

CAUSE NO. 09-0005

IN THE SUPREME COURT OF TEXAS
AT AUSTIN, TEXAS

TRANSCONTINENTAL INSURANCE COMPANY,
Petitioner
v.
JOYCE CRUMP,
Respondent

On Petition for Review from the Fourteenth Court of Appeals at Houston, Texas
DOCKET NO. 14-06-00905-CV

PETITIONER'S REPLY TO RESPONDENT'S POSTSUBMISSION AUTHORITIES

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TABLE OF CONTENTS

INDEX OF AUTHORITIESiii

I. THE PRODUCING CAUSE STANDARD APPLIED TO WORKERS' COMPENSATION CLAIMS HAS BEEN AND SHOULD REMAIN THE SAME STANDARD APPLIED IN ALL PRODUCING CAUSE CLAIMS 2

II. THE COMPLAINT RELATING TO THE PRODUCING CAUSE INSTRUCTION WAS NOT WAIVED 6

III. PRODUCING CAUSE OF A CO-MORBID CONDITION IS NOT EVIDENCE OF PRODUCING CAUSE OF DEATH 7

PRAYER 8

CERTIFICATE OF SERVICE..... 9

INDEX OF AUTHORITIES

Cases

<i>Ford Motor Co. v. Ledesma</i> , 242 S.W.3d 32 (Tex. 2007)	2, 4, 5
<i>Jacoby v. TEIA</i> 318 S.W.2d 921 (Tex. Civ. App.—San Antonio 1958, writ ref’d n.r.e.)	3
<i>Schulle v. TEIA</i> , 787 S.W.2d 608 (Tex. App.—Austin 1990, writ denied).....	3
<i>TEIA v. Burnett</i> , 105 S.W.2d 200 (Tex. 1937).....	2, 3, 8
<i>Texas Indem. Ins. Co. v. Staggs</i> , 134 S.W.2d 1026 (Tex. 1940).....	3, 4
<i>Union Pump v. Albritton</i> , 898 S.W.2d 773 (Tex. 1995).....	4
<i>Willis v. Donnelly</i> , 199 S.W.3d 262 (Tex. 2006).....	7

Statutes

TEX. R. CIV. P. 278	6
---------------------------	---

Other Authorities

Comm. on Pattern Jury Charges, State Bar of Tex., <i>Texas Pattern Jury Charges: Business Consumer Insurance Employment</i> , PJC 102.1 (2008)	5
Comm. on Pattern Jury Charges, State Bar of Tex., <i>Texas Pattern Jury Charges: General Negligence and Intentional Torts</i> , PJC 2.4 (2008).....	5

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Under the guise of additional authorities, but without truly providing any, Respondent presents three new arguments. Respondent now argues that this Court should abandon decades of precedent and adopt a different and distinct producing cause standard for workers' compensation cases than that applied to all other cases utilizing producing cause. Then, although never previously raised at trial, before the court of appeals, or in the briefing to this Court, Respondent attempts to interject waiver for the first time. Finally, after Respondent conceded in oral arguments that the court of appeals incorrectly concluded that the *Robinson* factors are inapplicable to workers' compensation claims, Respondent argues that evidence of causation relating to a co-morbid condition is somehow evidence of the causation of death. As none of these arguments bear merit, Transcontinental Insurance Company files this response.

I. THE PRODUCING CAUSE STANDARD APPLIED TO WORKERS' COMPENSATION CLAIMS HAS BEEN AND SHOULD REMAIN THE SAME STANDARD APPLIED IN ALL PRODUCING CAUSE CLAIMS.

An evaluation of Texas jurisprudence clearly demonstrates that the producing cause standard applicable to workers' compensation claims is the same standard applied to all other types of cases utilizing producing cause. This Court, in *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007), provided a clear explanation of how the definition should be charged consistent with historical precedent, but replacing archaic language with terms that can be understood by a contemporary jury. Here, the lower courts erroneously distinguished the producing cause standards in workers' compensation from all other manner of cases. The court of appeals then adopted a producing cause standard for workers' compensation cases using a definition this Court held was unacceptable and abandoning the "but for" portion of the instruction.

