ORAL ARGUMENT — 10/20/98
98-0130
RHONE-POULENC V. KENDA STEEL

LAWYER: The issue in this occupational disease case in light of this court's decision in *Childs*, is whether...

BAKER: _____ by your statement then, we're not having a contest about whether this is an occupational disease or not?

LAWYER: No, we are not. This is an occupational disease case.

HANKINSON: Is it a latent occupational disease case?

LAWYER: Yes, I would agree that it's a latent occupational disease case. And the issue is whether, in this latent occupational disease case, both the fact of injury and the causal link to the work must be objectively verifiable and inherently undiscoverable before the discovery rule can apply. This court held in *Childs,* in a latent occupational disease case that was a silicosis case, that the discovery rule did apply and that under the discovery rule the cause of action accrued when the plaintiff knew or should have known of both the fact of injury and the causal link to the work. That was implicit in the majority opinion in *Childs,* that the discovery rule applied under the two part test in *Altai*. In fact that's what Justice Hankinson wrote.

OWEN: I think the question was brain tumors can occur for reasons other than occupational injuries?

LAWYER: That's correct. But the plaintiff has alleged this in terms of an occupational disease case. In other words, his allegation is, that this brain tumor was caused because of his work exposure. So in that sense, it's an occupational disease case. And our argument is, that in an occupational disease case like this one where the plaintiff's allegation is that Mr. Steel contracted this rare form of brain cancer because of his exposure at work for several years at Rhone-Poulenc to low levels of naturally occurring radiation, that in that type of occupational disease case unlike silicosis where there is scientific consensus and there isn't any doubt that the causal link to the work is objectively verifiable, that this case is different and that you can't jump over the objectively verifiable prong of the discovery rule applicability test in *Altai* and *S.V.* And that if you apply the objectively verifiable prong to this case, you would determine that this is not an objective verifiable cause of action...

ENOCH: In a summary judgment context what is the level of proof that the plaintiff must bring to dispute an issue on objectively verifiable?

LAWYER: Our case is unusual in the summary judgment in the sense that in this case the

plaintiff agreed to accept the burden of proof.

BAKER: But he already had it.

LAWYER: For purposes of summary judgment?

BAKER: No. He already had it all the way through, didn't he?

LAWYER: Right.

BAKER: But aren't there just legions of cases that say: Even though the plaintiff has the burden of proof under §c of 166(a), the movant has the burden to show as a matter of law. So how can you say that it was Mr. Steel's burden to prove his case before it got to the merits?

LAWYER: How it changed the burden of proof is that the trial judge ordered and he agreed to come forward by "X" date before summary judgment with legally sufficient evidence of causation.

BAKER: Which he did.

LAWYER: Well that's what the CA said, and that's why we're here. We think that's wrong.

BAKER: No, I mean from a factual standpoint they did file the affidavit that the pretrial order said you must file?

LAWYER: That's correct.

BAKER: But your quarrel is, so what it doesn't state what it's supposed to state?

LAWYER: That's our quarrel.

BAKER: Isn't it still your burden to prove as a matter of law with whatever they had there was not causation?

LAWYER: He has the burden of proof under the case management order to come forward with legally sufficient evidence of causation, and it's not.

BAKER: No, it said: Come forth with an affidavit from a medical doctor that says that in a reasonable medical probability, the brain tumor was caused by his work.

LAWYER: That's right.

BAKER: And that's what he said.

LAWYER: In the CA, the plaintiff conceded that that shifted the burden of proof on causation to him.

BAKER: So he's conceded that?

LAWYER: He's conceded. It's Tab 7 in our poster booklet. Plaintiffs told the CA, this is from their CA brief, the TC improperly placed the burden regarding causation on the nonmovant Steel. But his problem with that complaint is they had agreed to the case management orders placing burden on them.

OWEN: There were other remedies for failure to comply with the case management order are there not?

LAWYER: Sure.

OWEN: Why do you say that it's remedied in effect through summary judgments - switching the burden of summary judgment? What rule of procedure allows the TC to do that in the context of summary judgment to switch the burden for failure to comply with a pre-trial case management order?

LAWYER: As we cited in our reply brief, there are a number of instances where the other party that doesn't normally have the burden of proof on something takes the burden. And in this case it happens to be the plaintiff that accepted burden. If the plaintiff accepts that burden without objection, then the burden should shift.

