

**Environmental
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**ENVIROMENTAL NEWSLETTER
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**Texas Supreme Court Issues Long-Awaited Opinion in
Humble Sand & Gravel v. Gomez, but Questions Remain**

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- LEFT UNANSWERED BY THE COURT, HOWEVER, WAS ITS EAGERLY ANTICIPATED ANSWER TO THE QUESTION OF WHETHER A SUPPLIER LIKE HUMBLE SAND & GRAVEL HAD A DUTY TO WARN ITS CUSTOMERS' EMPLOYEES.
- THE COURT CONCLUDED THAT THE RELATIONSHIP BETWEEN AN EMPLOYEE, EMPLOYER, SUPPLIER AND INTERMEDIARY WAS BUT ONE FACTOR TO CONSIDER WHEN DETERMINING THE SCOPE OF A PRODUCT SUPPLIER'S DUTY TO WARN.

IN SEPTEMBER 2004, ALMOST TWO YEARS AFTER HEARING ORAL ARGUMENTS, IN AN 8-2 DECISION, THE TEXAS SUPREME COURT ISSUED ITS OPINION IN HUMBLE SAND & GRAVEL, INC. V. GOMEZ. AT ISSUE WAS WHETHER A MANUFACTURER OF SILICA PRODUCTS USED IN ABRASIVE BLASTING HAD A DUTY TO WARN THE PRODUCT'S ULTIMATE (SOPHISTICATED) USERS – ITS CUSTOMERS' EMPLOYEES. IN THE END, THE EAGERLY-AWAITED DECISION LEAVES THE STATE'S TOXIC TORT BAR WITH AS MANY QUESTIONS AS ANSWERS.

THE PLAINTIFF, RAYMOND GOMEZ, CONTRACTED SILICOSIS AFTER SIX AND A HALF YEARS OF WORKING AROUND ABRASIVE BLASTING (SOMETIMES CALLED SANDBLASTING) IN PLANTS IN ODESSA AND CORPUS CHRISTI IN THE 1980'S AND 1990'S. HIS SUIT WAS ORIGINALLY FILED IN STATE DISTRICT COURT IN JEFFERSON COUNTY, AND THE APPEAL AFTER TRIAL WAS HEARD BY THE TEXARKANA COURT OF APPEALS.

GOMEZ WORKED FOR TWO DIFFERENT COMPANIES, USING ABRASIVE BLASTING TO CLEAN OIL-FIELD AND OTHER INDUSTRIAL EQUIPMENT. THE PROCESS OF ABRASIVE BLASTING INVOLVED SPRAYING THE EQUIPMENT WITH PARTICLES OF FLINT THROUGH A NOZZLE WITH COMPRESSED AIR. FLINT IS MOSTLY COMPRISED OF SILICA DIOXIDE, WHICH IN ITS NATURAL STATE IS NOT DANGEROUS, BUT BECOMES DANGEROUS WHEN SHATTERED INTO EXTREMELY SMALL PARTICLES, SOME SO SMALL AS TO BE INVISIBLE TO THE NAKED EYE. THE DUST IS SAID TO CAUSE SILICOSIS.

HUMBLE SAND & GRAVEL WAS JUST ONE OF THE SUPPLIERS OF SILICA DIOXIDE TO GOMEZ'S EMPLOYERS (GOMEZ SETTLED WITH ALL DEFENDANTS EXCEPT HUMBLE SAND & GRAVEL BEFORE TRIAL IN 1999). KNOWING THE INHALATION OF ITS PRODUCT COULD CAUSE SILICOSIS, HUMBLE SAND & GAVEL ADDED WARNINGS TO ITS PACKAGING.

IN THE 1970'S AND 1980'S, THE WARNING READ:

**WARNING!
MAY BE INJURIOUS TO HEALTH IF PROPER
PROTECTIVE EQUIPMENT IS NOT USED.**

IN THE 1990'S, THE WARNING READ:

**WARNING
BREATHING DUST OF THIS PRODUCT
CAUSES SILICOSIS,
A SERIOUSLY DISABLING AND
FATAL DISEASE.
AN APPROVED AND WELL-MAINTAINED
AIR SUPPLIED ABRASIVE BLASTING HOOD
MUST BE WORN AT ALL TIMES WHILE
HANDLING AND USING THIS PRODUCT.
FOLLOW ALL APPLICABLE
OSHA STANDARDS.**

