ORAL ARGUMENT – 10/20/03
02-1008
STORAGE & PROCESSORS V. REYES

BRIM: Promote certainty and uniformity in the law, reduce ambiguity, reduce the need for satellite litigation, all of these are phrases that this court has used to describe the aims of the express negligence doctrine. Unfortunately, the opinion issued out of the Texarkana CA in this case effectively thwarts each and every of those aims.

The single issue that we're going to struggle with this morning is to what extent risk shifting has to occur in order to trigger the application of the express negligence doctrine? The petitioner's position throughout this litigation has been consistent with the position taken by this court since the doctrine's inception in 1987, that it requires complete shifting of risk from one side to another on a transaction.

The court has couched its original holdings in terms of extraordinary risk shifting. But the practical effect in each case that the court has considered has been a complete shifting from one side to the other.

The Texarkana CA has taken an approach 180 degrees the opposite. Under the Texarkana's court approach, any degree of risk shifting, variously referred to as some degree, but in essence any degree, is sufficient to trigger application of the doctrine. The risk that we run if the doctrine is triggered and that's inconsistent with the intent of the contracting party, somebody in that equation is not going to get the benefit of their bargain. And that's an issue that we need to consider.

The Texarkana court gets to its position by using this court's opinion in Lawrence as a springboard. In essence Texarkana implicitly takes the position that in Lawrence this court effectively expanded the express negligence doctrine without necessarily coming out and saying so. That's contrary to what the court has done in connection with this doctrine historically. Every time a move has been made to expand the doctrine, which has only occurred once in terms of moving the doctrine from application only to indemnity provisions to releases, which that's been the only expansion, when it has done that, when it has restricted the doctrine, it has come forth and specifically stated what it was doing.

We have not been confronted with a situation where this court attempted to mask what it was up to. This court is very good about coming out and saying if we're going to change the law, this is what the law is now going to be and this is why we're going to change it, and these are the standards that we're going to follow. There was no announcement like that in Lawrence.

Additionally, if you take a look at the court's analysis in the Lawrence opinion, this court comes out and flatly says benefit plans, the type that we're litigating in this case,

do not involve risk shifting. If this court was intending in Lawrence to change the fundamental nature of the express negligence doctrine, I do not believe this court would have made that observation that the very agreement that was being litigated in Lawrence, which is the same type of agreement that we have here, was not even risk shifting. Risk shifting is at the core of the express negligence doctrine.

OWEN: Has the legislature done anything in this area since our decision in Lawrence?

BRIM: The only thing the legislature has done is they have come back and amended the Texas Worker's Comp Act, and they have effectively invalidated these pre-injury waivers that exist under these types of plans. The problem is the Texarkana CA's opinion is not restricted to worker's compensation cases. They paint with a very broad brush. Their holding in this case could be applied, not only in the worker's comp context, but in any commercial context, and in any personal injury type context.

One of the biggest distinguishing features between the plan that we're talking about here and the various agreements that the courts have looked at, dating back to the Ethel case, Dresser and their progeny is, basically what are the party's respective positions? Under a traditional express negligence analysis one party was accepting complete liability for a transaction. There's a complete shift of risk from one side to the other.

The plan that we're talking about here, just like the plan that this court looked at in the Lawrence case, essentially sets up a no fault remedial scheme to provide benefits to injured employees. It sets up a scheme where the employee in exchange for limited benefits is able to come forward, obtain those benefits from his employer, who if a nonsubscriber is not obligated to provide those benefits, and at the same time assures himself of receiving benefits in a timely manner, and he knows what the benefits are going to be.

Now in Dresser this court defined specifically the types of releases it was concerned with. And again this is consistent with what we have said up to this point, that a release is to relieve a party of their responsibility, hold the other party completely without responsibility, exonerate a party from liability. There are these types of extreme situations that the court was concerned about. It's not situations where the parties contract between themselves to come up with a private remedial scheme for whatever problem they might encounter.

We're not dealing with a situation here where one party is attempting to gain an unfair advantage over the other party.

PHILLIPS: If your contract and deed was - if you're hurt on the job, you won't get comp, but you will get $1 a week. No questions asked. For the next 10 weeks. That's not a complete shifting. So you would say there's no express negligence doctrine there?

BRIM: I would say this, and this is exactly the argument that respondent has raised

and has relied upon. Obviously at first, I would say that's not this case.

PHILLIPS: I understand. But you keep telling us it's got to be this bright line. It's got to be 100%. Is that really true or just 99.99%?

