TREND ON HOUSEHOLD ASBESTOS EXPOSURE

by

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The price tag on asbestos-related household exposure litigation in Texas has been significantly reduced. Until recently, Texas courts had not weighed in on the controversy of whether a premises owner owes a duty to household members of its employees or contractors. Other states have addressed this issue, and the trend from the majority of courts has been to decline creation of a new duty.¹

Since the emergence of asbestos litigation in the 1970s, it has continued to grow and expand to the point that the United States Supreme Court characterized it as an “elephantine mass” in 1999. *See Amchem Prods., Inc. v. Windsor*, 527 U.S. 815, 821 (1999). The toll taken on the economy, companies and the judicial system for this litigation has been enormous.² Two recent cases in Texas’ Appellate Courts have given Texas the chance to weigh in on the controversy and signal an embrace of the national trend to short-cut expansion of asbestos litigation to household exposure cases.

¹See *In the Matter of New York City Asbestos Litigation (Holdampf, et al. v. A.C. & S., Inc., et al., & The Port Authority of New York and New Jersey)*, 5 N.Y.3d 486, 806 N.Y.S.2d 146 (N.Y. 2005) (holding that the employer-landowner did not owe a duty of care to the spouse of an employee who alleged she was injured by asbestos brought home on her husband’s clothes); *CSX Transportation, Inc. v. Williams, et al. v. Leverett*, 608 S.E.2d 208 (Ga. Sup. Ct. 2005) (declining to extend “the employer’s duty [to furnish a reasonably safe place to work and to exercise ordinary care and diligence to keep it safe] beyond the workplace to encompass all who might come into contact with an employee or an employee’s clothing outside the workplace”); *In re Certified Question from the 14th Dist. Ct. of App. of Texas*, 479 Mich. 498, 740 N.W.2d 206, 222 (Mich. 2007) (no duty based on the lack of a relationship); *Martin v. General Electric Co., et al.*, 2007 WL 2682064, at *8 (E.D. Ky. Sept. 5, 2007) (holding that the harm was unforeseeable, therefore there was no duty); *In re Asbestos Litigation*, 2007 WL 4571196 (Del. Super. Dec. 21, 2007) (unpublished opinion) (that the relationship between the spouse of one of its workers and the premises owner was insufficient to impose a duty of care); *Rohrbaugh v. Owens Corning Fiberglass Corp.*, 965 F.2d 844 (10th Cir. 1995) (construing Oklahoma law and holding that there is no duty to household members). *But see Olivo v. Owens-Illinois Inc., et al.*, 895 A.2d 1143, 1149 (N.J. 2006) (holding that to the extent a premises owner owes a duty to its workers it also owes a duty to their spouses handling the workers’ clothing); *Zimko v. Am. Cyanamid*, 905 So.2d 465, 483 (La.App. 4 Cir. 2005), *writ denied*, 925 So.2d 538 (La. 2006) (following the lower court’s decision in *Holdampf*, which was reversed, the court held that a premises owner did owe a duty to household members); *Satterfield v. Breeding Insulation Co., Inc.*, 2007 WL 1159416 (Tenn. Ct. App. April 19, 2007) (recognizing a duty “limited to the foreseeability of harm to members of employees’ households who routinely come into close contact with employees’ contaminated clothing over an extended period of time”).

²It has been estimated that over \$70 billion had been spent in asbestos litigation. See Stephen J. Carroll et al., *Asbestos Litigation xxiv* (RAND Inst. For Civil Justice 2005), available at <http://www.rand.org/publications/MG/MG162>. Further, over 70 companies have filed for bankruptcy as a result of this litigation. See *id.*

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In *Alcoa Inc. v. Behringer*,³ the Fifth District Court of Appeals definitively declined to extend the duty of a premises owner to the household members of its workers. More recently, the Fourteenth Court of Appeals in Houston, Texas issued a new opinion in *Exxon Mobil Corp. v. Altimore*,⁴ sidestepping the issue of duty directly, but ultimately holding that plaintiffs presented insufficient evidence to support a finding of an extreme degree of risk of serious injury to a household member of one of Exxon's employees, furthering the trend away from extending a premises owner's duties. Although the Texas Supreme Court has yet to decide the issue, the *Behringer* opinion and the new *Altimore* decision signal an embrace under Texas jurisprudence of the majority trend of other states that find no duty to household members. See *supra* note 1.

