

## **SPRING 2013 NEWSLETTER**

### **PREMISES LIABILITY LITIGATION UPDATE**

**By Gerald B. Lotzer**

***Dow Chem. Co. v. Abutahoun*, No. 05-11-01277-CV, (Tex.App. – Dallas, Feb. 28, 2011), 2013 Tex. App. Lexis 1265.**

Plaintiffs filed suit against multiple defendants, including the Dow Chemical Company, following the death of Robert Wayne Henderson alleging that Mr. Henderson's death was caused by exposure to asbestos products and asbestos-containing dust from various sources, including Dow's Freeport, Texas facility. Mr. Henderson (now deceased) had performed work at the Freeport facility while employed by a Dow contractor, Win-Way Industries, Inc. Dow's own employees worked just a few feet away, tearing off old pipe insulation and insulating pipes. Mr. Henderson had testified that the Dow employees were doing the "same kind of work" Win-Way employees were doing. Plaintiffs asserted claims against Dow under theories of premises liability, negligence, gross negligence, and conspiracy. Specifically, Plaintiffs asserted that Dow failed to keep its premises in a reasonably safe condition and failed to warn Mr. Henderson of "dangerous ongoing activities, namely the use, application, and clean-up and removal of asbestos containing products."

Dow filed its Motion for Summary Judgment taking the position that the premises owner is not liable for injuries sustained by an independent contractor's employee as a result of failing to provide a safe workplace in an action arising from the condition or use of an improved real property where the contractor constructs, repairs, renovates, or modifies the improvement, unless the owner exercised *control* over the contractor's work and had *actual knowledge* of the dangerous condition.

The decision turned on the pertinent provision of Chapter 95, Subsection 95.003, that a "property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from a failure to provide a safe workplace unless the owner exercised *control* over the contractor's work and had *actual knowledge* of the dangerous condition." (Emphasis added.)

The MDL pre-trial Court granted summary judgment in favor of Dow as to Plaintiff's claims that Mr. Henderson "was injured by exposure to respirable asbestos as a result of the activities of Mr. Henderson and/or the activities of other employees of Mr. Henderson's employer on the premises of Dow. They denied Dow's summary judgment motion as to all other claims against it, including that Mr. Henderson was injured by virtue of the activities of Dow employees. A trial was held on the remaining claims and the jury returned a verdict in which it found Dow negligent and attributed 35% of the responsibility for Mr. Henderson's injuries to Dow. Based on the verdict, after applying several adjustments, the trial court rendered judgment

against Dow in the amount of \$2.64 million dollars plus interest and court costs.

On appeal, Dow asserted 4 issues. First, Dow contends that Chapter 95 does not distinguish between the property owner's liability for exposures caused by activities of contractors and their employees on the one hand, and exposure caused from its own employees' activities on the other. Dow therefore asserted that Chapter 95 applies to all of Appellee's claims against Dow. Secondly, Dow contended that even if Chapter 95 does not bar all of Plaintiff's claims, the evidence of a "substantial-factor causation", resulting from the activities of Dow's employees, is not legally or factually sufficient, and/or the evidence was legally and factually insufficient to support the amounts awarded by the jury to the Plaintiffs, and that the closing arguments of Plaintiff's counsel were improper and incurable. The Court decided in favor of Dow on its first issue and therefore did not address the remaining issues. It reversed the trial court's judgment and rendered a Take Nothing Judgment in favor of Dow.