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HUMBLE SAND & GRAVEL V. MARTINEZ

LAWYER: This case presents the clear question about whether actual or constructive knowledge of the permanent nature of an illness or an injury should control the accrual of a cause of action for purposes of the statute of limitations in latent disease cases. This case does present a very different fact situation.

I also know that the court is familiar with the facts, but I have a blowup here, which I think sets forth the important dates. The first important date, in 1985 this plaintiff learns that his brother is ill with silicosis. His brother was a sandblaster and he knows silicosis is caused by breathing dust. On August 31, 1989, this plaintiff claims that he had the first manifestation of an occupational lung disease. And in Sept. 1989, files a worker's compensation claim in which he says: He has a lung disease arising out of the course of his employment.

One year later, in 1990, he is referred by his lawyer to a doctor, who advises a biopsy, although the doctor does tell him that is a problem. In 1991, the biopsy is conducted. In Oct. 1991, the plaintiff is told he has silicosis, and then he files this lawsuit in August, 1992.

GONZALEZ: Why is there a gap of 1 year between the date he was told a biopsy was advised and does nothing for 1 year to get that biopsy?

LAWYER: That's obviously one of our points. I think the evidence read in a light very favorable to the plaintiff is, that he claims he didn't have money to do it. And that there were financial reasons why he did not have the biopsy done. I do not think the record reflects any medical reason why that was not done. Keeping in mind of course, that his lawyer is the one obviously who paid for the biopsy, and also paid for the initial consultation. So I wonder, as we all should, why in fact, the medical treatment wasn't sought earlier.

This does lead me to an argument I was going to make a little bit later, but I will make it here, because it fits and, that is, the application of the statute of limitations in this particular case to bar this claim is not unfair. Because in 1989, the plaintiff claims that he has this injury or this illness, and had he sought the medical treatment earlier and had he gotten the biopsy earlier, he clearly could have filed this third-party action within 2 years of the date that he had manifestation of the injury or the illness. So there is nothing unfair here with holding Mr. Martinez to his duty of inquiry in August, 1989, because in fact, he could have filed suit timely had he seen the doctors quickly.

In listening to the arguments a little bit earlier, there are some interesting

things that we talk about in terms of the discovery rule. I think the problem lies in the way that the courts have described the rule. The courts have done it in a way that has subtle differences. Now, this court up until now has indicated that the discovery rule stops, that is, the cause of action starts to accrue from limitations purposes when we have knowledge of the injury, either actual or constructive knowledge of the injury.

There are cases from the CAs in which the courts have held: Knowledge of the injury plus in general knowledge of the cause. There are other courts that say: It is when a party has a duty to make inquiry as to whether that party has a cause of action.

There are differences among those tests, which is reflected in the first case or the second case the court heard this morning. Because if the question is: Fact of injury, that's a separate accrual point that in fact of injury and in general caused.

Now, in this case we do not have that problem. Because in this case we know that the plaintiff has knowledge of the fact of injury no later than August 31, 1989. We also know that he has knowledge of the fact of injury and in general terms the cause by 1989, because he says: I have a lung disease arising out of my employment, my brother has the same symptoms, my brother had the same disease "silicosis"caused by inhaling dust.

So in this particular case whether the court adopts knowledge of injury or knowledge of injury plus cause in general, is irrelevant for purposes here, because we need both tests.

The third test that is announced is the inquiry into legal rights. Once again in this case, we have met it, because the plaintiff did exactly that in Sept. 1989, he felt bad enough to hire a lawyer and to pursue a worker's compensation claim for occupational injury. So under any standard up until the CA's opinion in this case, the statute of limitation began to run no later than August 31, 1989 or at latest Sept. 1989 when the worker's compensation claim was filed.

Why we are here, I, submit, is because the CA engrafted an additional requirement onto the accrual rule, and that is, the court held not only does the plaintiff have to know constructively or actually knowledge of the fact of injury, and perhaps knowledge of generally the cause and not only have a duty to inquire, but the plaintiff must also know about whether the disease is temporary or permanent. There is no question that this is a departure from the law of this state regardless of the test that the court adopts.