Legal Duty in Texas. To prevail on a cause of action for negligence under Texas law, the plaintiff must satisfy three elements: (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately caused by the breach. See *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987). The threshold issue is whether the defendant owed a duty to the plaintiff. *Id.*; *Graff v. Beard*, 858 S.W.2d 918, 919 (Tex. 1993). The Texas Supreme Court has stated that in determining whether a legal duty exists at common law, courts should look at "the risk, foreseeability, and likelihood of injury weighed against the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1991); *El Chico Corp. v. Poole*, 732 S.W.2d 306, 309 (Tex. 1987). Generally, a person does not owe a duty to another in the absence of some relationship that imposes the duty. See *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1984). For instance, premises owners generally have a duty to use reasonable care to make their premises safe for the use of invitees. See *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 53 (Tex. 1997).

In household exposure cases, plaintiffs have sought to expand this duty to spouses or family members of an employee or contractor who worked at a defendant's premises, despite the lack of a direct relationship between the family members and the premises owner. As a result, plaintiffs argue that the injuries to family members were foreseeable by the premises owner. Thus they argue that the duty of care should be extended to the household members of workers injured as a result of secondhand exposure to contaminants, such as asbestos, which were brought home on the clothing of the workers.

Alcoa Inc. v. Behringer: Background. In *Behringer*, Barbara Alford married John Alford in the 1950s. Mr. Alford worked at an Alcoa facility in Rockdale, Texas during and after their marriage. In 1959, Barbara and John Alford were divorced and ceased living together. In the 1960s, Barbara Alford married Leroy Behringer. Barbara Behringer was diagnosed with pleural mesothelioma in 2003. She and Leroy Behringer then filed suit alleging negligence against Alcoa claiming that she contracted mesothelioma as a result of washing John Alford's work clothes during their marriage in the 1950s. Plaintiffs claimed that Mr. Alford's clothes that she washed had asbestos on them from the Alcoa facility where Mr. Alford worked. Alcoa moved for summary judgment on the basis that Alcoa did not have a duty to the household members of its employees who had never set foot in an Alcoa facility. After the trial court's denial of the summary judgment, *Behringer* was tried before a jury in Dallas, Texas. The jury found Alcoa negligent, and a judgment was entered in November 2005 against Alcoa.⁵ Alcoa appealed.

The Behringer Appeal & Opinion. The key issue raised on appeal, and addressed by the Fifth District

³235 S.W.3d 456 (Tex. App. – Dallas 2007, pet. filed). Richard O. Faulk, Kevin L. Colbert and Diana P. Larson of Gardere Wynne Sewell LLP were trial counsel in the *Behringer* case. The appellees/plaintiffs in the *Behringer* case have filed a petition for review with the Texas Supreme Court. At the time of this publication, the Texas Supreme Court has requested appellant, Alcoa, to respond to the petition for review. No opinion or ruling has been issued by the Texas Supreme Court.

⁴ __ S.W.3d __, 2008 WL 885955 (Tex. App.—Hous. [14th Dist.] Apr. 3, 2008, n.p.h.). The *Altimore* case has a complex appellate history. The court has actually issued four opinions in this case. The first opinion was issued on August 1, 2006 (2006 WL 2165725). This opinion was replaced by a new opinion on December 7, 2006 (2006 WL 3511723), which was replaced on April 19, 2007 with a new opinion (2007 WL 117447). On August 9, 2007, the Court withdrew its last opinion and the new opinion was issued April 3, 2008.

⁵The jury awarded Mrs. Behringer \$12 million in actual damages and \$2 million in exemplary damages. Mr. Behringer was awarded \$1.5 million in actual damages and \$2 million in exemplary damages. After settlement credits and the punitive damages cap were applied, the court entered a judgment against Alcoa for \$15,593,340.05. See 235 S.W.3d at 459.