BRIM: Historically it has been absolutely true. The court has not wavered from that. And the court has not had an opportunity to address a situation where less than 100% of the responsibility is shifted. I think the crux of that analysis should that case present itself is 1) have it start at the TC level, have the TC evaluate whether or not based on the express terms of the agreements at issue, whether it looks like one party has attempted to engage in extraordinary shifting of the risk, that may be less than 100%. I think the case that respondent raised and the question that CJ Phillips just raised is probably the most difficult question answered in the context of this analysis.

OWEN: Is this agreement still valid, and would it be valid under the new legislation?

BRIM: This particular agreement if entered into today would not be enforceable under the amended Texas Workers Comp Act.

PHILLIPS: In other words if you were injured today it's not enforceable. But if you're injured before the legislation?

BRIM: I believe that's correct.

WAINWRIGHT: So you don't see any tension between Lawrence and Dresser Industries then?

BRIM: I think Lawrence is the natural outgrowth of Dresser to the extent that Lawrence continues to go along with the holding as announced also in the HEB CA's case out of Houston, that these types of benefit plans are not the same type, do not ____ the same type of releases that the court contemplated in Dresser, or that the court contemplated in Ethel.

WAINWRIGHT: In Lawrence did we say that the benefit plan there did not shift risk? So that's the way the CA cited it.

BRIM: I think this court perhaps borrowed that portion of its analysis from the appeals court in Houston from the HEB case. The HEB case came out first and specifically held that, and this court seemed to adopt the same line of reasoning that the benefit plans here are simply not of the shifting type that we were concerned about in Ethel and Dresser.

WAINWRIGHT: In Dresser we talked about extraordinary risk existing as a condition to applying the fair notice requirements. Correct?

BRIM: Yes.

WAINWRIGHT: So we have Dresser saying extraordinary risk must be present. Lawrence we at least recognized that there was no shift in risk. Tension or no?

BRIM: Well that's the dichotomy we run into, that this court in Lawrence specifically said these types of agreements don't shift risk. And then 2-3 pages later in the opinion they go through an express negligence analysis. Not really an analysis in terms of the express negligence test applies to these types of agreements for reasons X, Y and Z and this is why these particular agreements meet the test. This court essentially just echoed the finding from the Amarillo CA that, yes, the agreements present in Lawrence did meet express negligence requirements. The court did not go into any analysis of why are we even going down that road.

WAINWRIGHT: Do you see a tension between the two cases?

BRIM: I think the only tension is the fact that this court in Lawrence held that there was no risk shifting, which is the crux of applying the express negligence test, but then went ahead and applied it anyway. That would be the extent of the tension.

WAINWRIGHT: So which rationale would you say applies to this case? Assume in this case there is little risk being shifted. In Lawrence we said with no risk shifting, but we did go ahead and apply those requirements. Then do you have to pick one or the other?

BRIM: I think there is an inherent conflict between the court's initial determination in Lawrence that there is no risk shifting present, and then a subsequent application of an express negligence test. My argument thus far has been that application of that express negligence test really was dicta. It wasn't necessary to the outcome of the opinion because the court should not have gotten to that point in the absence of risk shifting.

PHILLIPS: It makes you think the dissent was right all along.

BRIM: What we're going to struggle with in determining this case is how is this court going to move from the bright line standard that it's had since 1987 under Ethel that a complete shifting of risk is required to trigger application of the doctrine to some amorphous concept of you know some rift shifting, a little bit of rift shifting, substantial rift shifting. Contracting parties can never know at the outset what their contracting for when you've got a moving target standard to work with. Contracting parties can understand that okay if I am trying to shift all of my liability to my other party, we can deal with that. Contracting parties have a very difficult time dealing with a situation where they don't know until well after the contract has been executed and something that happens that triggers one of these provisions, and then liability is subsequently determined what their obligations are. That's a very unfair position that the contracting party is in. If they are able to reach an agreement at the outset as to what their stint of liability should be, and they sign up for that deal, that deal should be honored by the courts. There should be a degree of predictability involved that they know when that contract is entered into it's going to be enforced.

I want to reach back to CJ Phillips' question dealing with the nominal retention of liability by one of the contracting parties. Because I think that's obviously a problem area here. And I think the way that's ultimately going to have to be addressed is initially at the TC phase, the TC is going to have to look at that agreement that comes before it and make a determination whether or not extraordinary risk was shifted even though it may have been less than complete.

I think part of the guidelines that the court is going to have to look at it are the same concerns that this court looked at in Ethel, which are these contracts essentially trying to get something into the deal and hide it from the other party and not let them know the effect of the agreement.

PHILLIPS: If you have more on that thought about what the TC has to look at tell me.