SPECTOR: What ever happened to the worker's comp. claim?

LAWYER: My understanding is that it is still pending.

SPECTOR: So is there anything in the record that the test required could have been paid

for by the worker's comp?

LAWYER: My understanding is in order to be fair to the plaintiffs is that the claim was controverted, and that the only evidence at least in the record of which I am aware is that the insurance carrier denied payment for those bills. That's what Mr. Martinez said. Frankly, the facts are different. I just do not know, but that's the record that's before us.

I am a little bit troubled about going down that road just because of free health care and the fact that the plaintiff's lawyer is the one who ultimately sent him to those doctors. I submit to the court, that arguing that financial consideration should come into play in this case is probably misconstrued because, he obviously did get to a doctor, and he did get the biopsy, and someone paid for it, that seems to me it could have been done much earlier. Then the whole question about whether financial status should impact the running of the statute of limitation, that's a slope down which I am not so sure this court ought to go.

If, in fact, the CA is correct that the permanence of the injury is a controlling factor to determine the accrual of the statute of limitations, that runs contrary to the law that this court has announced at least 3 times in the last 6 months. In the *Murphy v. Campbell* case, the court held that the cause of action accrues when the plaintiff is legally injured, however slight. In the *Kenneco Chemical* case, the court will recall that was a case involving damage as a result of chlordane, which is a chemical. The issue in that case was, the cross-plaintiff was arguing: limitations should not run until the chlordane reached a particular level. The court said: No, once you know that chlordane is dangerous, that starts the running of the statute of limitations. The *Kenneco Energy* case, the cause of action accrues when the plaintiff has facts required to assert the cause of action. The opinion of the CA also conflicts with *Moreno* and *Russell*, in which the court held, the cause of action accrues when the fact of injury is known; and there are a number of other cases.

Addressing the policy: Should this court change the rule that the CA wants to announce and make it a permanent injury rather than a temporary one? It seems to me and it seems to us, that this type of rule would defeat the whole purpose of the statute of limitations. We talk about preventing claims from becoming stale, more specifically we want to prevent evidence, witnesses from disappearing, memories faded, and clearly if we wait until there is a understanding of a permanent nature, we think that would undermine the whole policy underlying the statute of limitation.

Two quick points. One, this court is familiar with exposure cases. One of the critical issues in these cases always is product identification. And as time goes on trying to identify products to which a person may have been exposed 20-25 years ago clearly presents a problem. If we include not only waiting until the plaintiff has knowledge of injury, but until the plaintiff has knowledge of permanent injury, we just exacerbate the problem. And recall also, what the statute of limitations does is says: the time starts to run for which the plaintiff was making inquiry. The

plaintiff has 2 years to decide if in fact he or she has a cause of action.

OWEN: Let's assume that this plaintiff had not gone to the doctor, but had symptoms. At what point along the continuum do the early symptoms of the middle stage...what point have you placed on inquiry?

LAWYER: Depending on which way this court goes in terms of what is the test. Is it knowledge of injury, or is it knowledge of injury plus cause? That might have an impact on your honor's decision as to where in the continuum it goes. Also, I think, you need to understand and we all need to understand at what point in time are those symptoms connected with the injury? If the symptoms are connected with the injury, then it seems to me that the statute of limitation begins to run when the symptoms in fact manifest themselves.

Now if the court is going to say: Well, we're a little concerned about that because it may be a very minor thing, then maybe you want to engraft on the causation issue. If I have a symptom that I know is related to exposure to silicone, then it seems to me the statute of limitation begins to run right there. And I have two years to make the inquiry, and then the question becomes: What are the damages that I have suffered as a result of that exposure, for what am I suing? Remember also, that at the time of trial one of the issues is going to be what are the future damages that his person is going to suffer. So the jury looks at this particular plaintiff at that point in time and if the plaintiff has very little symptom, but has evidence that is credible before the jury that he or she is going to develop a horrible disease, that is compensable. But in terms of the statute of limitations, if the symptom isn't...

OWEN: Let's talk about the asbestos cases. For example, let's assume that someone has _____ and the doctor say: We can't say you will develop asbestos or lung cancer, you may or you may not. But you're saying you have to go ahead and sue when you know that you have the early stages that may or may not lead to a deadly or _____?

