CONCUR and Opinion Filed March 25, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00979-CV

BELL HELICOPTER TEXTRON, INC., Appellant
V.
SHIRLEY DICKSON, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF BILLY DICKSON, DECEASED, RANDALL C. DICKSON, DARYL W. DICKSON, AND DEANA K. BOAZ KIZER, Appellees

On Appeal from the 95th District Court
Dallas County, Texas
Trial Court Cause No. DC-12-05995-D

CONCURRING OPINION ON MOTION FOR EN BANC RECONSIDERATION

Before the Court sitting En Banc.
Concurring Opinion by Justice Whitehill

I agree with the decision to deny en banc rehearing in this case because the panel opinion was correctly decided. I also write separately to address the dissenting opinion's suggestion that this Court, as previously constituted, had a predilection against jury verdicts.

I.

This is a gross negligence case. To recover, Dickson had to prove

> by clear and convincing evidence that: (1) when viewed objectively from [Bell's] standpoint at the time of the event, the act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) [Bell] had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Goodyear Tire & Rubber Co. v. Rogers, 538 S.W.3d 637, 644–45 (Tex. App.—Dallas 2017, pet. denied) (quoting *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012)).[1]

There is evidence that Bell probably had access to information during the relevant time period indicating that, as a general premise, asbestos exposure could be dangerous. But what is missing is more than a scintilla of evidence that any Bell vice principal (or even Dickson) knew in 1962 through 1968 that the fiberboards at issue contained asbestos. Absent such evidence, it necessarily follows that there is no evidence (measured by a gross negligence or any other standard) that Bell had actual, subjective knowledge of any asbestos exposure risk toward Dickson and acted with conscious indifference to that risk.

The dissent does not attempt to fill these evidentiary holes.

[1] I agree that *Goodyear* was correctly decided and is binding precedent in this case. Likewise, as we stated in both *Goodyear* and the panel opinion in the present case, *Waldrip* is binding precedent that we followed in both instances. The dissenting opinion does not assert that we misstated the law in this case. Instead, its premise is that the panel here overlooked evidence that, if it existed, might prompt a different result. But even if that were correct (and it's not), that would not be grounds for en banc reconsideration. *See* TEX. R. APP. P. 41.2(c).

II.

With no apparent bearing on the correct legal analysis of the issues in this case, the dissenting opinion (i) criticizes four prior opinions from this Court that are not asbestos cases and have no apparent logical relationship to this case and (ii) extolls this Court's unanimously shared admiration for and faith in the right to a jury trial enshrined in the Texas Constitution. TEX. CONST. art. I, § 15.[2]

Regardless of whether this Court correctly decided those four cases, what is the point of criticizing them when they have no bearing on whether the panel correctly decided the case before us?

And what is the basis for suggesting that this Court had a bias against jury verdicts when our decisions like *U-Haul International, Inc. v. Waldrip*, 322 S.W.3d 821 (Tex. App.—Dallas 2010), *rev'd in part and aff'd in part*, 380 S.W.3d 118 (Tex. 2012) (reversing our affirmance of the plaintiff's verdict); *TRG-Braes Brook, LP v. Hepfner*, No. 05-17-01094-CV, 2018 WL 3434555 (Tex. App.—Dallas July 17, 2018, no pet.) (mem. op.) (affirming plaintiffs' judgment on jury verdict); *Hill v. Spracklen*, No. 05-17-00829-CV, 2018 WL 3387452 (Tex. App.—Dallas July 12, 2018, pet. denied) (mem. op.) (same); *Wal-Mart Stores Tex., LLC v. Bishop*, 553

[2] The federal constitution's Seventh Amendment right to a jury trial does not apply in state court. *Osborn v. Haley*, 549 U.S. 225, 252 n.17 (2007); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719 (1999); *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974); *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 374 (Tex. 2000) ("The right to a jury trial in civil cases in federal courts is found in the Seventh Amendment, but it has never been extended to the states.").

S.W.3d 648 (Tex. App.—Dallas 2018, pet. granted, aff'd as modified w.r.m.) (same); *Choctaw Nation of Okla. v. Sewell*, No. 05-16-01011-CV, 2018 WL 2410550 (Tex. App.—Dallas May 29, 2018, pet. dism'd) (mem. op.) (same); *Goodyear Tire & Rubber Co. v. Rogers*, 538 S.W.3d 637 (Tex. App.—Dallas 2017, pet. denied) (affirming liability findings and affirming damages award conditioned on acceptance of remittitur); *Dao v. Garcia*, 486 S.W.3d 618 (Tex. App.—Dallas 2016, pet. denied) (affirming plaintiffs' judgment on jury verdict), and many other such cases belie that notion and demonstrate our commitment to correctly apply the law to the issues presented without bias against or favoritism for anyone?

The dissenting opinion doesn't answer those questions.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

Bridges, Myers, Schenck, and Evans, JJ., join this opinion.

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