Dissenting 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 Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-12-05995-D

DISSENTING OPINION ON DENIAL OF EN BANC RECONSIDERATION

Before the Court En Banc
Dissenting Opinion by Justice Carlyle

My friends on the court have concluded en banc review is not appropriate in this case. I respectfully dissent. This court has misapplied the legal sufficiency standard of review to second-guess jury verdicts before and here, it does so again.[1]

[1] Upon a brief survey of recent jury verdicts reversed by panels of this court, I note several cases, and do so not to accuse the prior members of this court of, as the concurring opinion says, having "a predilection against jury verdicts" or "bias against jury verdicts." Rather, I note these specific cases, as I say, for their misapplication of the legal sufficiency standard of review. *See, e.g., Inland W. Dallas Lincoln Park Ltd.*

Though the panel opinion recites that it considers "all the evidence" the jury heard, it does not.[2] The panel does not address verdict-supportive evidence admitted through Bell's corporate representative Mike Ishmael, which included the following testimony:

> Q. . . . Bell Helicopter knew after it knew of the hazards of asbestos in 1955 that people like Billy Dickson were going to continue to work

---

P'ship v. Nguyen, No. 05-17-00151-CV, 2018 WL 4103292 (Tex. App.—Dallas Aug. 29, 2018) (mem. op.) (reversing jury verdict on issue not raised by appellant), *withdrawn and superseded*, 2018 WL 6583024 (Tex. App.—Dallas Dec. 14, 2018, no pet. h.) (mem. op.) (reversing jury verdict for lack of direct evidence as to fraud, though arguably, circumstantial evidence supported it; reversing verdict on negligent misrepresentation for insufficient damages evidence in complex damages question in unique situation where several measures of relevant damages were established); *Viking Healthcare, LLC v. Zeig Elec., Inc.*, No. 05-15-00835-CV, 2016 WL 7448335 (Tex. App.—Dallas Oct. 27, 2016, pet. denied) (mem. op.) (reversing post-jury-verdict judgment and remanding for new trial based on invited *Casteel*-type error by recharacterizing it, at appellant's invitation, as a sufficiency complaint); *Brandt Cos., LLC v. Beard Process Sols., Inc.*, No. 05-17-00780-CV, 2018 WL 4103210 (Tex. App.—Dallas Aug. 29, 2018, pet. granted, judgm't vacated w.r.m.) (mem. op.) (involving "two ships Peerless"-type problem: a jury found for Beard that it did not agree to a contract with Brandt; this court reversed because it found evidence "conclusively established" a contract existed and, confusingly, "less than a scintilla of evidence" supported the jury's conclusion that the parties "did not enter into a written subcontract"; the panel ignored settled contract principles regarding the evidence supporting the verdict, primarily that "the parties must assent to the same thing, in the same sense, at the same time," *see Citibank (S. Dakota), N.A. v. Tran*, No. 05-11-01423-CV, 2013 WL 3205878, at *3 (Tex. App.—Dallas June 21, 2013, pet. denied) (mem. op.); RESTATEMENT (SECOND) OF CONTRACTS, § 20 ("Effect of Misunderstanding . . . There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and . . . neither party knows or has reason to know the meaning attached by the other . . . .")); *Dallas Cty. Sch. v. Green*, 518 S.W.3d 449 (Tex. App.—Dallas 2016), *rev'd sub nom. Green v. Dallas Cty. Sch.*, 537 S.W.3d 501 (Tex. 2017) (per curiam) (reversing because intermediate appellate court erred by requiring proof from employee that congestive heart failure caused urinary incontinence when Texas law, unobjected-to portions of jury charge, and evidence before the jury allowed conclusion that incontinence was itself a disability).

[2] When reviewing the legal sufficiency of evidence to support a finding that must be proved by clear and convincing evidence, an appellate court must look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 866 (Tex. 2017). In doing so, the reviewing court must assume the fact-finder resolved disputed facts in favor of its finding if a reasonable fact-finder could do so. *Id.*; *City of Keller v. Wilson*, 168 S.W.3d 802, 817 (Tex. 2005).

Of course, evidence that was not admitted into the record cannot inform a legal sufficiency analysis. *See City of Keller*, 168 S.W.3d at 821–28 (discussing review of evidence in the record in context of legal sufficiency); *Bullet Trap, L.L.C. v. Waterproof Positive LLC*, No. 05-18-00529-CV, 2019 WL 3543579, at *2 (Tex. App.—Dallas Aug. 5, 2019, pet. denied) (mem. op.) ("[w]hen reviewing the legal sufficiency of the evidence, we consider all the evidence before the jury"). The panel opinion's legal sufficiency analysis regarding Bell's knowledge properly disregards the other-exposure evidence the trial court excluded.