LAWYER: That's not what we have here. Two points. The first is, the person either has asbestos or does not have asbestos. If that person in fact has asbestos and the symptoms are consistent with the asbestos, and a doctor says: "Well you don't have it," we run into the misdiagnosis problem that I think one of the Justices mentioned earlier, and then the question is: Do you visit upon defendant, the misdiagnosis by the doctor? If in fact the person does not have the disease, then there's no problem because there's no limitations to run. But what it really ties into is the question about whether this court is going to include causation into the test. Because if we have injury plus causation, then it _____ the statute does begin to run. And I don't think there is anything...I have a disease and it's going to get worse. That is what trials are all about in terms of future damages. And certainly a plaintiff...it happens all the time where a plaintiff's expert gets on the stand and says: Here are the symptoms, they are consistent with a permanent injury that is going to arise. I'm not so sure, I may come before you at another time to argue a different position, but in the theoretical field, I think that's compensable. It is something the jury is going to have to decide.

OWEN: In the silicosis cases let's say he starts with a persistent cough and the doctor says we can't tell yet, it's going to take more time for us to diagnose whether you have silicosis or not. When does limitations along that continuum when you know that you have an injury, and you know that you're a sandblaster, so if you get it, you know where it came from?

LAWYER: It depends about the injury for which you are seeking compensation. If the plaintiff is seeking compensation because he or she is coughing and has the symptoms, it seems to me the limitations runs at the point of which he or she has those symptoms. If we cannot, if the doctors says and it's consistent with everything that we know in medical literature, the doctors says: "You do not have silicosis right now, you may develop it but you don't have it," if the plaintiff then tries to sue for silicosis 2 years after he in fact has it, I think that's reasonable. Of course, that's not what we have here. Because here we have, or he knows he's got it...

OWEN: So you're saying limitations does depend upon medical science's ability to diagnose?

LAWYER: Again, it depends which test this court wants to adopt. If the test is, and I think it's because it's never arisen, if the test is that we're going to have knowledge of injury alone, then the statute of limitation begins to accrue at that point without knowing the cause. If, however, this court says; We're going to have injury plus in general knowledge of causation, that' a different test. And that may come into play when we decide should the person be charged with filing with an inquiry into a cause of action upon the symptoms or upon a general knowledge that we have not only symptoms but a link to something such as occupational disease.

ABBOTT: What you're saying is silicosis is a developing disease?

LAWYER: Yes.

ABBOTT: And just because you're exposed to some of the dust, and you cough doesn't mean you have silicosis?

LAWYER: That's correct.

ABBOTT: But it could turn out that 2 years later, you may develop diagnosable silicosis?

LAWYER: Yes, sir.

ABBOTT: If I understand what you said, you say the statute of limitations should not run on a silicosis claim until the disease is diagnosed. How can you sue for silicosis until you have silicosis?

LAWYER: That's right. I'm not so sure I'd use the term "diagnose" such that it gets

down the path that I'm not so sure I want to go. But, again, if the person is going to sue for the symptom when he first gets the coughing, but that's when it starts if he's going to sue for the coughing, and there's a question I suspect about whether the coughing is in fact enough of a symptom to establish silicosis, but let's assume for the purposes of your question, that by gosh he doesn't have silicosis, no question about it until 5 years later, it seems to me making him file a cause of action for silicosis before he has it creates a problem. That is, I would not be before you arguing that. But again, I don't want to lose site of the fact that that's not what we have here.

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RESPONDENT

THOMPSON: With respect to the discovery rule, I don't think anybody argues the discovery rule doesn't apply. The question is: How do you apply the discovery rule in late disease cases? And if you look at the federal cases that started to deal with occupation diseases in the early '70s and the '80s, which is where most of the cases were filed in those days, they actually talk about the discovery, the injury and its cause. The *Glasscock v. Armstrong,* 946 F2d, 1085 discusses injury and its cause. _____ *v.* _____ *Robbins*, 741 Fd2 79, case discusses injury and its cause. These are cited in our brief. And then recently, quite frankly, the Houston CA 1st District, *Steele v. Roman Pilank* which is not cited in our brief, 1997 Westlaw 703, 795, Nov. 1997, discusses the exact issue on a brain cancer case. The brain cancer was diagnosed, didn't know the cause, statute didn't start to run until 1-1/2 years later when they found out what the cause of the brain cancer was.