Court of Appeals, was whether Alcoa owed a legal duty to Mrs. Behringer. More specifically, Alcoa argued that “it did not owe a legal duty to appellees because in the 1950s Alcoa could not foresee the harm of non-occupational asbestos exposure.” See 235 S.W.3d at 459. The *Behringer* court agreed with Alcoa’s argument, holding that “the dangers of non-occupational exposure to asbestos dust on workers’ clothes was neither known nor reasonably foreseeable to Alcoa in the 1950s.”⁶

Exxon Mobil Corp. v. Altimore: Background. *Altimore* was likewise an asbestos personal injury case. Louise Altimore (also referred to as “Plaintiff” or “Appellee” in the opinion) claimed that she contracted mesothelioma from domestic/household asbestos exposure through her husband, who worked at ExxonMobil Corporation (“Exxon”). Mrs. Altimore alleged that she was exposed to asbestos while washing her husband’s work clothes which she alleged had asbestos-containing dust on them. Mr. Altimore worked at the Exxon facility in Baytown, Texas between 1942 and 1977. At trial, Exxon was found negligent by a jury and a judgment for \$992,001 in exemplary damages was entered against Exxon.⁷ Exxon appealed.

The Altimore Appeal. The key issue raised on appeal by Exxon and the *amicus curiae* in support⁸ was whether a premises owner or employer has a duty of care to household members of workers for injuries to the household members from secondhand exposure to contaminants, such as asbestos, which were brought home on the clothing of the workers. As in *Behringer*, Mrs. Altimore had no relationship with Exxon and the only relationship was between Exxon and her husband, an Exxon employee. Such secondhand exposure should not be sufficient to impose liability, Exxon argued. The Fourteenth District Court of Appeals agreed, at least initially. The court’s original *Altimore* opinion held that Exxon had not breached a duty to a household member of one of its workers as the risk of harm to that individual was not foreseeable.⁹

The New Altimore Appellate Decision: Sidestepping Duty, the Court Provides Relief. The *Altimore* court withdrew its original opinion and ultimately replaced it with a new opinion that sidestepped the issue of duty, focusing instead on the legal sufficiency of the evidence to support the imposition of exemplary damages. Despite this sidestep, the *Altimore* court followed the *Behringer* court’s review of the medical and scientific literature available to premises owners at that time regarding exposure to asbestos brought home on the clothing of workers at a premises. See also Colbert & Larson, *Ascent to Knowledge: The Foreseeability of ‘Medical Curiosities’*, Vol. 21 No. 17 MEALEY’S LITIGATION REPORT: ASBESTOS, Oct. 4, 2006. The *Altimore* court noted that “[d]uring the relevant time period, 1942 to 1972, there was a consensus within the scientific community that there was a measurably safe level of exposure to asbestos.” See 2008 WL 885955, at *6. Further, “[b]y 1972, experts agreed that a certain degree of exposure to asbestos could cause *asbestosis* or *cancer*. After this postulate was generally accepted, the debate focused on what constituted a safe level of exposure for workers.” *Id.* at *6.

The *Altimore* court noted two important issues in reviewing the medical and scientific literature. First, the court acknowledged that the majority of the scientific community believed a person’s risk of harm would vary depending on the type of exposure to which the individual was subjected. The court acknowledged that exposure through mining of asbestos is not the same as exposure by working with asbestos-containing products. See *id.* at n. 2. Second, the court acknowledged that to successfully bring an exposure case, the plaintiff must support his claim that he was exposed to a sufficient amount of asbestos to have caused his disease. *Id.* at *8. Moreover, a plaintiff must present “comparative epidemiological studies or expert testimony delineating the difference

⁶235 S.W.3d at 462 (Procedural note without substantive effect: The timing of the release of the *Behringer* opinion post-dated the release of the original *Altimore* opinion and actually cited the *Altimore* opinion as authority for its ruling that “the dangers of non-occupational exposure to asbestos dust on workers’ clothes was neither known nor reasonably foreseeable to Alcoa in the 1950s.” Subsequently, when the Fourteenth Court of Appeals in *Altimore* granted the motion for rehearing and withdrew its original opinion, the *Behringer* court then withdrew its original opinion that cited *Altimore* and reissued its opinion without that citation to *Altimore* but held firm to the language that “the dangers of non-occupational exposure to asbestos dust on workers’ clothes was neither known nor reasonably foreseeable to Alcoa in the 1950s.”).

⁷The jury also awarded Plaintiffs \$992,001 in actual damages. However, the settlement credit in the case was sufficient to eliminate this award leaving only the exemplary damages award.

⁸Diana P. Larson and Richard O. Faulk of Gardere Wynne Sewell LLP wrote an *amicus* brief in support of ExxonMobil Corporation on behalf of the American Chemistry Council and the Texas Chemical Council in the *Altimore* case.