OWEN: They accepted it for discovery purposes. Where do the rules allow the TC to change the rules of summary judgment as they then existed and take the burden off of you in summary judgment to come forward affirmatively and disprove each element?

LAWYER: I can't point you to a specific rule of procedure that says that he can accept the burden. I can point you to cases, such as *State v. Paine*. Remember in the charge context where the other side took the burden and the court said: Well he took the burden, and so that's no problem. And we cite another case in our footnote in our reply brief where the court says: we're not going to correct it if you took the burden.

ENOCH: Do you lose this case if the court decides that the plaintiff did not take the burden on the motion for summary judgment?

LAWYER: If you conclude that he did not accept the burden on causation, then I probably lose on the Jeffrey Steel claims. I guess I would still lose on Gregory Steel, because if you don't

believe that he took the burden, then I can't make my legally insufficient evidence argument, because I would have then had the burden to negate causation as opposed to him having to come forward.

ENOCH: But don't you have expert facts on the record in negating causation?

LAWYER: We did put in an affidavit from a toxicologist, Dr. Stanley Pier, who attacked Dr. Teitelbaum's affidavit.

ENOCH: On the point that you cannot conclude that this cancer was the result of rare earth minerals causing this?

LAWYER: Right. But I'm not standing here saying I would take the position that Pier's affidavit conclusively proves as a matter of law, no causation. The posture that we're here on, is that the plaintiff accepted the burden of proof on causation by a specific date, two times in two case management orders and said: I will come forward with proof on causation. And the evidence that he came forward with was the affidavit of Dr. Stanley Teitelbaum. And as a matter of law, that evidence is legally insufficient evidence of causation under this court's decisions in *Gamble* and *Robinson*. And the way we get from there to the negation of the objective verifiability standard is this analysis that we put forward on our chart, and there's a small version of that in Tab 4 of the poster booklet.

ABBOTT: Let me ask you a question concerning how we apply this particular test. And I want to use by analogy, two different ways of analyzing a constitutional challenger: facial challenge; and an as applied challenge. And it seems as though what you are arguing in this case, is to apply the discovery rule standards concerning objective verifiability on an as applied basis, as opposed to a facial challenge basis. It seems to me the ways that we have handled the inherently undiscoverable aspect is facial. In other words, under any circumstances, not necessarily the circumstances limited to this case, is this going to be inherently undiscoverable? If that's the case, why should we not also apply the same with say facial challenges, as opposed to an applied challenge on the objectively verifiable analysis, such that we don't look necessarily to the facts of this particular case, but we look as to whether or not a brain tumor or whatever the injury may be could be objectively verifiable?

LAWYER: I don't know that I quarrel with that analysis. But I think our argument would still work. In other words, if it was the plaintiff's burden of proof to come forward and prove legally sufficient evidence of causation, part of what he's got to prove is general causation. I am referring now to Justice Hankinson's decision in *Havener*. It's general causation verses specific causation. And part of that is, can exposure to radiation ever cause this rare form of brain cancer or cancer? And we would say Teetlebond's affidavit is legally insufficient evidence on general causation. So if you want to analyze it as a facial attack or an as applied attack, I don't think that would matter to our analysis.

HECHT: But he could say if radiation didn't cause it, then it's not an occupational disease case?

LAWYER: That's right.

HECHT: So when you say earlier that it is an occupational disease case, you're just saying that's what's been pleaded?

LAWYER: That's what I mean. Yes.

HECHT: But in *Childs*, the difference in *Childs* was, you couldn't get silicosis any other way than at work?

LAWYER: That's right. And the CA recognizes that. They say: Silicosis and asbestosis is one thing because that's always related to the work, but this cancer is something else, because it may not be related to the work. That's why I think the application of the objective verifiable prong is so important. And if you want to talk about categories of latent occupational diseases, you know it's one thing to say that silicosis or asbestosis is inherently undiscoverable and objectively verifiable, but that doesn't mean that every allegation of a latent occupational disease would meet that test.

HECHT: But when you start off saying this is latent occupational disease case, you don't mean to concede that they've proved causation?

LAWYER: No. What I am saying is that's the posture that it comes in, that's their allegation.

HANKINSON: And you're distinguishing *Childs,* as this being a case where the discovery rule would not apply then?

LAWYER: That's right. That's what we're saying. The discovery rule does not apply in this case.

HANKINSON: And *Childs* begins with well established case law showing that in that type of case, the discovery rule does apply and then begins to talk about how the discovery rule works?

