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E.I. DUPONT

SMITH: In the history of American jurisprudence no litigation has consumed more litigant time, involved more parties or monopolized more judicial resources than asbestos litigation. And that is true especially of this state, which until very recently was recognized by the US SC as having constituted itself the world's forum of last resort in asbestos litigation.

In 1997 though the Texas legislature knowing of that addressed the issue and passed a statute. The statute that will be the basis primarily of our discussions today is §71.052 of the Tex. Civ. Pract. & Rem Code.

In our discussions about the statute and about its applications to DuPont, I would hope that we would touch on three issues. First of all, does the statute mandate dismissal of the claims against DuPont? Secondly, are post trial appeals adequate to address the statute's dismissal right? And then finally, have the plaintiffs somehow proved any affirmative impediment other than the two traditional mandamus prongs to the grant of mandamus in this case?

I would suggest that the answer to the first question is yes. §71.052 does indeed mandate dismissal of the claims against DuPont. Quite simply because the statute in its plain terms states four requirements and when those four requirements are met, those being that the claim involves asbestos exposure, that the claim arose out of state, that it arose to a plaintiff who resided out of state when the claim arose, and that it arose within the proper window of time dismissal is mandated. There is no TC discretion in the statute. So recognize this is not the general permissive forum non conveniens statute that we discuss today. It is a mandatory statute.

HANKINSON: Is the burden upon the defendant to show that all requirements have been met under the statute before being entitled to dismissal?

SMITH: Yes. I believe it would be as far as those four elements.

HANKINSON: Aren't there some plaintiffs that are included in this group that were Texas residents at the time the claim arose?

SMITH: There are as we calculated 34 claimants out of more than 8,000 who at some time in their working life were Texas residents. The first observation is as to all but those 34. Clearly, indisputably, I don't think there is a dispute in this case that the four elements of the statute were met. As to those 34, first of all, the statute itself provides a mechanism for determining where and when the claim arose. In subpart (h) it states, that when a defendant's exposure is in more than one state, that you look to the predominant exposures.

HANKINSON: My point in asking the question is this. If it's the burden of the defendant to show that all requirements are met, is there any dispute as to all 8,000 plaintiffs that you claim should have their claims dismissed against DuPont with respect to the proof of those elements?

SMITH: The plaintiffs have not raised a dispute with respect to the proof of those four elements.

HANKINSON: Well I understand from the briefing that there are allegations that there are as you say something like 34 plaintiffs for whom DuPont has not met the requirement to show that all of these things are met. And I'm just trying to ascertain if you prevail or not, do you prevail entirely or is there a dispute as to any of these plaintiffs as to whether or not their claim should be dismissed because there is some question about whether they were Texas residents or not?

SMITH: First of all, as to the 8,000 or so plaintiffs who never, ever lived in Texas their claims or the dismissal right as to those is not held hostage by the other 34. And then secondly, as to the other 34, DuPont believes that the record establishes the factors that would mandate even given if they had some brief Texas residence that the TC determine that the claims overall arose out of state.

HANKINSON: Have we ever had a determination by the TC on that issue?

SMITH: No, we have not.

HANKINSON: So wouldn't it be appropriate for the TC even if we rule in your favor with respect to interpreting the statute to determine which of these 8,000 claims would be subject to dismissal?

SMITH: I believe the answer to that is that at the time that the hearing concluded, and the TC made its decision, closed the record, closed the evidence, there was no controverting evidence. There was no controversy because the plaintiff...

HANKINSON: But that's why my first question to you was, wasn't it incumbent upon DuPont in the first instance to prove the requirements of the statute?

SMITH: DuPont, we believe, made a prima facie showing of everyone of those requirements even as to the 34.

HANKINSON: So you don't think that there are any Texas residents that are included in the brief?