ABBOTT: Even in that framework why would it not be clear that as of Oct. 31, 1989, that your client knew or should have known, or at a minimum was put on inquiry to find out that he had a lung disease related to being exposed to silicone?

THOMPSON: First off, the dates we agree with, the inferences of the facts they put up there, we do not agree with. And with respect to what Mr. Martinez knew, he testified in his deposition: He did not know he was ill. And as a matter of fact what he specifically stated and that's the summary judgment evidence before this court that we're here on is first: I didn't know what he had(talking about his brother here), I didn't know what silicosis was. He talks about himself and I will talk about why he filed a claim and I will go into that more detail Just for precaution and then he said: I didn't know I was ill. That's the summary judgment evidence that we come before this court with. And it's important to actually understand that we don't come...

PHILLIPS: You're saying he said: He did not know he was ill or did not know he had silicosis?

THOMPSON: He said: I did not know he was ill. And later on it was clear he didn't know he had silicosis. There is no evidence that he thought he had silicosis until Dr. ____ in 1991 told him he had silicosis.

PHILLIPS: What date is it your saying he said that he did not know he was ill?

THOMPSON: When the compensation claim was filed, he was asked why he filed it in 1989. His testimony that's in the record at 1489 or 1508, is that: I didn't know I was ill; I filed as a precaution. It's important to know we're here on summary judgment. And on summary judgment we're not on an even playing field. I mean the field is tilted squarely and heavily in favor of the nonmovant. All statements that he says are to be taken as true. All inferences and indulgences where there are fact disputes are to be taken in favor of the nonmoving party. And with respect to the issues that they've discussed, I'll discuss those in order. He had a normal chest x-ray in 1983. That's in the record. Everything is okay. He doesn't know of any problems. In 1985, they talked about well your brother was in the hospital with silicosis. You knew that your brother had silicosis. The record says the summary judgment evidence established "he didn't know what silicosis was." And his answer he gave, that's in the record: "First, I didn't know what he had. He told me later on, but when he mentioned silicosis, I never thought that it was an illness. I thought it was an allergy that was affecting him. What I'm trying to say is, I didn't know what silicosis was." In 1989, he has a little bit of shortness of breath. Much like claimant in the earlier case, he went to a lawyer who as a matter of precaution filed a comp claim. And he didn't say silicosis. There is no mention of sandblasting on the claim. He said: Had a lung disease.

HECHT: Would you think it would make a difference if it were?

THOMPSON: My client, unlike the client in the case before us, didn't think he had silicosis, didn't think he was ill. In the case before us, he thought he had silicosis and it turned out the doctor said well, well don't think you do. My client didn't know he was ill, didn't think that. The lawyer filed a claim for him of a lung disease. And the summary judgment evidence showed what my client understood about why that claim was filed. And we will discuss in detail why my client understood that.

Why did the lawyer file the claim? In 1989, there are different standards for comp claims verses third-party claims. There's a 30-day time limit to give an employer notice of first manifestation of any disease, or you may lose your right to pursue that claim. If you notice, that lawyer's first manifestation date he put in there is within 30 days of the date he filed the claim. Now he may have been worried about limitations running on a comp claim on why he filed it.

HANKINSON: There's a point that there's a fact issue then as to when he was on actual or constructive notice?

THOMPSON: Absolutely.

HANKINSON: And that fact issue is raised by his testimony that: I know this is what the comp claim forms says, but here's what I really thought at the time.

THOMPSON: That's correct. One of the other things in the context we have to understand is this is a working class immigrant person that is not highly educated. He had a 9th grade education in Mexico. He doesn't speak English well. There was an interpreter in the deposition. He doesn't read English. The thing that was filed was filed in English. What he said was: "I didn't know I was ill. I filed it as a precaution." And the different standard that...in those days quite frankly, lawyers may have let claims be filed, and they laid dormant for 9-10 years, because they weren't in a court. They were before an industrial accident board and the plaintiff would just sit there for years, and they may in fact thought the disease may catch up with the claim.