LAWYER: That's right. You said that you agree that under the *Altai* standard, a two part test, the discovery rule did apply. And there's a lengthy discussion of whether the causal link to the work in that case was inherently undiscoverable.

HANKINSON: And then you're also in this case asking us to frankly not decide this case in the ususal posture of a summary judgment motion as the rule read at the time this one was granted. But, in fact, looking at it via the scheduling order, we have this unique procedural animal here

basically that could put the plaintiff as a result of the TC order to the burden of proving causation before the case went forward?

LAWYER: That's right. Just like it would be under the new summary judgment rule. Judge Owen asked what procedural device allows it under the new summary judgment rule. This is precisely what would happen.

OWEN: Let me make sure I understand your argument. Are you saying that even if we disagree with you, that the plaintiff did not assume the burden, that you lose on limitations with regard to Jeffrey Steel?

LAWYER: My difficulty there is that it's in terms of whether or not it's objectively verifiable. Then, if I cannot rely on his burden of proof on the sufficiency of the evidence on causation, then I have to have come forward and negated objective verifiability. And I feel like unless I can place the burden on him, that's a difficult thing for me to do on this record.

ABBOTT: Going back to where you were wanting to go. It's your position with regard to objective verifiability, that we must be up to the red box as far as the quantum of proof?

LAWYER: I think in a scientific causal toxic case causal connection like this one, that that's the way *Epsy* would work. But my position is also that this case doesn't need to be decided up there at the red box. Because I think there's not legally sufficient evidence of the causal link down here at the green box. And if I, as the defendant negate it, if I came forward and said I can show you that there's not legally sufficient evidence of a causal link.

ABBOTT: So you're saying they are not even on the chart?

LAWYER: My position is they had to get by the green box because they had the burden of proof on that under the case management order.

OWEN: But all this assumes that we're going to say that brain cancer is the type of disease that the discovery rule applies until you know that it's caused by exposure in the workplace, is that correct?

LAWYER: All this assumes that you would apply the *Altai* two part test to this type of claim, and ask whether or not the wrong, here the wrongful exposure, is both inherently undiscoverable and objectively verifiable.

OWEN: What about the injury itself? If we were to conclude that the injury itself was not inherently undiscoverable, does any of this apply?

LAWYER: Of course under *Childs*, in the context of an occupational disease, you would

have to show both the injury and the causal link to the work. We think the two part test would apply to both of those things under *Childs*. But now if you don't treat it as an occupational disease case, then maybe you could go back to our first argument that we made in our brief on the merits. We felt after *Childs,* it was pretty tough to continue to try to make that argument, that you only had to know about the injury and not the causal link. But we felt like our third argument, which is now the argument in our reply brief, was a strong argument in light of *Childs*, because it seems that if the statute of limitations begins to run under the discovery rule upon the plaintiff's knowledge of both the fact of injury and the causal link, then the two part test should apply to both of those things before you decide if the discovery...

OWEN: Do you read *Childs* as overruling *Marino* or *Ingersoll-Rand*?

LAWYER: No, I don't think *Childs* overrules them. But *Childs*, I would say, is limited to occupational disease cases.

ENOCH: Does it help the analysis in considering that the word 'injury' is a term of art meaning it incorporates within this very meaning that what was happening was the result of wrongful conduct? So you have the causal link issue in a latent disease case simply is another way of saying this is an injury as opposed to something occurring naturally. So in *Childs*, we already knew that it was only the result of an external agent that caused it, so we accept without any analysis that that silicosis is an injury. Here the argument is, brain cancer, there's nothing about brain cancer even knowing you have it that gives you any indication that it's an injury. It is only after determining it is resulting from an external agent do you come to a conclusion that it's an injury. So in this case, you don't have knowledge. This is your typical discovery rule issue, because you don't know you have an injury merely because you suffer from brain cancer. Something else has to come to your knowledge: you realize oops, this may be an injury. And in the workplace context, the argument would be: well I have come to realize that the external agent is work related. And so now it becomes an injury. What's missing here is we have no determination that this is in fact an injury that has occurred. So we have no mechanism for a discovery rule application.

LAWYER: That's correct.

ABBOTT: Doesn't that though make it inherently undiscoverable?

LAWYER: Sure it does. And I'm not arguing it's inherently undiscoverable except under their arguments that they discovered it from the newspaper. My argument is it's not objectively verifiable.

ABBOTT: What would you put forth as being the necessary quantum of proof in order to establish...