> with asbestos products in the 1960s; isn't that right, at Bell Helicopter with—
>
> A. That there was going to be asbestos used in the manufacture of helicopters, yes, sir.

Further, the panel identifies shortcomings in the plaintiff's testimony regarding his own knowledge about his asbestos exposure and, in an analytical switch, repackages them as reasons his causation expert witness lacked a proper basis for his opinion. In doing so, the panel reformulates the trial burden, faulting the plaintiff for not knowing what he was exposed to, when, and how dangerous it was. But at trial, the plaintiff had to prove these matters as to the defendant, Bell—not as to himself.

The panel opinion begins its discussion by reciting the plaintiff's testimony, noting that he did not recall a brand name on the heat-resistant boards used to construct structures he designed for high-temperature helicopter-part testing for Bell, and that he did not know until recent years that the heat-resistant boards were made up of three layers. The expert opined based in part on the plaintiff's description of heat-resistant boards Bell used as consisting of three layers stuck together. The expert testified there were only five brands of heat-resistant boards used at the time, that only one was layered, and that it was layered exactly as the plaintiff described. Based on this, the expert professed his expert opinion that the layered heat-resistant board was a particular type of asbestos. No record evidence suggested the layered

heat-resistant board would have been constructed of anything but asbestos—the difference would have been in the type of asbestos.

In the face of that record, the panel here faults the plaintiff's failure to present direct evidence that Bell knew about asbestos use at the relevant time. The panel focuses on the *plaintiff's* lack of knowledge about the layered boards at the time of his work and, in doing so, discounts the expert's opinion. Under one interpretation, the idea may be that, because the plaintiff didn't know at the exact time he was working near it that the substance was asbestos, the plaintiff's trial expert now, some years later, may not rely on plaintiff's after-the-fact knowledge to support his expert opinion. But this introduces a time-specific-knowledge burden *on a plaintiff* that no court has ever imposed.

Further, circumstantial evidence, arising from the expert's opinion based on undisputed facts, supports the jury's conclusion that Bell had the requisite knowledge of asbestos risks. A reader of the panel opinion would have no idea there were any witnesses or evidence besides what the panel describes. In fact, there was substantial additional evidence.

The plaintiff's expert testified that high-ranking members of Bell were members of relevant scientific communities that produced written materials circulated—and at the very least available—to their members. This included Bell's president, Lawrence D. Bell, who appears to have been a member of the board of trustees of the National Safety Council, as mentioned in a 1951 list. The written

materials include articles published in the 1930s by the American Society of Mechanical Engineers' journal, *Mechanical Engineering,* addressing the dangers of asbestos in the industrial workplace and linking it to physical ailments in the respiratory system. Evidence supported that Bell would have known of these through employee-members of ASME starting in 1927. There is the 1951 book *Accident Prevention Manual for Industrial Operations*, produced by the NSC, in which the list describing Mr. Bell as an NSC trustee appears. That book discusses asbestos in the chapter "Industrial Poisons," and says, "Inhalation of excessive quantities of asbestos fiber can produce a fibrosis in the lungs similar to that found in silicosis . . . . [T]he condition develops slowly and advances slowly and is equally resistant to treatment." The record also contains (1) NSC documents from 1951 and 1956 detailing knowledge about asbestos problems; (2) a May 15, 1950 *Newsweek* issue containing a note discussing air pollution concerns raised by U.S. Public Health Service studies pointing to "airborne particles," like asbestos, selenium, beryllium, arsenic, and chromates, "as the cause of some forms of cancer and respiratory ailments"; and (3) a 1952 encyclopedia article addressing "occupational cancers" that states cancers of the respiratory tract "occur in workers who are exposed to the inhalation of chrome salts, asbestos dust and nickel carbonyl," *see Cancer*, ENCYCLOPAEDIA BRITTANICA, vol. 4, 731 (1952). This evidence is significant, and a separate panel of this court relied on exactly this type of evidence, from the same expert witness, in affirming a jury verdict two years ago. *See Goodyear Tire &*

Rubber Co. v. Rogers, 538 S.W.3d 637 (Tex. App.—Dallas 2017, pet. denied). In short, there was extensive evidence supporting a conclusion that Bell knew about the dangers of asbestos in industrial operations.