SMITH: No, I do not think so. As to the availability of mandamus, the adequacy of the appeal right or not, the important issues here are, the most important of all, is that the statute itself, its purpose is a docket clearing mechanism. And that that purpose cannot be served at all if

this court allows the TC's refusal to dismiss to percolate through the system until final appeal. And even that though, we're held hostage to the fact that this issue as to DuPont if it is not decided today, if it's not decided through mandamus may well evade a review. You find that in this case the plaintiffs have thus far refused to take DuPont to a trial. Several small trial groups have occurred, but DuPont has been nonsuited or severed at least from everyone of those trial groups. So as yet, DuPont has not been brought to trial, but yet, DuPont has been forced to suffer all the burdens of pretrial discovery...

HANKINSON: One of your arguments related to why there is no adequate remedy on appeal is that you take the position that §71.052 is a subject matter jurisdiction provision as opposed to triggering any other type of issue. And on that basis say that because the TC acted outside its jurisdiction it should be mandamused. On what do you hang your argument that this is a subject matter jurisdiction provision besides the reference to jurisdiction solely in the title to that section?

SMITH: Primarily as far as the statutory language would be the reference to jurisdiction. But secondarily, would also be the absolute dismissal right that is conferred. We view the statute as being one that states that if these four elements are met, the TC has no ability, no authority to do anything but dismissing this case such that the TC's power is constricted. Now that power...

HANKINSON: But it also - the court has other power though if the plaintiff chooses under subpart (c) to take certain action in order to try to preserve its claim for dismissal. How could the TC act on, for example, the election to abate if it didn't have subject matter jurisdiction?

SMITH: As we understand the statute, the election to abate must occur before the TC's ruling on the dismissal motion. That comes first. If the election occurs, and it's an election to abate or an election to accept the Texas punitive damage cap, then indeed jurisdiction exist in the case.

HANKINSON: Say that again.

SMITH: If the plaintiff makes that election, and that's the problem here, is the plaintiffs refused to make the election.

HANKINSON: If the plaintiff makes the election, then the court obtains subject matter jurisdiction at that point in time.

SMITH: The court's jurisdiction continues. The limitation never rises up _____.

HANKINSON: Then this is not a subject matter jurisdiction as such?

SMITH: I will confess that subject matter may not be the precise word here. The point is primarily to distinguish that I think from a personal jurisdiction in the statute, and clearly this is not a personal jurisdiction issue.

HANKINSON: So you're not hanging your hat on the fact that this is a subject matter jurisdiction?

SMITH: No. I don't believe that we have to go that far. All we have to do as a relator is show that the statute circumscribes the TC's discretion and it certainly does that. And that discretion was circumscribed in this particular case because DuPont proved all four elements. DuPont made the stipulations about use of discovery product and about statute of limitations that this statute imposes on it. And then the plaintiffs were then placed to their election: did they want to abate this case or did they want to accept the punitive damage caps and continue on in Texas? And the plaintiffs indeed chose to do neither. They refused that election. The statute is clear that in that circumstance if the plaintiffs don't make that election there is one choice, and one choice only, and that is that the TC shall dismiss. The TC in this case refused to dismiss. That is the clear violation of law that raises in this case. And I believe it's a violation that cannot actually be contested in this case. The question then is again, is mandamus available?

PHILLIPS: Can you forfeit your right to any relief due to latches or waiver or some failure to action, and if so, how come waiting nearly three years to bring this motion constitute that type of behavior?

SMITH: I find it difficult that latches could apply in this case when the legislature chose - it understood that it could place a time limit on the motion practice and it chose not to do so. It placed a time limit on the permissive forum non conveniens statute, but it didn't here. Now as far waiver arguments go, I would suggest that those arguments first of all were waived in the TC when the plaintiffs themselves never brought forth any waiver argument. They weren't proven in the TC. Certainly the waiver argument or forfeiture argument to apply here the plaintiffs would have to prove that DuPont induced reliance and that DuPont acted inconsistent with its rights and _____ statute. There is no such proof in this record. No such allegation.

ENOCH: But in River City hasn't this court made a determination that we look at the record as a mandamus, and if we look and decide that they haven't filed timely, 3 months, that that's just too late, it's not the emergency that they are claiming it is?