LAWYER: But for the case management order. And if I was not able to rely on him

having the burden of proof, the defendant could come forward and show that there is no scientific expert consensus that brain cancer is caused by exposure to low level radiation. See, the defendant in this case could have done it that way. We could have come in and negated the red box.

ABBOTT: And you're saying that if a defendant negates the red box?

LAWYER: Then he's negated objective verifiability. And if he negates objective verifiability, then he's negated the discovery rule, and if he negates the discovery rule, I win. And that's where I am.

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RESPONDENT

BARNES: The CA correctly reversed and remanded this case because Rhone-Poulenc failed to meet its burden under summary judgment. For everything else that's going on in this case, it is still a summary judgment file.

HECHT: You say it shifted?

BARNES: Yes. The burden shifted. When we agreed to the case management order, at that time the Steels agreed to bring forward this evidence that was outlined. They brought that evidence forward in the affidavit of Dr. Teitelbaum.

HECHT: So your position is, yes, you had the burden, yes the court could put it on you, but yes, you discharged it?

BARNES: No, I don't agree that we had the burden. We simply had an agreement to bring forward a specific category of evidence, which we did in the affidavit.

HECHT: And if you didn't, then what?

BARNES: If we didn't, then we would be in violation of an agreed management order and some sanctions would probably be appropriate.

HECHT: But you wouldn't lose this?

BARNES: We wouldn't lose the case.

PHILLIPS: This was a burden of production, not of persuasion?

BARNES: Correct. And regarding the discovery rule in a case such as this one, the causation is inherently intertwined in the objectively verifiable aspect. We have pled that it was an

injury that was unknown.

OWEN: What if the cancer had occurred back in the 1950's and it was not fatal, and the state of scientific knowledge didn't catch up with all of this until the 90's, would you say that limitations has tolled from the 50's to the 90's, until science can establish the causal link between the cancer and the occupational exposure?

BARNES: I would not toll for 40 years.

OWEN: How long would you toll?

BARNES: I would toll as this court has already identified, that once the worker who has not been lackluster in determining whether there is an injury discovers that the injury was caused in the workplace...

OWEN: Well that's my hypothetical. Assume with me that there was no scientific evidence of any kind back in the 50's that cancer was caused by a particular occupational exposure, but 40 years later, there was that scientific evidence. Would you toll limitations in those kinds of cases until the scientific community could look back and say these cancers, we now know were caused by occupational exposures?

BARNES: I have a problem there, and I'm not quite sure where did this plaintiff from the 50's determine that the injury was caused by the workplace. If the plaintiff is still in the workplace, and today a doctor says: your cancer is caused by x chemical, then yes, I would toll until that discovery period, because the plaintiff has not done anything wrong. The plaintiff has gone to work, has been exposed, has been injured by the explosion.

OWEN: In my hypothetical, the plaintiff learns at the same time the studies come out. They are published on the news, and the plaintiff learns simultaneously with the scientific establishment that these types of cancers that occurred in the 50's that he had were caused by occupational exposure. Now do you toll limitations there or not?

BARNES: Yes, I would.

OWEN: Why?

BARNES: Because again, the plaintiff has done nothing wrong. And to hold the plaintiff to a standard it would not allow the plaintiffs to file at that time. It would require workers such as Jeffrey Steel and his wife Kendra to have the scientific evidence in his case of oncology.

OWEN: So you basically say, we toll limitations until the scientific community can catch up, and tell us what the causation is?

BARNES: Yes, I would. And I would again, because based on these facts, the Steel's had done nothing wrong. As Dr. Teitelbaum noted in his affidavit, Jeffrey Steel was a regular _____ at work. And his regular appearance at work is indeed what caused him to have such massive exposure. The causation in this case follows a long line of cases handled by this court in the past few years since *Robinson*.

I think that it is important to view the affidavits in comparison. Dr. Teitelbaum's affidavit established several things: 1) that there were specific environmental hazards encountered by Jeffrey Steel. He identified the hazards encountered by Mr. Steel at work. Mr. Steel, himself, talked about how in his work situation he was often almost immersed in radioactive chemical.

Now he has listed specific authorities for his conclusion on his affidavit. So we have training, we have experience, we have knowledge of an expert witness. So the only thing that would be left would be methodology. And the methodology followed by Dr. Teitelbaum is the methodology followed by occupational toxicologists, which he is by profession. He is not someone who was hired to write a report for a lawsuit. This is what Dr. Teitelbaum does.