This Court first addressed the standard for producing cause in workers' compensation claims in *TEIA v. Burnett*, 105 S.W.2d 200 (Tex. 1937). *Burnett* addressed a workers' compensation death claim where the employee was injured by a blow to his head. One year later, he died from typhus. Like here, the family in *Burnett* filed a death claim, asserting that the work-related injury lowered the employee's resistance and that the lowered resistance made the employee susceptible to typhus and death. This Court inquired, within the producing cause analysis, whether lowered resistance by a work-related injury can create a compensable death claim when death is by ordinary disease of life. In rendering judgment, this Court held the Workers' Compensation Act defines injury as damage or harm to the physical structure of the body and such disease that

naturally results therefrom. *Id.* at 202. Thus, if death is caused by an ordinary disease of life, regardless of decreased resistance, it cannot be compensable. *Id.* In reaching its conclusion, this Court applied a producing cause standard defined as:

*That cause, which in the natural and continuous sequence, produces the death and without which such death would not have occurred.*¹

Id. This is the producing cause standard applied to workers' compensation death claims for almost seventy years. *See Jacoby v. TEIA* 318 S.W.2d 921 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.); *Schulle v. TEIA*, 787 S.W.2d 608 (Tex. App.—Austin 1990, writ denied).

That the producing cause standard applied to workers' compensation cases is the same as applied to all other cases defining producing cause has been clear for decades. In 1940, this Court first addressed the similarity between producing cause in workers' compensation claims and producing cause generally. In *Texas Indem. Ins. Co. v. Staggs*, 134 S.W.2d 1026 (Tex. 1940), this Court faced a claim for workers' compensation death benefits, where the worker fell while descending the steps of his home and hit his head on a concrete block. He then went to work, where he was found dead on the floor of the office of a pumping plant. The widow alleged that the exhaust pipe of one of the engines in the pumping plant leaked, causing great quantities of carbon monoxide gas to accumulate in the building. The petition alleged that the combination of the head injury and the gas caused her husband's death. In addressing causation, this Court held the

¹ This is the producing cause standard Transcontinental requested the trial court provide in the charge. The trial court refused.

approved definition for "producing cause" in workers' compensation cases is in substance the same as the approved definition of "proximate cause" in negligence cases except for the foreseeability element that belongs in proximate cause, but not in producing cause. *Id.* at 1028-29. This Court again approved the definition of producing cause as that cause which, in a natural and continuous sequence, produces the death in issue, and without which the death would not have occurred. *Id.* at 1028.

This Court has repeatedly held producing cause is a "*cause in fact*" inquiry with two elements. First, the substantial factor element, which prior to *Ledesma* was defined as "a direct and natural cause or an efficient exciting or contributing cause that in a natural sequence produced the incident or death." Second, the "but for" element, "without which such event would not have occurred." The fact that producing cause or cause in fact has two elements is perhaps most clearly articulated by this Court's decision in *Union Pump v. Albritton*, 898 S.W.2d 773 (Tex. 1995).

In *Ledesma*, the trial court, when defining producing cause, utilized a version of the substantial factor element, but failed to include the "but for" portion. This Court held that the charge was incomplete because it lacked the "but for" test, and also held that the language defining substantial factor – *efficient or exciting* – was foreign to modern English and of little help to the jury. Thus, the court held that the first portion of the producing cause standard should be "that cause in which a natural and continuous sequence was a substantial factor in bringing about an event and without which the event would not have occurred." *Ledesma*, 242 S.W.3d at 46.

That *Ledesma* is applied to the cause in fact inquiry in all cases and is not a significant departure from the historical workers' compensation definition perhaps is most evident from review of the explanations within the Pattern Jury Charges adopted since this Court decided *Ledesma*. For example, in negligence cases, the Pattern Jury Charges recommends the following instruction for proximate cause:

Proximate cause means that cause which in a natural and continuous sequence produces an event and without which cause such event would not have occurred. [Foreseeability portion intentionally omitted]

Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence and Intentional Torts*, PJC 2.4 (2008). As it relates to the cause in fact inquiry of proximate cause, the Pattern Jury Charges explains that proximate cause may need to be modified as:

A proximate cause is a substantial factor that [in a natural and continuous sequence] brings about an event and without which such event would not have occurred. *Id.*

A similar definition has since been applied by the Pattern Jury Charges in defining producing cause for deceptive trade practices claims. Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business Consumer Insurance Employment*, PJC 102.1 (2008). What is clear is that the "cause in fact" inquiry for producing cause has been historically applied uniformly by this Court. There is simply no basis for the court of appeals' conclusion and Respondent's argument that *Ledesma* should not apply because a different producing cause standard is necessary for workers' compensation standards or that the omission of the "but for" portion of causation is appropriate. Perhaps what is most ironic is that Respondent relied on the court of appeals'

decision in *Ledesma* to obtain the instruction in question, but now argues *Ledesma* is not applicable. CR 2177 and 2263.

