

No. 14-08-00886-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS
HOUSTON, TEXAS

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
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BENSON BAILESS AND ALNET BAILESS,

Appellants,

v.

KAISER GYPSUM COMPANY, INC., ET AL.,

Appellees.

ON APPEAL FROM THE
11TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY
HONORABLE MARK DAVIDSON, PRESIDING.

BRIEF OF APPELLANTS

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<i>King Ranch, Inc. v. Chapman</i> , 118 S.W.3d 742 (Tex. 2003).....	13
<i>Kurak v. A.P. Green Refractories Co.</i> , 689 A.2d 757 (N.J. Super. A.D. 1997).....	8
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<i>Preston Gate, L.P. v. Bukaty</i> , 248 S.W.3d 892 (Tex. App.—Dallas 2008, no pet.).....	13
<i>State v. Heal</i> , 917 S.W.2d 6 (Tex. 1996).....	14
<i>Rutherford v. Owens-Illinois</i> , 67 Cal. Rptr. 2d 16, 941 P.2d 1203 (1997).....	11, 15, 16, 28, 29
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Other

Antman, *Malignant Mesothelioma*,
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Bernard D. Goldstein & Mary Sue Henifin, REFERENCE GUIDE ON TOXICOLOGY,
in Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC
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Bianchi, *Latency periods in asbestos-related mesothelioma of the pleura*,
EUR. J. CANCER PREV. 6:162-166 (1997)..... 24

Browne and Smither, *Asbestos-related mesothelioma:
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Casenote: *Toxic Tort - Causation in Asbestos Claims - The Texas Supreme
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Coggon, et al., *Differences in Occupational Mortality from
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	Page(s)
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Fischbein, et al., <i>Drywall construction and asbestos exposure</i> , AMER. INDUS. HYG. ASSOC. J., 40:402-407 (1979).....	22
Giarelli et al., <i>Malignant mesothelioma of the pleura in Trieste, Italy</i> , AM. J. IND. MED. 22:521-530 (1992).....	24
Greenburg and Davies, <i>Mesothelioma Register 1967-68</i> , BRIT. J. IND. MED. 31:91-104 (1974).....	24
Iwatsubo, et al., <i>Pleural Mesothelioma: Dose-Response Relation at Low Levels of Asbestos Exposure in a French Population-based Case-Control Study</i> , AM. J. EPID. 148(2):133-142 (1998).....	23
Joseph Sanders, Michael D. Green, William C. Powers, Jr., <i>A Tribute to Professor David Fischer: The Insubstantiality of the "Substantial Factor" Test for Causation</i> , 73 MO. L. REV. 399 (Spring 2008).....	17, 27
MAS Work Practice Study: <i>"Kelly-Moore, Mixing, Applying, Sanding & Cleanup of Asbestos Containing Finishing Compound,"</i> October 1999.....	4
<i>Mesothelioma: Has Patient Had Contact With Even Small Amount of Asbestos?</i> , 257 JAMA 1569 (Mar. 27, 1987).....	7
Michael Green, <i>A Future for Asbestos Apportionment?</i> , 12 CONN. INS. L.J. 315 (2005/2006).....	30
Neumann, et al, <i>Malignant Mesothelioma Register 1987-1999</i> , INT. ARCH. OCCUP. ENVIRON. HEALTH 74:383-395 (2001).....	24
Newhouse and Thompson, <i>Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area</i> , BRIT. J. INDUS. MED. 22:261-66 (1965).....	24
PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 26 (Roggli, et al., eds. 2d ed. 2004).....	5, 7

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PROSSER & KEETON ON TORTS (5th ed. 1984) § 41.....	29
PROSSER & KEETON ON TORTS (5th ed. 1988 supp.) § 41.....	29
RESTATEMENT (SECOND) OF TORTS §9 cmt. b (1965)	18
RESTATEMENT (THIRD) OF TORTS: <i>Liability for Physical Harm</i> § 26 cmt. j and Reporters' Note cmt. j (Proposed Final Draft No. 1, 2005)	28
RESTATEMENT (THIRD) OF TORTS § 27 (Tentative Draft No. 2, 2005)	19
RESTATEMENT (THIRD) OF TORTS: <i>Liability for Physical Harm</i> (Basic Principles) § 36 cmt. b (Trivial and Insubstantial Contributions to Multiple-Sufficient Causal Sets) (Tentative Draft No. 3, April 7, 2003).....	10, 19
Rodelsperger, et al., <i>Asbestos and Man-Made Vitreous Fibers as Risk Factors for Diffuse Malignant Mesothelioma: Results from a German Hospital-Based Case-Control Study</i> , AM. J. INDUS. MED. 39:262-275 (2001)	24
Rohl, et al., <i>Exposure to Asbestos in the Use of Consumer Spackling, Patching, and Taping Compounds</i> ," Science, Vol. 1 (1975)	22
Verma and Middleton, <i>Occupational Exposure to Asbestos in the Drywall Taping Process</i> , AMER. INDUS. HYG. J., Vol. 41 (1980)	22
World Health Organization, <i>Environmental Health Criteria 203: Chrysotile Asbestos</i> (1998) ("EHC 203")	7

STATEMENT OF THE CASE

- Nature of the Case:** Appellants Benson Bailess and his wife Alnet sued several manufacturers of asbestos-containing joint compounds to recover for his mesothelioma-related injuries resulting from exposure to such compounds, some of which were manufactured by Appellee Kelly Moore Paint Company, Inc. ["Kelly Moore"].
- Course of Proceedings:** The former judge of the Texas Asbestos Multi-District Litigation and 11th Judicial District Court, the Honorable Mark Davidson, granted Appellee Kelly Moore's No-Evidence Motion for Summary Judgment on causation in open court on June 20, 2008. CR 169-70; 940-41; 1st Supp. CR 14. After the motion was granted and the remaining claims were remanded to the 333rd Judicial District Court for trial, the remaining defendants settled the Bailesses' remaining claims, and that court's former judge, the Honorable Joseph Halbach, Jr., signed a final order, dated August 11, 2008, which reflected the disposition of all of the Bailesses' claims, including its claims against Kelly Moore. CR 994. A timely appeal was then taken from the final order encompassing Judge Davidson's earlier ruling.
- MDL Court:** The 11th Judicial District Court of Harris County, Texas,
Former Judge Mark Davidson, presiding.¹
- Trial Court:** The 333rd Judicial District Court of Harris County, Texas,
Former Judge, Joseph Halbach, Jr., presiding.
- Trial Court's Disposition:** Interlocutory no-evidence summary judgment was granted in favor of Appellee Kelly Moore and against Appellants Bailess. The trial court thereafter entered a final order reflecting the disposition of all of the Bailesses' claims, including their claims against Kelly Moore.

¹As this is an appeal from an order of the MDL court, this appeal should be expedited by this Court. *See* TEX. R. JUD. ADMIN. 13.9(c).