SMITH: This statute doesn't mean that it has to be an emergency. Recognize that this statute, the window that the legislature...

ENOCH: But this is not a standard for the statute. This is a mandamus. So the argument goes can this thing protect on appeal or not. That's when we exercise our jurisdiction making it a mandamus. And you argue, well but the statute is met, so now the dismissal ought to be there. And the question is, should we enter the fray and mandamus? And River City would say, well gosh if you waited three years to argue this maybe this isn't as important to you as you're trying to make us think it is. And so why should we now impose mandamus?

SMITH: I see two questions at play here. One, did we wait too long to exercise our

statutory motion rights? And then two, after that or after the TC's ruling did DuPont wait too long to file a mandamus petition? I will address those in turn. First of all, as to the statutory motion right, recognize that the legislature when it passed this statute applied the motion right to cases that had been in existence for almost two full years at the time the statute was passed. So the legislature recognized in its policy making power that it would apply this docket clearing function even to claims that had existed two years or about in the judicial system even if they were absolutely raised at the first instance. So the legislature saw fit that there wasn't that kind of immediacy.

Second, there is an explanation for why DuPont in this case didn't immediately raise the motion. And that is, that it had special appearance litigation percolating and certainly DuPont didn't want to act inconsistent with its position in a special appearance proceedings. And as soon as those were concluded, DuPont timely filed this motion, I would believe and had it heard.

PHILLIPS: There is no legal impediment. You just thought that would look bad from an appellate strategy?

SMITH: I think that's correct. And secondly, as to the mandamus right, there really isn't any delay as to when DuPont filed the mandamus. Now it's true that this proceeding percolates from two different DCs and the dismissal motion was ruled on in one court about three months earlier than it was ruled on in the second court. DuPont did delay filing mandamus in the first proceeding in an attempt to line the two up. There is no allegation in this case, no suggestion that I know of, whether it be on the record or behind the record, that in those intervening times that somehow the plaintiffs were prejudiced by DuPont's decision about mandamus.

PHILLIPS: What if anything was going on in the TC while your special appearance was pending in the appellate court?

SMITH: In the TC certainly discovery was going on as to the predominant bulk, the other 70 or so defendants at the time, which now had been whittled down to about 20. By and large the discovery as to DuPont was somewhat limited, and then there was certainly no trial as to DuPont because the claims against DuPont were either severed or nonsuited.

HANKINSON: Looking at the statutory interpretation question. I understand that you place your emphasis on the reference to claim in part A of section 71.052. How do you reconcile that with the statutory note which says that that section 2, which was the bill, applies to a civil action that's pending on the effective date of the act, and the legislature's reference is to the application in the statute to impending civil action as opposed to a claim?

SMITH: I see there being overlay there. First of all, the enabling legislation or the reference states that the statute's purpose is to take care of cases that were already in the system. And then secondly, when this legislature addressed the problem through the various statutory language, the legislature chose to address it on a plain claim by claim basis. So I don't see an

inconsistency there.

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RESPONDENT

DORSANIO: The real parties in interest believe that mandamusing dismissal of the plaintiff's claim would actually subvert the statutory scheme as it was revised in 1997. In connection with that central argument, the real parties in interest take the position and contend that the trial judges committed no abuse of discretion, not a clear abuse of discretion, not a super clear abuse of discretion, or any kind of abuse of discretion under the circumstances of the case, which involved DuPont waiting more than 2 years in one case, and approximately 3 years in the other case to file the motion to dismiss on the basis of 71.052.

O'NEILL: Have you claimed any prejudice that you've experienced as a result of that delay?

DORSANIO: Yes. The prejudice that we experienced with respect to the delay is the prejudice of participating in litigation in the TC. Actually there was considerable discovery and arguments about the sufficiency of the pleadings with respect to the plaintiffs and DuPont. DuPont affirmatively sought merits discovery and sought to challenge the plaintiffs pleadings on the basis of special exceptions. And there were hearings conducted. There was considerable litigation during the interim period when no motion for forum non conveniens was dismissed.