HECHT: What's the status of this claim?

THOMPSON: This claim is pending. I guess 8-9 years later. But it's undisputed in this case, that no doctor ever told Mr. Martinez that he had silicosis, or a lung disease before 1990.

OWEN: Is there any evidence of whether a doctor could have told him that had he gone sooner?

THOMPSON: Well the only evidence is he did act within...if you said 1989 was the date, that's when it started, you better do something within 2 years, he did actually go to a doctor, Wisenfelt within that 2 year time period. Dr. Wisenfelt was an allergist in Midland, which is the big city compared to Odessa, and Dr. Wisenfelt said: I don't know what's wrong with you, we need to find out some more stuff. So he actually did exercise due diligence and go to a doctor who said: I don't know what's wrong with you, I guess we've gotta look at some more things.

GONZALEZ: What about the year gap between the date it says: You've got to have a biopsy and the date of the biopsy?

THOMPSON: First off there's no evidence who paid for any of that test work for Dr. Wisenfelt or Dr. Bierslow. The year gap, the only thing I can tell you is that Mr. Martinez is on food stamps, the record shows, he has no bank account. Mr. Martinez did not have much money. Mr. Martinez lived in Odessa, Texas, in which board certified occupational physicians are B(?) readers(?) don't abound on every corner. And he did in fact go to who he thought was a good doctor, Dr. Wisenfelt in Midland There is no evidence in the record as to the year time period, except the evidence is he was financially distraught during that time period.

BAKER: Do you believe then that that's a factor that should be considered by courts when they are looking at due diligence fact?

THOMPSON: Yes, sir. I believe it's a fact issue by the jury. Because I believe there's a fact issue regarding this whole matter about the context of which it was in. What Dr. Wisenfelt told him when he went to the doctor, the doctor said: I can't diagnose you with anything; I'm not sure what you have. Those are all intertwined and that's one of the reasons why this court, I guess in 1943 in

the *Robeck(?)* case talked about why these questions and it was not a discovery rule case, but in 1943 in the *Robeck(?) v. Hunt* case...

BAKER: Getting back to the financial factor. It cuts the other way, too. If you have all kinds of coverage or cash to pay for the treatment and you don't go, you can still then argue "well you had the money and you should have gone." An opposite, "well you didn't have the money, but you should have gone."

THOMPSON: I don't disagree with that. I believe that's why a jury is particularly well suited to hear the evidence regarding these things, and if the jury makes a determination that you knew about the injury, but you waited too long, then so be it. But those things are intricately tied up with the factual issues. In 1943 this court in a fraud case, which had a kind of discovery rule statute...

BAKER: Well then is your argument: But there are excuses for lack of due diligence that a party is prevented to put into the record, rather than the inquiring were they diligent or not after they discovered that they have symptoms and an injury _____?

THOMPSON: I think all the relevant facts enter into the calculus in determining whether or not due diligence was exercised. I will tell you that my own belief is: He did not believe that he had silicosis in 1989. There is no evidence in the record that says he believed it. There is no evidence in the record that says any doctor told him. There is no evidence that said "employment notation." And if you look at these cases you will see where the kind of evidence that bars plaintiffs come from. Doctors notation: I told him he had asbestosis in 1983. Notations from the employer saying: He was told that he had asbestos disease 5 years ago. Notations from other plaintiffs: Yeah, he told me that he was sick with asbestos 6 years ago. That's where these issues come up before the court. They are not here in this case.

BAKER: Did the record show that his brother told him that the brother had silicosis?

THOMPSON: In 1985 his brother told him he had silicosis. The record says that.

BAKER: His answer is: I didn't know what it was.

THOMPSON: That is the summary judgment evidence.

BAKER: But he had the same symptoms?

THOMPSON: No he didn't have the same. He was never hospitalized for it. He had slight shortness of breath.

BAKER: And you argue he didn't do that, because he didn't have the money to go.