The panel also faulted the expert's use of post-1968 studies to approximate the plaintiff's exposure, observing that those studies were no evidence of Bell's awareness of an extreme risk posed between 1962 and 1968. But the plaintiff did not rely on those studies to establish Bell's awareness. Rather, he relied on the studies to calculate the dose of asbestos he received. *See Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 770–71 (Tex. 2007) (dose must be proven as the single most important factor in evaluating whether an alleged exposure caused a specific adverse effect). Not only does the record support that the expert's testimony based on those studies addressed the dose, so too does our case law recognize this focus and proof requirement. As I note, the record supports the jury's conclusion regarding Bell's knowledge separate from these studies.

Over and above all these instances where the panel, in my view, re-characterized the evidence, the panel failed to address Bell corporate representative Mike Ishmael's testimony. Mr. Ishmael agreed "Bell knew the hazards of asbestos by at least the 1950s." He agreed Bell would have known asbestos caused lung cancer as of 1955. Bell knew products it crafted incorporated asbestos components from at least 1955.

There is circumstantial evidence, too. The trial included evidence regarding Congress's 1951 Walsh-Healey Act, of which Bell admitted knowing and which set asbestos-exposure standards by law. Moreover, Bell admitted that, as a U.S. Department of Defense contractor, Bell knew whatever the U.S. government knew about asbestos-containing products. Several government studies, including those mentioned above, demonstrate that the government was past simply knowing that asbestos was harmful and had mustered congressional action on the point by 1951.

And, when asked whether, after Bell knew about asbestos hazards from at least 1955, Bell's employees like the plaintiff would continue to work with asbestos products in the 1960s, Mr. Ishmael responded, "That there was going to be asbestos used in the manufacture of helicopters, yes, sir." When asked whether "any sort of disposable protective clothing or anything" was available to plaintiff "during the time he was exposed to asbestos in the lab," Mr. Ishmael responded, "Yeah, I do believe it was available. Yes, I do believe it was available." These are admissions that support an inference that Bell subjectively knew it continued to expose the plaintiff to a known dangerous substance. *See Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 569 (Tex. 2016) (explaining that "danger" of which evidence of subjective knowledge was required was not mere presence of hazardous gas at plant, but presence of gas in pipeline employee was working on).

Finally, the parties sparred about the meaning of certain environmental testing done at Bell beginning in the 1970s and continuing thereafter. Bell sought to defend

on the basis that it had a document-retention policy going back only thirty years, compliant with OSHA regulations, such that any 1960s testing would have been unavailable based on the document-retention policy. Bell argued that because it had sent Mr. Ishmael, its corporate representative, to look for old documents and because he had produced everything available from Bell's records, "what we do know has – has been part of the reason we didn't find some of that [sic] documents? It was the document retention policy." Bell perfected this argument both in closing and throughout the corporate representative's testimony by suggesting the jury should not infer Bell did *no* testing in the 1960s, just that records from any testing it had done were now gone and this was okay because OSHA only required it to retain documents for thirty years.[3] The jury rejected Bell's argument.[4]

Stepping back from the evidence presented to the jurors, let us not forget we are discussing the quantum of proof necessary for gross negligence, the highest iteration of the *lowest* mental state, far from intentional conduct. Through this lens, the evidence from Bell's corporate representative, Mr. Ishmael, provides helpful

[3] The final rule establishing thirty years as the minimum retention time did not go into effect until May 23, 1980. 29 C.F.R. 1910.1020, established at 45 Fed. Reg. 35212, *see also id.* at 35216, 35256. The guidance before then was the 1970 OSHA Act itself, which only required companies to "keep adequate records of all occupational accidents and illnesses for proper evaluation and necessary corrective action." 29 U.S.C. § 668(a)(3).

[4] Justice Eva Guzman has harshly criticized these limited-duration retention policies because, though now "commonplace," they "assure the destruction of potentially unfavorable evidence." *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9, 37–38 (Tex. 2014) (Guzman, J., dissenting, joined by Devine and Brown, JJ.). Particularly relevant to this discussion, the *Goodyear* opinion, 538 S.W.3d at 645–47, discusses the available documents from relevant time periods where here, perhaps due to Bell's limited-duration document-retention policy, we have none.