O'NEILL: Have you changed your position in anyway as a result of...

DORSANIO: Well one of the things that was not done by the plaintiffs is they didn't seek to go to an alternative forum or to check to see if one was available, which is something that the statute contemplates that plaintiffs might do. And it's something that may have been more possible in the past than now.

O'NEILL: But we don't have anything in the record specifically to that effect. I mean that's a vague notion we have. But you don't have any particular plaintiffs here who you can show failed to make an election and therefore could have brought their suit somewhere else if this had been done earlier by DuPont?

DORSANIO: No. The trial judges denied motions to dismiss.

O'NEILL: But there's nothing before the TC, nothing in the record we could hang out hat on in terms of some sort of tangible prejudice or right that was given over in another forum.

DORSANIO: At the one hearing that was conducted with respect to an oral presentation before Judge Clark, only one of these cases actually had a hearing. The Parsons case. At that one hearing there was a lot of discussion about discovery issues and special exception issues. Now it's

perfectly clear that the trial judge regarded the behavior of DuPont in that context as dilatory.

O'NEILL: But that's not the focus of my question. The focus is - I mean I can see a very compelling argument that if the plaintiffs waited some period of time because no motion was filed, and they lost rights in another jurisdiction as a result and that affected their election right, then I can see a prejudice that would develop. But we don't have any particular evidence of that in this record correct?

DORSANIO: As to what happened in other jurisdictions? No. We do not. We do have evidence in this record that the plaintiffs made agreements with DuPont to abate or stay trial on the merits without having any appreciation that DuPont would subsequently file a motion to dismiss on forum non conveniens grounds. As a last strategy after their special appearance motions were overruled in the TC, the CA concluded that they were subject to general jurisdiction.

O'NEILL: What prejudice did you experience from that separate and apart from any prejudice you experienced as a result of the special appearance being on file?

DORSANIO: I don't think that the - in this context, in this timing, that the special appearance would have stayed trial on the merits in all of these matters. There are a number of various cases and it's a little bit more complicated than an ordinary case where you're talking about one cause number and not a bunch of severed cases out. But aside from that, the parties believed that it was necessary to seek continuances from the trial judge on the basis that some pretrial matters need to be disposed of before it's sensible to proceed. Those pretrial matters were the special appearance motions in the context of waiting to see what happens in appellate courts or in the SC.

BAKER: Isn't that required by the rules?

DORSANIO: The statute and the rules address this at various times that may be pertinent.

BAKER: I'm trying to get along with Justice O'Neill the answer to what prejudice, if any, and you're talking about delays. But then you say the reason for the delay is trying to have the special appearances determined. And so my question is, don't our rules require that if one of those is raised it has to be determined before anything else?

DORSANIO: For trial on the merits. That's what the statute has required for some time. But we're talking about a longer time period than that. We're also talking about cases with different cause numbers that wouldn't have had special appearance motions involved in them.

BAKER: But your clients are the plaintiffs in those cases you are now talking about. Can't they set them for trial and go ahead without regard to what DuPont...

DORSANIO: Unfortunately, they agreed not to do so believing that the special appearance motions, Orange County, is a place where DuPont is the largest employer, that the special appearance

motions would be overruled and we would ultimately get down...

BAKER: Well does that make you a participant in whatever delay?.

DORSANIO: A very unwitting and duped participant.

BAKER: Your people were represented by counsel all the way through this.