BRIM: I think as a practical matter, the TC really is going to have to make a determination as to what the intent of, not necessarily the parties to the agreement were, but what was attempted to be accomplished by the document the way it was drafted? Is it drafted as a clean document where anybody can pick it up and read it and determine what its effect is? Or is it a document like we had leading up to the adoption of the express negligence doctrine in Ethel where the attorneys were getting pretty crafty at trying to hide the _____ agreements, create situations where you really didn't know what your liability was until some court down the road made a ruling on it. Are we looking at situations where parties are using some _____ means nefarious means to try to escape liability.

* * * * * * * * * *

RESPONDENT

WICOFF: I'd like to start my argument by addressing the petitioner's, I think valid concern, about contracting parties sitting down to enter into a contract, and having some clarity or certainty as to what they are contracting to. And our position has evolved a little bit.

In our brief we talked about extraordinary shifting of the risk being tantamount to a substantial shifting of the risk, or shifting a lot of the risk. We may have used other words. And I agree with Mr. Brim that that does not lend itself to clarity in drafting contracts.

Therefore, I would like to take this opportunity to embrace the CA's view on this, which is that any shifting of the risk, however slight, should trigger the fair notice doctrine.

PHILLIPS: So any liquidated damages clause?

WICOFF: Yes.

PHILLIPS: Anything?

WICOFF: Anything.

PHILLIPS: We're going to have a lot of contracts invalid then. That's a business for lawyers and judges.

WICOFF: The problem here is - well maybe not those types of contracts. Let me focus on this type as an example. The problem here is, it's hard to know how much risk is being shifted unless it's all being shifted. But J. Phillips, I think you brought home the important point here is that a contacting party can retain for itself very little risk, very little liability. It can shift almost all of it to the other party, and sort of say you're going to foot the bill for most of my future negligence and know that that's the effect of the contact and not be required to give fair notice.

HECHT: The problem I have with that is that you can't really tell how much or whose negligence is being shifted. Perhaps the employer is being negligent. Perhaps the accident occurs even if the employer is not negligent. In an employment context it's hard to see at the outset how much is being shifted and for what. And then in the context of compensation laws, which do some of that shifting and have for 100 years, it's hard to see how that's extraordinary.

WICOFF: The word extraordinary is a difficult word. It can mean different things. It can mean extraordinary in the sense of extreme, or it can mean extra ordinary. Just not what you would ordinarily expect or anticipate.

HECHT: And this can hardly be extraordinary in the context of worker's comp laws, which do something similar. On the other hand it could be extraordinary and relative to something else.

WICOFF: That's right. I guess - what I would like to talk about is it's not an onerous burden to comply with the fair notice doctrine.

OWEN: Well if this were a subscriber to the worker's comp act, you wouldn't have any of this but you would still have risk shifting, and it could be less or even more risk shifting, and you wouldn't have to meet any of these requirements.

WICOFF: That's right.

HECHT: So why _____ when it's a private arrangement instead of a public arrangement?

WICOFF: Because it's fair. Because if I'm contracting with you, and I'm saying to you J. Hecht - or if I know that the effect of the agreement is that you are going to foot the bill for my future negligence or mine, it is not an onerous burden on my part to comply with the fair notice doctrine and to make sure that my contracting partner knows what's going on here.

I do not understand, I guess from an equity standpoint, why it is so burdensome to include the word negligence in a release such as this, and to put it in bold print. The Lawrence case was exactly on point with this case. And I do not understand any distinction there except that the employer in that case did comply with the fair notice doctrine. It was conspicuous. It did mention the term negligence. And had the employer in this case done likewise, the result might have been different. It would have been different.

While talking about Lawrence, I think it's important to say that whatever Dresser and Ethel v. Daniel may have stated, Lawrence is the most recent case and the most on point case. And in order to go with the petitioner's position in this case, you are going to have to repudiate Lawrence in some way. I do not know of any conspicuousness requirement as to this court saying we hereby announce that we are now shifting the fair notice doctrine to apply to still another situation. That's clearly what this court did in that case.

There is no distinction on the facts as to what type of agreement you had there. It's the same as it was here. And the employer was found to have been required to comply with the fair notice doctrine. That's what this court held and I don't see any distinction.

And again, I just don't understand from the way most people would view contracts, and what they should be told in entering in to a contract, what is so onerous about making sure, even if there's a possibility of some future shift of risk, why not be sure that they know what they are getting in to. One of two things would have happened in this case had there been negligence included in the release in bold print. Either a perspective employee would have said I'm not signing that. Or he would have said fine. I am going to go ahead and sign it. Either way that seems to enure to the benefit of the employer. He's either nipping in the bud some future litigious sort of employee, or he's getting them to sign an agreement that meets with any _____ fair notice requirements.

Again, I do not see that this is an onerous requirement, and I think that in terms of making your contracting partner absolutely clear on what it is that you may be asking him to do in the future because of your negligence, I think it's the least we can do.

