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MAY 21, 2009

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EXPERT TESTIMONY THRESHOLDS: TEXAS SUPREME COURT REVERSES JURY AWARD FINDING EXPERT CONCLUSIONS UNSUPPORTED IN BENZENE CASE

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The Texas Supreme Court reversed a \$7.6 million verdict in favor of the parents of a child with acute lymphoblastic leukemia in **City of San Antonio v. Pollock**, No. 04-1118 (May 1, 2009) because the parents' experts' testimony lacked support. Their daughter was diagnosed with acute lymphoblastic leukemia. The parents sued the City of San Antonio, which had operated a neighboring landfill closed for twenty years. The plaintiffs claimed that their daughter contracted acute lymphoblastic leukemia as the result of *in utero* exposure to benzene transported by landfill gas.

At trial, the jury found that the closed landfill constituted a nuisance and awarded plaintiffs \$23.1 million. The trial court reduced the award, and otherwise entered judgment on the verdict, plus prejudgment interest and costs, for a total of almost \$20 million. On appeal, the San Antonio Court of Appeals reduced the award to \$7.6 million and affirmed the judgment in all other respects.

However, the Texas Supreme Court concluded that the parents' main expert witnesses did not have enough support for their conclusions. Since it was based on this expert witness testimony, the Court reversed the judgment.

The testimony of one of the experts, Mr. Kraft, a landfill engineer, was offered to prove the child was exposed *in utero* to landfill gas at levels high enough to cause acute lymphoblastic leukemia. Although landfill gas had never been found on the property from the time the parents lived there through the time of trial, it had been found in other homes in the neighborhood. Also, the parents smelled odors in their home and back yard which they believed to be landfill gas, and they also believed that subsidence in the back yard might have been due to underground leachate from the landfill. Mr. Kraft asserted that the landfill gas could have migrated to

the property along underground utility lines or through the ground generally. The Court found that Mr. Kraft's conclusion was not supportable, because there was no evidence from which one could infer that the mother was exposed to concentrations of benzene in landfill gas on their property to the extent that there was a risk to the child *in utero*.

The testimony of the other expert, Dr. Patel, a pediatric oncologist, was offered to support the conclusion that the mother's exposure to benzene could cause the child to contract acute lymphoblastic leukemia. However, one of the studies relied upon by Dr. Patel found that chromosomal aberrations (like those experienced by the child that caused her acute lymphoblastic leukemia) may result from exposure to benzene in concentrations upwards of 60 times the level of exposure the child experienced, according to Dr. Kraft. Another study on which Dr. Patel relied found a correlation between exposure to concentrations of benzene 200 times the level of exposure claimed by Dr. Kraft and that the effect was "clear[ly] dose dependent." The Court found that, "[g]iven this large gap between the exposure levels in the studies that Dr. Patel relied on and the concentration Dr. Kraft hypothesized that the Pollocks had been exposed to, those studies provide no basis for his opinion that the Pollocks' claimed benzene exposure caused Sarah's [acute lymphoblastic leukemia]."

Dr. Patel also asserted that the mother's exposure to benzene was higher than the levels reported because the exposure had occurred over a longer period of time. He also stated that the pattern of chromosomal anomalies indicated that the daughter's acute lymphoblastic leukemia was benzene-induced. The Court found that these conclusions were unsupported and provided no evidence that the daughter's acute lymphoblastic leukemia was caused by the mother's exposure to benzene from the landfill.

This case represents the latest in a line of cases (including *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007)), in which the Texas Supreme Court has maintained high standards to ensure a reliable, scientific basis for an expert's testimony to establish exposure and causation in toxic tort cases. Texas was once the favorite destination of the toxic tort plaintiffs' bar, but some plaintiffs may choose to avoid Texas and bring their suits in other forums, if available, where

there may be less rigorous standards for expert testimony on exposure and causation. Because liability insurers continue to face claims arising from toxic tort exposures, this case will have an impact on the evaluation and defense of those claims.

For a further analysis of the Pollock decision and its impact on the insurance industry, please contact Gene F. Creely, II (832.214.3928; gcreely@cozen.com) of Cozen O'Connor's Houston office.