AT VARIOUS TIMES DURING HIS TENURE WORKING WITH SILICA, GOMEZ USED PAPER MASKS THAT WERE SECURED TO HIS FACE WITH RUBBER BANDS, AS WELL AS AIR-FED HOODS THAT KEPT THE DUST OUT AND THAT HE MAINTAINED HIMSELF. HOWEVER, THE HOODS WERE ONLY CAPABLE OF BEING WORN AROUND HIS WORK STATION, BECAUSE OF THE SHORT LENGTH OF THE AIR-FEED LINES, AND HE HAD TO TAKE THE HOOD OFF WHEN NOT AT HIS WORK STATION. GOMEZ TESTIFIED THAT HE THOUGHT THAT THE "INJURIOUS TO HEALTH" WARNING MEANT THAT THE DUST COULD HURT SKIN WHEN BLASTED OFF SURFACES AND THAT IT WAS UNHEALTHY TO BREATHE. HE ALSO SAW OTHER WARNINGS ABOUT BREATHING FREE SILICA DUST, WHICH COULD CAUSE SILICOSIS AND LUNG INJURY. HOWEVER, HE DID NOT QUESTION THESE WARNINGS IN ANY DEPTH, AND LATER TESTIFIED THAT HAD HE KNOWN HOW DANGEROUS IT WAS TO

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BREATHE THE DUST, HE WOULD HAVE NOT TAKEN A JOB THAT REQUIRED WORKING AROUND IT. AT AGE 33, GOMEZ HAD A LIFE EXPECTANCY OF 20-25 YEARS (HE DIED IN 2001 IN A CAR ACCIDENT).

THE TRIAL COURT ALLOWED EVIDENCE THAT GOMEZ'S EMPLOYERS USED FLINT FROM SUPPLIERS IN ADDITION TO HUMBLE SAND & GRAVEL, BUT EXCLUDED EVIDENCE THAT GOMEZ HAD PREVIOUSLY ADMITTED THAT THE OTHER SUPPLIERS WERE ALSO RESPONSIBLE FOR HIS INJURIES. ASKED ONLY ABOUT HUMBLE SAND & GRAVEL AND GOMEZ'S RESPONSIBILITY, THE JURY FOUND THAT HE WAS INJURED BECAUSE OF A MARKETING DEFECT IN HUMBLE SAND & GRAVEL'S PRODUCT (BASED ON THE TEXAS PATTERN JURY CHARGES' DEFINITIONS OF "MARKETING DEFECT," "ADEQUATE" AND "UNREASONABLY DANGEROUS"). THE JURY ALSO FOUND THAT HUMBLE SAND & GRAVEL WAS NEGLIGENT.

ON APPEAL, HUMBLE SAND & GRAVEL ARGUED THAT IT HAD NO DUTY TO WARN OF ITS PRODUCT'S DANGERS BECAUSE SUCH DANGERS WERE WELL-KNOWN IN THE ABRASIVE BLASTING INDUSTRY, IT SOLD ONLY TO INDUSTRIAL CUSTOMERS, AND IT WAS ENTITLED TO RELY ON ITS CUSTOMERS TO WARN THEIR OWN EMPLOYEES. IF THE PRODUCT'S CUSTOMERS ALREADY KNOW OF THE RISKS OF THE PRODUCT'S USE AND ARE BY LAW OBLIGATED TO WARN THEIR OWN EMPLOYEES, HUMBLE SAND & GRAVEL ARGUED, THEN THE SUPPLIER HAD NO DUTY TO WARN THE CUSTOMER'S EMPLOYEES. IT FURTHER ARGUED THAT AWARENESS OF RISKS SHOULD BE DETERMINED OBJECTIVELY IN THE CONTEXT OF THE PARTICULAR INDUSTRY. GOMEZ CONTENDED THAT EMPLOYERS COULD NOT BE RELIED UPON TO PROVIDE WARNINGS REGARDING DISABILITY AND DEATH.

IN A 6-2 OPINION, THE COURT HELD THAT HUMBLE SAND & GRAVEL HAD NO DUTY TO WARN ITS CUSTOMERS (LIKE GOMEZ'S EMPLOYERS) THAT INHALING THE SILICA DUST COULD BE FATAL. THE COURT NOTED THAT EMPLOYERS IN SUCH INDUSTRIES ARE NOTORIOUS FOR NOT PROTECTING THEIR EMPLOYEES, EVEN THOUGH THE EMPLOYERS MAY KNOW OF THE RISKS OF WORKING WITH SILICA: "BLASTING OPERATORS' DISREGARD OF THE RISKS TO THEIR EMPLOYEES OF INHALING

SILICA DUST WAS NOT FOR WANT OF ADDITIONAL INFORMATION... BUT FOR WANT OF CARE."