OWEN: Do you agree with Mr. Brim that this agreement would not be enforceable today?

WICOFF: That's correct.

OWEN: Do you also agree that this particular agreement is enforceable? It's not captured by the new legislation?

WICOFF: This agreement is enforceable in other respects.

OWEN: Under the new legislation it doesn't void this particular agreement?

WICOFF: Correct. I agree with that.

SMITH: What's the public policy of this new legislation?

WICOFF: I don't have that judge. I would assume the public policy that was being urged with that legislation was that they - well I think what the dissent said in Lawrence. I think that the legislature was concerned that these private benefit plans may or may not compensate you as well as worker's comp and very frequently don't. And I think there was a concern about them doing that, and so the legislature took it upon themselves to address that.

You can have, and there was a line that the petitioners relied upon in Lawrence where they said that there was no shifting of the risk because there was a private benefit plan. Well there are private benefit plans and then there are private benefit plans. You could have a private benefit plan that may provide very little for the injured employee. That doesn't mean that the risk hasn't been shifted. Substantial risk may have been shifted. As soon as that benefit plan may run out, who's footing the bill? who's going to pay for his own medica? Maybe the employee. Maybe the taxpayers. Somebody else has had the risk shifted to them.

I don't know whether the private benefit plan in Lawrence shifted the risk or not. And that's an inherent problem.

I would just again urge this court to consider the situations that may result if the petitioner's position prevails here. And the situations that may result are that people who are of a mind to do so may retain very slight risk for themselves and then not have to come clean entirely with their contracting partners. I think that's fundamentally unfair and I think that's why the CA's decision should be affirmed.

* * * * * * * * * *

REBUTTAL

BRIM: I think one point that we need to recognize with respect to the benefit plans that we're talking about in this case is that they were signed in 1993 and 1994. If you look at the way the disclaimer provisions that we're talking about today are drafted, it's pretty clear that express negligence concerns are no way are on the radar of the person that drafted that provision. Nothing is conspicuously stated. It doesn't address concerns about negligence. It simply provides that the parties have agreed as to what the remedies are going to be and left it simply at that.

The hazard that we now run if we adopt the opinion from the Texarkana CA is retroactive application of what the law is going to announce in this case. If this court says any level of risk shifted, in the agreements that do those, have to comply with the express negligence doctrine. What we're going to do is run directly in to the same concerns that this court specifically attempted to avoid in Lawrence.

OWEN: But how many of these agreements are we talking about since they are void going forward? I assume that even an injury under the 1993 agreement, you can't rely on that agreement anymore.

BRIM: They vary from plan to plan. Some plans have to renew annually. Some plans can go on for a period of time without having to have new waivers executed by the participating employees. The statute that was amended under the comp act that basically invalidated these waivers going forward, I don't think came in to existence prior to 2000. I think that was the effective date of the act.

OWEN: What's it affected to?

BRIM: Essentially what the comp amendment does it says that private benefit plans, that the plan is the exclusive remedy and waive the employee's common law rights are not enforceable. So in other words, you can be an employer, you can be a nonsubscribing employer, you can have a benefit plan if you want to, but under that plan the employee cannot waive its rights to go ahead and sue the employer.

OWEN: What I'm saying is if the employee executed in 1993 and then was hurt tomorrow, the employer can't rely on that old plan can they in light of this new statute?

BRIM: I believe under the new statute they still could assuming that the old agreement was still in effect. I think old agreements are basically grandfathered in under the new statute. And as of the effective date of the statute plans going forward are such it's non waiver provisions.

What we get to if the court affirms the Texarkana CA, the very same concerns that this court was reluctant to raise in Lawrence will be revisited. Some of those concerns were that now then we're going to retroactively invalidate these plans, and Lawrence is going to be because of public policy concerns. In this case it will be because of express negligence concerns. But the upshot of either one of those analysis is you're going to have a situation where there are a number of employees out there that have been injured that all of a sudden are going to have invalid plans and the employers are going to have no incentive to go ahead and continue to maintain those plans or to pay benefits under those plans. And the injured employees may have a remedy. They may not. At least under the context of the plan that we're talking about here, if it's held to be valid, and for whatever reason the employer bails on its obligations under the plan, either it fails to pay the benefits or refuses to pay the benefits, the employee still has a remedy. At minimum the employee has a breach of contract remedy. And depending on the circumstances, the employee may have tort remedies back against the employer.

I guess in sum. Adopting the approach by the Texarkana CA is not going to advance this court's goals of lessening the litigation. Making the law more certain. Making the law more predictable. And we request that the Texarkana court's opinion be reversed and judgment be

rendered for petitioner.