BAKER: There's some argument that your doctor's affidavit doesn't exclude any other source for the onset of the brain tumor; and that he only focuses on attempting to make a link between the workplace and Mr. Steel's disease. Is that part of your burden if we accept the burden of production to link those two things?

BARNES: Under summary judgment our burden is to raise a material fact issue to avoid summary judgment.

BAKER: Would that then include a showing that other sources are excluded vis-a-vis Mr. Steel then?

BARNES: One of the most difficult things in law is to prove a negative. And while it is possible that that might be the case, if we look then at Stanley Pier's affidavit, the Ph.D. expert hired by Rhone-Poulenc as its expert witness, that affidavit makes a global conclusory statement about: well it could have been cigarettes or it could have been any number of things.

BAKER: I'm not trying to say that what their expert said does or doesn't controvert what your expert said. But under the posture of this case and what happened, and you agreed with it, you would produce, how much do you have to produce to raise a fact question in negating of other sources in this particular case to show causation?

BARNES: That's the problem with all of these cases with the scientific causation.

BAKER: But we don't have that problem in silicosis or asbestosis anymore because

other sources when you have workplace exposure are excluded, and the scientific community agrees on that. But do we have the methodology of a scientific community agreeing that because these facts occur there's no other source for this brain tumor?

BARNES: It goes to the level of the burden of proof as well. Looking at this chart if we have to go to a causal link conclusively proven to get beyond summary judgment...

BAKER: Well then you might as well stop the case there and just prove up damages.

BARNES: Conclusively proving something sounds more like the _____ burden of beyond a reasonable doubt. And what a doctor must do here is establish that there is a genuine material fact issue: Is it possible that Jeffrey Steel's exposure to the radioactive material at Rhone-Poulenc was the cause of his brain tumor? And once that is done, then the case should move forward.

OWEN: Would your expert have given the same affidavit within the two-year limitations period? What in the record is there about the advancements of science's knowledge _____ between the running of limitations and the time the lawsuit was filed?

BARNES: You're talking about if the discovery rule does not apply here?

OWEN: No, I'm talking about whether it applies. You're saying that well I am entitled to wait until the scientific evidence catches up so I can realize what caused my injury. What evidence is there that had this plaintiff been diligent and gone to the books or consulted your own expert, that he would have been told: Your brain cancer is probably caused by your occupational exposure, and that he would have been told this within the limitations period?

BARNES: I don't believe there is anything in the record. All that is in the record is that we know that Jeffrey Steel was diagnosed by a medical doctor with having a brain tumor.

OWEN: What makes his injury inherently undiscoverable?

BARNES: Because he went to a doctor and his doctor did not tell him at that time.

OWEN: Is there evidence that no doctor could have told him at that time that it was related to his occupation?

BARNES: There is nothing in the record that indicates that.

BAKER: In your brief, you say that your doctor's affidavit should be upheld because it was common knowledge that working in places where there is radioactivity causes cancer. If it was common knowledge isn't it also common knowledge to Mr. Steel that he should have made a

contact between the diagnosis in October, 1989, and his workplace, since he knew that he was working with radioactive materials?

BARNES: That is always open to question about what intellectual level any given plaintiff may possess.

BAKER: Well common knowledge doesn't basically involve intellect. It involves what people know generally, doesn't it?

BARNES: It does indeed involve what people generally know. And perhaps, I misspoke by saying that. Perhaps it would be better said that the hazards of radioactivity may be generally known. But what is not commonly known is the specific link to occupational workers, which again is not in the record. So it becomes a fact issue though whether Jeffrey Steel should have known of the occupational nature of his injury.

HECHT: But before we get to that question, we have to ask: Should people generally know is it generally accepted that this type of work involves the risk of brain cancer just like working around silicon dust involves risk of silicosis and working around asbestos involves the risk of asbestosis. If that risk is not at the same high level doesn't that fail to meet the objective verifiability problem?

BARNES: No, it doesn't. It doesn't because again it is situation specific when the hazard is not as clearly known as it is with asbestosis and silicosis. And that's why in a fact intensive situation such as the Rhone-Poulenc matter, it is a question of fact that should be decided by the jury: whether Jeffrey Steel's conduct was reasonable?

HECHT: Well that is a question of fact that a fact finder would have to decide. But whether causation is objectively verifiable is not a question of fact except that it must be in forum(?) letter(?) facts; is that true or not?