LEFT UNANSWERED BY THE COURT, HOWEVER, WAS ITS EAGERLY ANTICIPATED ANSWER TO THE QUESTION OF WHETHER A SUPPLIER LIKE HUMBLE SAND & GRAVEL HAD A DUTY TO WARN ITS CUSTOMERS' EMPLOYEES. FROM THE RECORD, THE COURT WAS UNABLE TO DETERMINE WHETHER THE SUPPLIER/MANUFACTURER HAD A "REASONABLE ASSURANCE" THAT ANY WARNINGS IT SHOULD HAVE GIVEN WOULD REACH THOSE EMPLOYEES WHO WOULD BE ENDANGERED BY THE USE OF THE PRODUCT. GOMEZ ARGUED THAT IT IS NOT REASONABLE TO EXPECT AN EMPLOYER TO WARN ITS EMPLOYEES OF THE DANGERS OF A PRODUCT, AS OPPOSED TO THE REASONABLENESS OF A PATIENT RELYING ON HIS DOCTOR TO PROPERLY INFORM HIM. THE COURT CONCLUDED THAT THE RELATIONSHIP BETWEEN AN EMPLOYEE, EMPLOYER, SUPPLIER AND INTERMEDIARY WAS BUT ONE FACTOR TO CONSIDER WHEN DETERMINING THE SCOPE OF A PRODUCT SUPPLIER'S DUTY TO WARN. BASED ON THE RESTATEMENT AND CASE LAW, THE COURT ALSO LISTED OTHER FACTORS TO CONSIDER, INCLUDING SOCIAL, ECONOMIC AND POLITICAL QUESTIONS THAT COME WITH REQUIRING A SILICA SUPPLIER TO WARN ITS CUSTOMERS' EMPLOYEES, THE FORESEEABILITY AND LIKELIHOOD OF INJURY FROM THE FAILURE TO WARN, THE MAGNITUDE OF THE BURDEN ON THE SUPPLIER OF GUARDING AGAINST THE INJURY AND GIVING THE WARNINGS, THE FEASIBILITY AND EFFECTIVENESS OF THE SUPPLIER'S WARNINGS, THE RELIABILITY OF THE EMPLOYER TO WARN ITS EMPLOYEES, AND THE EXISTENCE AND EFFICACY OF OTHER PROTECTIONS. THESE FACTORS HAVE TO BE APPLIED TO THE ABRASIVE BLASTING INDUSTRY AS A WHOLE, NOT JUST TO THE PARTIES TO THIS CASE, INDIVIDUALLY (IN OTHER WORDS, THE FACTORS HAVE TO BE APPLIED OBJECTIVELY).

AFTER CONSIDERING ALL THE AFOREMENTIONED FACTORS, THE COURT HELD THAT IT COULD NOT DETERMINE FROM THE RECORD WHETHER A DUTY SHOULD BE IMPOSED ON HUMBLE SAND & GRAVEL TO WARN ITS CUSTOMERS' EMPLOYEES. IT ALSO NOTED THAT IF "ABRASIVE BLASTING WORKERS DO NOT ORDINARILY SEE BAG LABELS, IT WOULD DO LITTLE GOOD TO REQUIRE THAT THE

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LABELS BE MORE SPECIFIC.” THE COURT OPINED THAT THE BURDEN SHOULD HAVE BEEN ON THE SUPPLIER TO SHOW THAT THE WARNINGS, WHICH GOMEZ SAYS SHOULD HAVE BEEN USED, WOULD NOT HAVE BEEN EFFECTIVE IN THE END. THE COURT ALSO NOTED THAT IT COULD ALSO NOT SAY, FROM THE RECORD PRESENTED, THAT A DUTY TO WARN SHOULD NOT BE IMPOSED ON THE PRODUCT SUPPLIERS. THE CASE WAS REMANDED BACK FOR A NEW TRIAL.

REACTION TO THE OPINION HAS GENERALLY BEEN NEGATIVE. AS REPORTED IN TEXAS LAWYER, HUMBLE SAND & GRAVEL’S ATTORNEY IS GEARING UP FOR SIMILAR BATTLES IN THE FUTURE; HUMBLE SAND & GRAVEL WAS FOUND TO NOT HAVE A DUTY TO WARN ITS CUSTOMERS, BUT LEFT UNANSWERED WAS THE QUESTION OF WARNING THE ULTIMATE USERS, THE CUSTOMERS’ EMPLOYEES. FOR THEIR PART, GOMEZ’S ATTORNEYS ARE ALSO DISAPPOINTED. “WE’RE ALMOST AT SQUARE ONE STILL,” ONE OF HIS ATTORNEYS IS QUOTED AS SAYING IN *TEXAS LAWYER*, “IT TOOK THEM TWO YEARS...TO COME BACK AND SAY, ‘WE NEED MORE INFORMATION.’” THE ARTICLE ALSO NOTES ONE ATTORNEY’S OBSERVATION THAT BULK SUPPLIERS OF CHEMICALS ARE PROBABLY BETTER OFF AS A RESULT OF THIS DECISION THAN SUPPLIERS OF PRODUCTS SOLD IN PACKAGES (SUCH AS THE 100 LB BAGS SOLD BY HUMBLE SAND & GRAVEL). THE CONSENSUS SEEMS TO BE THAT, GIVEN THE FACT THAT THE GOMEZ COURT WAS PRESENTED WITH A LENGTHY TRIAL RECORD WITH MANY FACTS AND STILL COULD NOT COME TO A CONCLUSION AS TO A MANUFACTURER’S DUTY TO WARN A SOPHISTICATED USERS/EMPLOYEES OF ITS CUSTOMERS, FUTURE BATTLES OVER WARNINGS WILL ALSO RESULT IN EXTENDED COURTROOM BATTLES.