DORSANIO: That's right. Let me talk about the statute, and the reason why the statute is crafted the way it is. As this court decided and wrote in Owens Corning v. Carter, the first legislative response to this overall problem was an interesting one in the context of several different classes of cases. A forum non conveniens statute was passed to retract or pull back the Alfaro(?) case to a certain extent in 1993. But significant classes of cases were exempted from the operation of that statute. FELA cases, air transportation cases, as well as asbestos fiber cases. In effect the 1993 legislation, which wasn't materially changed in 1995, told the nonresident plaintiffs that they were invited to come to Texas and to litigate these kinds of claims, and that there wouldn't be any kind of forum non conveniens problem. The legislative history with respect to the 1997 amendments makes that perfectly plain. But by 1997, the legislature believed that much more had happened than was anticipated, and that we had had too many nonresidents who were injured elsewhere accept the invitation to come and litigate in Texas courts. But they come to litigate in Texas courts from the early 90's: 1992, 1995. DuPont being joined in this case in 1996. And had litigated for some considerable period of time before 1997. So the legislature crafted a general forum non conveniens statute that would be applicable more or less across the board, 71.051. And as this court knows modified 71.031 by adding a borrowing provision. And then to fix this problem of people who had been invited to come to Texas and file suits, we have 71.052 enacted. And it's perfectly plain from the legislative history that there was more involved from a policy standpoint than just unclogging Texas dockets. That was certainly one clear aim of the statutory changes, but the other aim was to treat these people who had been invited to come here and who had litigated here for a considerable period of time fairly.

Now treating them fairly meant that they would be looked at in different ways depending upon the duration of time that their cases had been filed. I prepared a small handout, which I believe accurately sets forth the different categories of cases dealt with in the statute, not just 71.052, but 71.051. Prior to Aug. 1, 1995, no forum non conveniens dismissal. This case if we don't argue a relation back doctrine fits within the second category: August 1, 1995 through Jan. 1, 1997. Because DuPont was joined in Orange County and in Jefferson County on Sept. 10, 1996.

BAKER: Are you not going to argue that relation back?

DORSANIO: I'm not going to argue that as my principal argument. I'm going to leave that to the briefs.

The second category is not like the first category or the third. The third

category was the one dealt with principally by this court in Owens Corning v. Carter. People who have filed after Jan 1, 1997. In that third category the court shall dismiss if defendant agrees that limitations are told, discovery can be used in the new state. And as this court held, that may mean that the case could be refiled here. That in a great many circumstances it means it needs to be refiled elsewhere.

In the middle category in order to deal with these plaintiffs fairly, the statute provides a way for the cases to stay in Texas, and it also gives the plaintiffs an opportunity during an abatement period to look around elsewhere to see if there are any alternatives that might be satisfactory alternatives.

If a motion had been filed earlier, as early as could have been done by DuPont, which could have invoked 71.052 as early as May 29, 1997, things would look considerably different in all likelihood to the plaintiffs from the standpoint of what kind of option they would be inclined to exercise.

At any rate, in this case the motion to dismiss was denied

O'NEILL: I don't understand that. Can you explain that to me? If the motion was denied - tell me how the May 29, 1997 - you're saying that's the soonest they could have filed the motion?

DORSANIO: Motion to dismiss for forum non conveniens under 71.052 that's as soon as they could have.

O'NEILL: Are you saying that would then take us into this third category?

DORSANIO: No. They could have filed it - 71.052 became effective 5/29/97.

HANKINSON: What do you mean by the statement that things would have looked a lot differently to the plaintiffs at that point in time on whether they would make an election?

DORSANIO: Well if a motion had been filed earlier, if the statute had been invoked at a time when it could have been invoked...

O'NEILL: Okay. Let's say it was filed the day the statute came into effect. I don't understand what then.

DORSANIO: Then under those circumstances the plaintiffs would have taken a look at the circumstances that were involved in filing the motion and would have made a determination as to how they would respond to it.

O'NEILL: But they could still do that when the motion was filed.

DORSANIO: They could still do that when the motion was filed, but they made an alternative response, which I think the statute also allows, saying that the defendant had waited too long to invoke the statutory mechanism, and had on that basis...

O'NEILL: You just made the statement that if they had filed it as early as possible somehow these columns would be affected. That's what I don't understand.