BARNES: It must be objectively verifiable in some manner. But in this case, it would have to be a scientist - a doctor or someone with special knowledge.

BAKER: Then your common knowledge comments in your brief have to do with the scientific environment and not the worker environment knowledge?

BARNES: That would be a fair interpretation. Again, this is such a fact intensive situation.

BAKER: When I read the record, there seems to be a clear gap on both sides of what happened if anything from October 1989 to Sept. 1990, by Mr. Steel. And you also state in your brief that the diligence is when you found out in 1990 from reading the Brazos Port News, that you

diligently filed your suit. I raise the question of the diligence in the discovery rule is from the time that injury occurred until you knew or should have known rather when you file your suit, would you agree with that?

BARNES: Yes.

BAKER: And so the diligence period in this case is from 1989 to 1990?

BARNES: It's from 1989 until Kenda Steel became aware and she filed suit within 2 years - technically it was slightly over because the deadline fell on the weekend.

BAKER: Do you agree with my statement that the diligence that the court must look at is what happened between the time you discover you have an injury and the time that you discover where it comes from? What I am referring to is the factual situation in *Childs* and *Humble* where one plaintiff learning of a disease took all kinds of efforts to see doctors, but every time he went they said something different other than this is a latent occupational disease of silicosis. In the other case, the plaintiff did absolutely nothing for a long-period of time. And this record doesn't show one way or the other what if anything was done by Mr. Steel.

BARNES: One distinction in this case though from the *Haussecker* and *Martinez* fact patterns(?) is that in this case, there was a much shorter time-frame.

BAKER: I understand, but that's a crucial time frame wouldn't you agree? If you can't get to Sept. 1990 even if the discovery rule applies, you are too late?

BARNES: Well the brain tumor was diagnosed, but the causation wasn't.

BAKER: I understand. What hypothetically should Mr. & Mrs. Steel do when they find out they have a brain tumor and he knows he's working in a workplace that has radioactive materials?

BARNES: When he discovers that the radioactive materials are perhaps the cause or likely the cause or professed to be the cause of the injury, now it goes from merely an illness of a tumor to an injury caused by some specific act, then at that moment the statute would begin to toll, the cause of action would accrue at that moment.

HANKINSON: In response to Justice Hecht's question, you kept saying that the question of the objective verifiability is fact intensive. And that is one element of our discovery of what we apply to determine if the discovery rule does apply in a particular case.

BARNES: Yes.

HANKINSON: Isn't the question of whether the discovery rule applies a question of law for the court?

BARNES: It is, but at the same time it involves some evidence of the causation.

HANKINSON: And so while it's 'fact intensive' and the court must look at the facts, the court must make a determination as a matter of law whether the two prongs of the discovery rule test in fact had been met?

BARNES: Yes.

HANKINSON: And so that does present a question of law for the court?

BARNES: Yes, the discovery rule of the statute presents a question of law for the court. But again in the circumstance such as this, the objective verifiability hinges on the input from some expert in the field. And that's what Dr. Teitelbaum's affidavit also did - raised a question at least for the court, because the court must make that determination whether it is possible that this injury was caused by radiation in the workplace.

HECHT: We've said it can't just be possible. It has to be a consensus _____, because if it's a question of he said, he said, he said, she said, she said, then that's not objectively verifiable, just a swearing match.

BARNES: That's right. And the swearing match aspect of this, this is a case I think that presents as Justice Gonzalez noted that sometimes it's better for the court to have its own disinterested expert. Justice Brier in his concurrence in *General Electric,* said the same thing. And the New England Journal of Medicine had filed an amicus brief in *General Electric* asking the court to appoint its own disinterested counsel. And this is the kind of file that would be I think ideally suited to this court establishing such a rule much as the courts do now with mediation rather alternative dispute resolutions, the parties could be charged with determining between themselves the technology, and then have a special report. If they cannot do that, the court could appoint a special master as already done in other circumstances. This master could prepare a factual report on the scientific background. And of course, the TC would have the ultimate ruling, but it would be guided by an expert in the field that has no interest in the outcome.

I think when the courts are freed from that, particularly for example: I think the Brazoria court is a good example of why this would be an effective plan. Brazoria's district court hears divorce, criminal, civil, and probate sometimes. So it has a wide variety. If that court could rely on a disinterested expert witness report when these sorts of issues are presented, I think that would promote not only the efficiency of the court system, but the effectiveness.

The TC would be freed from the courtroom battles which we have all seen on

these discovery issues dealing with whether an expert is qualified, and whether the expert has followed an accepted plan of action.