II. THE COMPLAINT RELATING TO THE PRODUCING CAUSE INSTRUCTION WAS NOT WAIVED

In order to preserve error for the failure to submit a complete instruction, a party must object to the omission and request the instruction in substantially correct wording. TEX. R. CIV. P. 278. Transcontinental submitted the producing cause instruction in substantially correct wording. CR 2143. Transcontinental then objected to the omission of the appropriate producing cause instruction. 8 RR 211. Although not necessary to preserve its appeal, Transcontinental also complained of the error associated with the jury instruction in its Motion for Judgment Notwithstanding the Verdict, CR 2180, and Motion for New Trial, CR 2429. The issue was fully presented to the Court of Appeals, in Appellant's Brief, on Motion for Rehearing and then clearly, although erroneously, ruled upon by the court of appeals. The issue was presented to this Court in Petition for Review and Brief on the Merits with arguments and authorities. Transcontinental has consistently set forth what the erroneous instruction was and what the appropriate instruction should have been. The authorities relied upon by Transcontinental have been consistent at the trial court, court of appeals and before this Court. Conversely, Respondent's argument relating to waiver or insufficiency of briefing has never heretofore been presented to any court in any manner. Because the error of both the trial court and court of appeals is patent and creates confusion in the application of the producing cause standard, Respondent, post-submission, urges that Transcontinental's

briefing is ambiguous without supporting argument, authority, or explanation as to how, why, or where the briefing is ambiguous. Respondent's argument is too vague to clearly respond to. At best, Respondent's complaint is nothing more than a vague, conclusory and hyper-technical challenge. A point should not be found to be waived based on an unduly technical application of procedural rules. *Willis v. Donnelly*, 199 S.W.3d 262 (Tex. 2006).

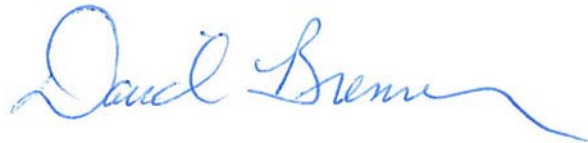
III. PRODUCING CAUSE OF A CO-MORBID CONDITION IS NOT EVIDENCE OF PRODUCING CAUSE OF DEATH

Respondent argues in her post-submission authorities that the court's error in allowing the testimony of Dr. Daller is not reversible because there is a scintilla of evidence from Transcontinental's expert that 1: Crump had a pre-existing chronic infection (ordinary disease of life); 2: that chronic infection played a role in his demise but was not the cause of death; 3: the work-related contusion could have been infected by the pre-existing chronic infection (histoplasmosis) but was not a cause of death; and 4: while the chronic infection (a co-morbid condition) would have contributed to his overall illness, Crump's immunosuppressant conditions were the general cause of death. This proves Crump suffered from co-morbid ordinary diseases of life that contributed to his illness. However, whether Crump suffered from a co-morbid condition is not in issue. The issue was whether the May 9, 2000 injury was a producing cause of death. This is no evidence that the work-related condition was a producing cause of death. In fact, applying this Court's holding in *Burnett*, as a matter of law, this Court should conclude that the death was not compensable. *Burnett*, 105 S.W.2d at 202.

PRAYER

For all the reasons set forth above, Transcontinental Insurance Company respectfully prays that the judgment of the trial court be reversed, in whole or in part, that judgment be rendered that Charles Crump's May 9, 2000 injury was not a producing cause of his death, and that Joyce Crump take nothing or, in the alternative, that the judgment of the court be reversed and remanded for new trial.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing pleading has been forwarded to all parties listed below, on this 11th day of March 2010 in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure.

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