context as to why a reasonable juror would credit the plaintiff's expert's testimony and essentially provides the missing pieces to the puzzle the panel presented in its opinion. *See Louisiana–Pacific Corp. v. Andrade*, 19 S.W.3d 245, 247 (Tex. 1999) (citing *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998)) (plaintiff may establish defendant's mental state by circumstantial evidence); *see also Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 248–49 (Tex. 2008) (explaining how circumstantial evidence constituted clear and convincing evidence of gross negligence). This is exactly why our standard of review requires us to look at *all* the evidence and observe whether any reasonable juror could credit sufficient evidence to support a verdict. *See City of Keller*, 168 S.W.3d at 823, 827. The panel did not do that here when it failed to address the Ishmael evidence. The panel ignored evidence supporting reasonable inferences that supported the jury's conclusions—the very same type of evidence another panel of this court recently approved as sufficient to support a verdict. *See Goodyear*, 538 S.W.3d at 637.

In *Goodyear*, this court affirmed a jury verdict for a plaintiff based on similar testimony from the same expert witness and similar asbestos exposure evidence regarding the plaintiff. In that case, the defendant company was a member of the relevant scientific societies that produced the journals offered as evidence. In this case, the member was Bell's president, no less a figure to be heavily invested in his workers' safety and whose knowledge may appropriately be imputed to the company.

In addition to ignoring ample record evidence, the panel comes to a different conclusion on evidence similar to that presented in *Goodyear*, a decision from just two years ago, from the same expert witness whose credentials no one questions. Though I do not contend the two cases are equivalent in every way, neither should my friends in opposition conclusively claim that *Goodyear* would have mandated reversing the jury verdict here. The most telling affirmation of that concept is the panel's choice not to rely on *Goodyear*, though both parties discussed the case at length in briefing.

Why we conclude so differently in these cases is beyond me. Our society's chosen legal organization includes delegating important legal decisions to a group of jurors. Those jurors' decisions may be idiosyncratic when different groups of them are presented similar evidence, but the courts who review their verdicts should not so diverge. They should certainly not diverge, as the panel did here, without even attempting to distinguish a recent, similar case. *See* Bryan A. Garner, et al., *The Law of Judicial Precedent* 96 (2016) ("A court distinguishes a precedent by discerning material differences between it and the present dispute, thereby concluding that the precedent is either not entirely applicable or wholly inapplicable."); *id*. at 385 ("Judges sitting in the same appellate court should not make contradictory or conflicting rulings in the same case or on the same subject. Each should defer to and accept decisions already made.").

Jury trials in civil cases are part of the bedrock of our judicial system, U.S. CONST. amend. VII; TEX. CONST. art. I, § 15, and the parties here presented a controversy to twelve jurors by their mammoth efforts, a luxury we retain in this republic.[5] We intermediate courts of appeals have a place in the review of those trials, but it is cabined. Our panels are not two or three additional jurors to convince,[6] nor are they charged with putting the appellee to a burden of re-proving its case because the losing appellant has crafted a creative new appellate argument or has re-branded on appeal an argument the jury rejected. In this context, we exist to correct obvious wrongs, to defer to jury determinations,[7] and, most fundamentally, to protect and nourish the jury trial.

I dissent from the denial of en banc review because we fail in that charge today.[8]

/Cory L. Carlyle/
CORY L. CARLYLE
JUSTICE

[5] *Cf.* William V. Dorsaneo III, *The Decline of Anglo-American Civil Jury Trial Practice*, 71 SMU L. REV. 353, 355–58 (2018) (describing the demise of the civil jury trial in England, such that only defamation, malicious prosecution, and false imprisonment claims qualify for civil jury trials).

[6] *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985) (requiring parties "to persuade three more judges at the appellate level is requiring too much" after they have "already been forced to concentrate their energies and resources on persuading" the fact-finder); *Montanez v. State*, 195 S.W.3d 101, 109 (Tex. Crim. App. 2006).

[7] We do not "second-guess" juries. *State v. $11,014.00*, 820 S.W.2d 783, 785 (Tex. 1991). This is a principle that derives directly from our Constitution's guarantee of the right to trial by jury. "[C]ourts must not lightly deprive our people of this right by taking an issue away from the jury." *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997). Justice Boyd's dissent in *Genie Indus., Inc. v. Matak*, 462 S.W.3d 1, 14 (Tex. 2015) (Boyd, J., dissenting, joined by Lehrmann & Devine, JJ.), eloquently makes this point.

[8] I only address the issue the panel addressed and offer no opinion regarding Bell's other appellate claims.

Burns, C.J., and Osborne, Partida-Kipness, and Reichek, JJ., join in this dissenting opinion

170979DF.P05