DORSANIO: No, the columns wouldn't be affected, because the plaintiff still would have sued DuPont in the second category, but DuPont would have filed a motion sooner.

O'NEILL: So how would the analysis be any different?

DORSANIO: If DuPont filed the motion sooner then the plaintiffs would be taking responsive action sooner. That would mean that they wouldn't have engaged in litigating in Texas...

O'NEILL: So we're back to what we were talking about awhile back?

DORSANIO: Yes. And they would have taken a look at the available alternatives at an earlier point in time and been better able to deal with the overall problem of deciding which election they were going to make.

O'NEILL: But again, we don't know that as a concrete specific matter. That's just a vague...

DORSANIO: We don't know that as a concrete specific matter because the trial judge denied DuPont relief because DuPont was too dilatory.

O'NEILL: But we could know that. That's something that's determinable. We could look at specific plaintiffs and what they could have done in other jurisdictions. That's determinable. But it is not determined before us.

DORSANIO: It is theoretically determinable. But it was not determined.

O'NEILL: No, theoretically. I mean you could take a plaintiff and say, because they waited so long they lost the right to file in another jurisdiction. The statute ran.

DORSANIO: Let's assume hypothetically they could file in another jurisdiction against DuPont. In all likelihood there would be complete diversity of citizenship and more than $75,000 in controversy. The case would then be removed. Upon removal it would be transferred to the multidistrict litigation proceeding in Philadelphia, and probably would never be heard from again. And especially in a context of claims for punitive damages, which are the claims under Alabama law that the plaintiffs can make under the Alabama Wrongful Death statute where you only get punitive damages.

BAKER: If the date that you suggest DuPont should have filed was May 1997, had the trial court determined their special appearances by that time?

DORSANIO: I don't know if the trial judge had determined the special appearances at that time, but the special appearances were determined in the TC long before. I think that they may have been determined by that time, but I don't have the specific recollection. It was long before...

BAKER: Your theory, they would not have waived their special appearance?

DORSANIO: There is no inconsistency, no waiver here. This is just a choice to wait until one thing is finished before doing something else. The legislature intended to unclog the system for sure and 71.052 is a work in progress in many respects. The first SB 220 talked about abating these cases, all of them, except in certain circumstances where somebody had been diagnosed with mesothelioma for one year giving the plaintiffs a chance to go elsewhere, saying that the defendant needs to make a motion to dismiss by some time in 1998. That dropped out of the picture when the statutory scheme changed to dividing cases up into pre-August 1, 1985 and then the middle category, and then the third category. But clearly the legislature contemplated that these motions would be made early. We would have 180 day abatement period possibly while the plaintiff looked around. And then the case would be gone if it left. And then we would have the opportunity for the plaintiff to elect to abide by the Texas cap, and have the matter stay here.

All of that was delayed in the first place by the action of DuPont. And because the trial judge ruled in the plaintiff's favor because the dilatory character of DuPont's activity in all likelihood from the standpoint of what the record shows happened at the hearing, all of this becomes put off, truncated, delayed.

The statute right now, 71.052 doesn't say when the defendant needs to move to dismiss. It doesn't say when the plaintiff needs to make the stipulations. It seems to have been assumed by the legislature that this would all kind of have happened pretty soon after the statute was passed. But it didn't in this case. The normal rule for dilatory pleas, whether it's called a plea in abatement or any other kind of dilatory plea in this jurisdiction, although we don't have a procedural rule that says anything about _____ water or timing is that they will be asserted promptly. There are several cases in our jurisprudence where that didn't happen, and the CAs have concluded that there would be no ability to litigate the plea in abatement, because too much time had passed.

Just two examples that I have cited in our briefing is one involving Charles Ben Howell and Justice Mauzy, 899 S.W.2d. Another one is out of the 1st CA, Blue Bonnet Farms v. Gibralter Savings. Both of those cases say, it is Texas law that you need to not sit on your rights, but you need to proceed to litigate dilatory pleas promptly.