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REBUTTAL

LAWYER: Let me just be clear about one thing. If you read the record in the TC in this case, it's very clear that the parties and the TC treated these case management orders as if they shifted the burden of proof to the plaintiff to prove causation. So I would say the answer to what CJ Phillips said, is the order on its face doesn't say 'burden of production verses burden of persuasion.' It does say, that the plaintiff has to come forward with the opinion of a medical doctor based on reasonable degree of medical probability, which is of course, the no evidence language out of *Havener*. And it does say that he has to show that it's a substantial contributing cause and give the basis of its opinion. It doesn't say whether it's talking about the burden of persuasion or the burden of production. But the parties if you read Rhone-Poulenc's motion for summary judgment and their response, (and don't forget that the court granted summary judgment on the Gregory Steel claims solely on the basis of causation; and there's not an affidavit from our side that says: let me come in and conclusively show you there is not causation) so the TC obviously read his order as putting the burden of proof on the plaintiff.

HECHT: But he probably couldn't do that over their objection?

LAWYER: But they didn't object. These were two agreed case management orders. They signed them.

OWEN: But that doesn't mean that you agreed to produce something in discovery that you agree that you assume a summary judgment burden?

LAWYER: That's what I'm getting to is what is the proper interpretation of the order. And my argument to the court is that the proper interpretation of the order, take the face of the order and read it in the context of the record below, and I think you will come to the conclusion that the parties and the court understood this to shift the burden of persuasion on the summary judgment to the plaintiff.

See, this plaintiff sued 90 defendants, and the judge was trying to deal with the fact that he had sued 90 defendants. It was anybody that ever had anything to do with this plant. The judge said in this agreed order, again that they agreed to, and ordered them to come forward with this proof of causation. And then Rhone-Poulenc files its motion for summary judgment and says: Okay, you told them to come forward and prove the causation, then Dr. Teitelbaum's affidavit is no good under *Daubert and Robinson*, it's legally insufficient evidence.

OWEN: He filed a motion to strike that affidavit. What happened to that motion?

LAWYER: The motion was not ruled on. There is not a ruling on that motion.

OWEN: In your summary judgment reply, did you anywhere object to the use of the affidavit independently of your motion to strike?

LAWYER: In the first motion for summary judgment, which we explain in our reply brief as a live motion, the trial judge granted both of our motions. He reserved a ruling on the first one, granted our plural motions. We urged that Teitlebaum's opinion was no good, legally insufficient evidence under *Havener* and *Daubert*.

BAKER: Your first motion they just put a letter in and didn't they have an affidavit by the time your second motion was on file...

LAWYER: They did...

BAKER: So doesn't that make things kind of different between the two motions?

LAWYER: But the second motion reurged the grounds of the first motion. So the second motion, we cited that in our reply brief, would be reurging the complaint about *Daubert* and *Robinson*. If I can just touch on that briefly. The plaintiff talks about *G.E. v. Joiner*. I hope you all read *G.E. v. Joiner*. I know you have because it's cited extensively in the *Gammel* case. If you look at Teitlebaum's opinion in this case and compare it to what the US SC wrote about Dr. Teitelbaum's opinion in that case, it suffers from precisely the same defects. There, Dr. Teitelbaum said, that the plaintiff's workplace exposure to PCV has caused his lung cancer. Here, he says the plaintiff's workplace exposure to radiation caused his brain cancer. The SC pointed out he leapt to the conclusion without eliminating other factors. He relied on animal studies without explaining how you could extrapolate to animal studies. He relied on irrelevant studies. He relied on studies that reach the opposite conclusion. All of these are exactly what's wrong with his opinion in our case.

HANKINSON: But in *Joiner*, the SC was determining whether the appropriate standard of review was in reviewing a TC's decision under 702 to exclude evidence. And the determination was made that the court did not abuse its discretion excluding the evidence. How procedurally does that tie in with where we are in terms of this unusual posture with the scheduling order and a summary judgment motion is _____?

LAWYER: You're absolutely right. But of course in *Havener*, the court wrote that the *Robinson* factors on admissibility also go to no evidence. And procedurally how it ties in is that we complained in our motion for summary judgment that the affidavit was no evidence...

BAKER: But you don't have the benefit of Part I when you filed your motion in this case. And it seems to me your argument is, that we ought to have the benefit of it, and this is a no evidence case, and therefore, we win?