⁹See 2006 WL 2165725 (Tex.App.—Hous. [14th Dist.] Aug. 1, 2006), withdrawn by 2006 WL 3511723 (Dec. 7, 2006) withdrawn by 2007 WL 117447 (April 19, 2007), withdrawn by ___ S.W.3d ___, 2008 WL 885955 (Tex. App.—Hous. [14th Dist.] Apr. 3, 2008, n.p.h.).

between a general danger versus an extreme risk to [plaintiff].” *Id.* at *8.

Ultimately, the *Altimore* court held that it could “not conclude that a reasonable trier of fact could form a firm belief or conviction, when viewed objectively from Exxon’s standpoint, there was an *extreme* degree of risk of serious injury to appellee during the relevant period of time.” *Id.* at *9.

Impact of Behringer & Altimore on Texas Household Exposure Cases. What does this mean for asbestos litigation and in particular for premises owners? Although there is not yet a definitive statement by the Supreme Court of Texas,¹⁰ *Behringer* and *Altimore* appear to signal an embrace of the trend toward not expanding the duties of premises owners in asbestos litigation. *Behringer* addressed the duty issue squarely and although the *Altimore* court sidestepped the duty issue,¹¹ these decisions should ultimately provide some relief to premises owners faced with a myriad of lawsuits from family members of its employees and contractors for alleged household exposure to chemicals and toxic substances. *Behringer* and *Altimore* indicate a further reigning-in of asbestos litigation in both the number of lawsuits filed and the price-tag of such litigation in Texas.¹²

Although *Behringer* and *Altimore* will not cease all household exposure cases from being filed, at least for now, they represent a denial of the plaintiffs’ bar’s attempt to expand the scope of duty and open a Pandora’s Box of increased costs of asbestos litigation. *Behringer* and *Altimore* follow the growing trend of not expanding common law duties, and as a result, not expanding asbestos litigation to another class of plaintiffs that have not previously been involved in this litigation. Such an expansion of a premises owners’ duties would have expanded litigation and potentially subjected premises owners to limitless liability, far beyond the workers and their spouses. Defendants in Texas now have the ability to cite to both *Behringer* and *Altimore* to support motions for summary judgment in similarly situated cases involving household exposure claims emanating from alleged exposure to asbestos before 1972. Although this does not stop plaintiffs from filing *all* household exposure cases, it should eliminate much of the litigation that certainly would otherwise have been filed by plaintiffs seeking to extend the current tort law and legal duties to household members of individuals that allegedly worked with or around asbestos. Because the *Behringer* appellees have asked the Texas Supreme Court to review the case, a definitive answer from the Texas High Court may be forthcoming. Until then, plaintiffs have little support in bringing household exposure cases against premises owners where the alleged exposure occurred prior to 1972.

¹⁰The *Behringer* opinion is currently before the Texas Supreme Court, which has not yet decided whether to take the case or not.

¹¹The court’s difficulties in this case are evident by the fact that the Court has issued three prior opinions in the case, which it withdrew, and issued the latest opinion in their place. See 2006 WL 2165725 (Tex.App.--Hous. [14th Dist.] Aug. 1, 2006), withdrawn by 2006 WL 3511723 (Dec. 7, 2006) withdrawn by 2007 WL 117447 (Apr. 19, 2007), withdrawn by __ S.W.3d __, 2008 WL 885955 (Tex. App.—Hous. [14th Dist.] Apr. 3, 2008, n.p.h.). The court’s original *Altimore* opinions held that Exxon had not breached a duty to a household member of one of its workers as the risk of harm to that individual was not foreseeable. See *id.* Ultimately, the court sidesteps the duty issue by acknowledging that the Texas Supreme Court has not dealt with “whether an employer has a legal duty (owed to the spouse of an employee) to warn or prevent the employee from transporting toxic dust to premises occupied by the spouse.” See 2008 WL 885955, at *1. In reaching its opinion, the court acknowledged that it assumed without deciding that Exxon breached its legal duty to Mrs. Altimore. *Id.*

¹²In recent years the courts and legislature have significantly slowed the pace of asbestos litigation in Texas through the passage of Rule 13 of the Texas Rules of Judicial Administration (providing for Multidistrict Litigation for asbestos claims), Chapter 90 of the Texas Civil Practice & Remedies Code (providing for the standards for asbestos and silica related claims in Texas), and the court’s rulings in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007) and *Georgia-Pacific v. Stephens*, 239 S.W. 3d 304 (Tex.App.—Hous. [1st Dist.] 2007, writ denied).