I want to talk about adequacy of remedy, which I do think fits into this quite well. This court has grappled with this issue and decided several cases over the years that have said, even if it is a plea to the jurisdiction, the remedy of appeal, the remedy at law is adequate. It doesn't

matter that the defendant has to sit there through a longer trial. But there's probably a better argument in this case from the standpoint of the plaintiffs, is that the harm that the legislature identified with respect to these middle category cases is not that they would proceed in Texas, but that they would proceed in Texas without the Texas cap. And that harm, if any, can clearly be remedied on appeal before a judgment or at any time.

If it comes to it, the plaintiffs will elect the Texas cap. The Alabama plaintiffs will elect the Texas cap if it comes to it. If they must do so.

O'NEILL: Well they can no longer do that can they?

DORSANIO: The statute has no time requirements on any of this. The argument that DuPont makes that somehow conditional jurisdiction vanishes never to be resurrected has no foundation in the statute or anywhere else that I can discern.

BAKER: Can we take your statement as a rule 11 agreement?

DORSANIO: You can take my statement as a...

BAKER: Can DuPont take it as a rule 11 agreement on behalf of the 8,000 plaintiffs you represent?

DORSANIO: No. It may well be that some of the plaintiffs won't want to do this.

BAKER: Then maybe you better withdraw that statement.

DORSANIO: I don't want to withdraw it. The plaintiffs, a considerable number of them will, but it will put some of them at more risk than others. And they may decide not to do it.

HANKINSON: You mentioned that the harm that the statute was trying to avoid was going forward without the statutory cap on punitive damages. Is there any reference in the legislative history to that?

DORSANIO: There is considerable talk about that.

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REBUTTAL

HANKINSON: Do you agree with Prof. Dorsanio that if you get to wait to file your motion to dismiss that the plaintiffs can wait then to file their election?

SMITH: No. I do not.

HANKINSON: Why not?

SMITH: I believe the statute - in not the clearest words - but I believe the statute itself provides for the sequence(?) that DuPont contemplates. In subpart (c) of the statute states, the court on motion of a defendant shall dismiss each claim against the defendant that meets the statute. Then it says, unless the plaintiff files a written statement electing to abate the plaintiff's claim...

HANKINSON: But if there's no time limit for you, there's no time limit for them. Would you respond to his argument?

SMITH: Continuing on there. For a period of 180 days from the date the court disposes of the defendant's motion. I believe that that states the plaintiff has to elect before there's a disposition of the motion to...

HANKINSON: But there's an or that comes after that. 180 days is only in subpart (1).

SMITH: I still think that the statute if you read it reasonably has only one conclusion and, that is, the plaintiff has to elect before the TC decides what to do with the claims against the defendant. That's the only sensible reading of the statute.

ENOCH: I thought the plaintiff got 180 days after the court decides what it's going to do?

SMITH: No. I don't believe that that's the case, because first of all the TC wouldn't know whether it was required to dismiss or not.

ENOCH: Here's a motion to dismiss, and the TC comes up and they are required to say, well give us 180 days to look around before they know whether the TC thinks the motion is good.

SMITH: That's their burden in responding to the motion.

ENOCH: They have to kind of guess what the judge is going to do. Why couldn't the judge say, you know I think their motion is good. And say, okay it's 180 days to go look around and see what we're going to do. Why couldn't they?

SMITH: There's really no guess work as to what the TC, if it's a TC that follows the law, what it will do. If the four elements are proven in this case there has to be a dismissal unless the plaintiff elects. And the plaintiffs are not put to a quandary at all. The plaintiff's choice is either elect to abate the case and go refile somewhere else or accept the Texas punitive damage caps, or in this case, do nothing and allow its case to be dismissed in Texas.

HANKINSON: This case hasn't been dismissed yet, so why can't they do it?

SMITH: This case should have been dismissed.

HANKINSON: But it hasn't been. Your opponents raise an argument that if we're going to let you all have as much time as you want, and you can say there's no time requirement in the statute, that we see no time requirement for the plaintiff to make an election before dismissal to avoid this. And I'm interested in what your response to that is.