LAWYER: Well that's exactly right.

BAKER: And you win because of the case management order?

LAWYER: That's right - two case management orders.

BAKER: So your view is that the plaintiff had to prove and in the context of a summary judgment conclusively that causation was there, and they couldn't do it so they lose?

LAWYER: He had to come forward with at least legally sufficient evidence to raise a fact issue on causation. That's what this order requires him to do, to come forward with medical opinion based on reasonable probability and show how it's supported, and that's what they didn't do. That's why we think we should prevail.

ENOCH: I have a question. This goes back to what I was asking early on. I'm not really interested in the TC reversing the burden of proof and that sort of the thing. The question is, how does one who wants to take the benefit of the discovery rule exception to the running of the statute of limitations establish the prong of objectively verifiable? Do we have any sufficient evidence? Do we have disputed evidence? It seems to me you argue that to get objectively verifiable, the plaintiff must conclusively establish a causal link. But assuming you had the burden of proof, you would take the position that we could conclusively conclude _____. But we're not on the merits. We are simply talking about can I get past the standard summary in a statute of limitations defense, not on the merits, does there need to be anything further on objectively verifiable than in a latent occupational disease case where there is a question of whether or not this injury was caused by occupation. Does it take anything more than simply someone who's versed in expertise in that science to come forward and say: there is a link? Does it take anything more to get to the second prong of this is an objectively verifiable injury?

LAWYER: Yes. I think it takes a lot more. If you're going to attempt to establish for summary judgment purposes as a defendant, forget the shifting of the burden of proof, to negate the discovery rule, then you would have to demonstrate that it met that there was no objective verifiability - negate objective verifiability as that standard as set forth in *S.V.*

ENOCH: But I'm talking about the plaintiff. The plaintiff has to show the applicability ultimately of the discovery rule?

LAWYER: Right. But on summary judgment before the new summary judgment rule...

ENOCH: I'm not talking about anything the defendant has to do. If the defendant is going to win, the defendant is going to have to conclusively prove that isn't the case. I'm going the other way. What does it take for the plaintiff to get over the threshold that my injury was objectively verifiable in a case where it is contested whether there is a causal link?

LAWYER: At trial? I think on summary judgment it wouldn't be the plaintiff's burden under the old summary judgment rule, because the defendant would have to...

ENOCH: Then what does it take to raise a fact issue on that issue?

LAWYER: To raise a fact issue, you would at least have to have legally sufficient evidence of the causal link. Because, otherwise, there couldn't be a dispute for the jury to decide. They couldn't even get up to a dispute between experts on the swearing match, which under *S.V.* isn't even enough. You have to get up to scientific expert consensus. So I think if the defendant was trying to demonstrate on summary judgment that it was conclusively established that it's not objectively verifiable, I would have had to come in with an affidavit and say: Look, there is no scientific expert consensus that brain cancer can be caused by radiation. None. These people are never going to meet _____. I can negate that. And the reason I think I didn't have to do that here, is because I stand on the shifting burden of proof and I say, he was supposed to prove legally sufficient evidence of a causal link, which is the fundamental building block. If you don't have legally sufficient evidence, you can't possible get up to expert scientific consensus. And if his evidence was legally insufficient under this court's decisions in *Havener* and *Robinson*, and accordingly on that basis alone, objective verifiability is negated.

ABBOTT: And you're saying that Dr. Teitelbaum doesn't get them on board at all?

LAWYER: Dr. Teitelbaum cannot possibly get to the green legally sufficient evidence of a causal link under this court's decisions in *Havener.*

ABBOTT: Leaving that point aside, I want you to help make sense for me and in congruity in your position, and that is it seems as though the outcome of your position would be that if you can prove in _____ through say scientific expert consensus on a causal link, then you can benefit from the discovery rule and you don't have to file your claim right away. If, however, you cannot prove your claim, then you don't get the benefit of the discovery rule and you do have to file your lawsuit right away.

LAWYER: Well except that if you have to sue timely and you don't get the benefit of the discovery rule, then you get to go to the jury on lesser levels of proof: the swearing match between experts. You are never going to get to the jury at all as a plaintiff if you can't prove legally sufficient evidence. But under *S.V.*, you can get to the jury on the swearing match, you don't have to get up to a higher level of proof of the scientific expert consensus if you sue quicker. But if you want the benefit of the discovery rule, then by gosh you better have very strong proof and you better be able to meet the scientific expert consensus. That's the way I read *S.V.*