SMITH: I suppose that would be _____. That contemplates that the TC would be required - if the TC follows what the statute says, at the time the TC sits down to rule in this case or any other case like it where the plaintiff chooses not to elect in response to the motion the TC at that stage is required to dismiss the cause. If the TC follows the statute, the plaintiff is not going to have a claim left on which to elect.

ENOCH: You say it's an abuse of discretion. You file a motion that alleges the four elements. Now is the court required to dismiss at that point?

SMITH: If we prove the four elements at hearing.

ENOCH: So you file a motion. Now there's a hearing. And on the hearing you provide evidence on the four elements. Some of it's disputed. Some of it's not disputed. At that point, is the plaintiff permitted to file the election, or is it too late to file the election at the conclusion of the evidence of the defendant's case?

SMITH: I have no problem with the plaintiff filing a motion at that juncture before there is a ruling on the motion. But when the motion is ruled on there is no longer a claim and there's no longer anything with which to exercise the election right.

ENOCH: If the TC makes an oral ruling from the bench, that's when it's too late to file the election?

SMITH: Every position has its breaking point. I'm not sure that I would parse hairs between oral rulings and written orders. But the point is, in this case there was clearly a definitive ruling by the TC, orally and then in writing, and the plaintiffs if they chose which to elect, they were at their own peril if they didn't elect before the TC ruled.

HANKINSON: Why did they have to elect if the TC said, I'm not going to dismiss? If orally from the bench the judge says, I'm not dismissing, then the election would never be in play. If you're saying that the trial judge can sit there and say, plaintiffs I think I'm going to grant this motion, I'm going to dismiss. Then the plaintiff jumps out and says, judge I make an election, then it would be okay. But we've never got to that point in this case.

SMITH: Another problem I have with that position is, that that would presume that a plaintiff could go ahead and try the case on its merits with conclusion, and then see what result that

they liked, and then decide well I think I will go ahead and abate the case since I didn't win in Texas and file somewhere else. I just think it's an unworkable position. It's not something that's provided for in the statute. And this statute by the way does not contain any exception for plaintiffs that Mr. Dorsano purports. The statute is plain and clear on its merits.

ENOCH: The TC didn't dismiss. The CA didn't dismiss. And we've made no representation one way or the other about our decision. Can Mr. Dorsanio go out now and file an election to take the damage caps, and if he does so, what do we do?

SMITH: My initial response would still be as consistently with what I've stated before, and that's at the time the TC rules the period for making an election is over.

ENOCH: Even if the TC denies it?

SMITH: This court is being asked to determine whether this TC when it ruled in 2000 rules consonant with this statute, and if it did or didn't do that, whether this court should grant mandamus. The question is not what a TC...

ENOCH: Assume everything you say is correct, that the TC never indicated any intention about granting the dismissal. At what point would the plaintiff have known that they must exercise the election? Because you filed a dismissal are they required to do the election not knowing what the TC would do, or after they hear your evidence are they then required to evaluate themselves on whether it's good or not and then file the election? Or what really happens is, the TC says, I'm fixing to dismiss, then they have to either elect or they suffer the dismissal. Isn't that how the statute works? The TC says, look. It's good. I'm going to dismiss and they've got to exercise their election at that point. Isn't that really how the statute works?

SMITH: I respectfully have to disagree. I believe the statute is contemplated to work such that the defendant files the motion and defendant goes on the record as invoking the power of the statute. And then the plaintiff based on that and that alone is put to the choice, based on all the circumstances of the litigation, do I want to elect to abate this case or do I want to elect to embrace the punitive damage caps, or do I just want to waive that, forgo that, refuse that, and take my chances. And the plaintiff is put to that election at the outset based on the filing of the motion, not based on hypothesizing what the TC will rule, or is this a TC that obeys the law or doesn't obey the law. The law was clear, and these plaintiffs chose not to exercise their rights.