THOMPSON: Well the summary judgment evidence before this court was: I didn't know I was ill, and I didn't know what silicosis was, I thought it was an allergy. And quite frankly, if you look at the doctor he saw in Midland, he was an allergist. To me it's a jury question that all of this information goes into the calculus to determine that.

ABBOTT: Looking at September 1989, it says: client has a lung disease arising out of and in the course of his employment. It talks about cause damages to his lungs. Why would that not put him on notice that he needs to go see a doctor to figure out if he really does have a problem?

THOMPSON: What he testified as to, and remember the context, this is a working class immigrant who can't read English and can't speak English, and whose lawyer files this statement: He said, I filed it as a precaution. I didn't know I was ill, didn't believe I was ill, it never stopped me from working. All I had was some slight shortness of breath, which quite frankly if you've ever gone through these cases every time you've ever deposed a plaintiff shortness of breath is _____. It is ever present. But if it did put him on notice, the *Srite* case which is an interesting case out of the Houston CA, because of what they say is part of what the law requires. The *Srite* case actually says: The burden is on the defendant in a summary judgment case on limitations to prove that he had an injury before that date of 1989. But they have to prove that there was an injury. And in this case, there is no proof other than a comp claim that has no objective medical evidence to substantiate it, that there's any injury in 1989. He had shortness of breath, but he didn't think he was ill.

ENOCH: It may be one thing to say: I don't know why the lawyer filed a comp claim. But it's entirely different when client says: I'm not ill, I don't think I'm ill, I'm not sick, but I am going to go get a lawyer. It seems to me that at some point his actions should take precedence over his words. He obviously thought something because he went to hire a lawyer. And he obviously thought something that he told the lawyer that indicated to the lawyer that in order to be a precaution, he needs to put the employer on notice that there may have been an injury. It seems to me that the court cannot condone a claimant to later on say: I didn't mean it. It seems to me, we can't ignore a comp claim that's filed. He might not know what the claim was, but it seems to me we can't ignore his conduct in attempting to obtain a benefit based on an injury by simply allowing him after the fact to say: Well I didn't know I was ill, I didn't think I was ill, I didn't think there was anything wrong. I mean it seems it goes too far to say in a summary judgment context ignore his actions and accept only what he says in his deposition.

THOMPSON: Well, I think that quite frankly all evidence that he says has to be taken true. However, let's look at the 1989 comp filing. The comp filing was not for silicosis. It did not say silicosis. It did not say that I know that I was exposed to silicon, I am a sandblaster. It didn't say any of that stuff. Unlike the case before us where the comp filing said: I had silicosis, I believed I had silicosis, I thought I had silicosis. It said none of that. And the summary judgment evidence is that he didn't know he was ill. Why the lawyer did what he did in 1989, I theorize, but he did something without medical documentation, without medical diagnosis. And, quite frankly, much like the judge's question earlier about should you be able to go into something that has not been

medically proven yet. He didn't know anything about it. And he did take some action. And he did go see a doctor. And the doctor said: I don't know what is your problem. And in addition to that, the insurance company controverted his worker's comp. claim saying: There's no evidence of any occupational disease, we're not going to pay for any medical treatment or any medical thing because there's just no evidence of anything like that.

HECHT: Your case aside, this doesn't really pertain as much to your case as the prior one. But in a context where the law has statute to impose for injuries that occur in construction and engineering and architectural process, and has adverse possession statutes that require after a certain specific time, then title may change. Should the discovery rule operate to permit a cause of action 30, 40, 50 years after the injury first happens? We were talking earlier about a birth defect or some exposure when it takes that long to determine that there really was a serious injury at that time?

THOMPSON: I think historically we always have. I've done this for 16 years now, and I've been in depositions with many of the same lawyers time and time again. Remember that the burden of proof is on the plaintiff. The burden of going forward is on the plaintiff. They have to prove what products they were exposed to. This court has rejected market share liability at least in the situation that was brought to this court, they have the burden of proof to prove whose products they were exposed to, they have the burden of proof under the *Havener* opinion, to prove causation under stringent requirements. So the burden of proof is on the plaintiff. And I think quite frankly if you look in *Urie v. Thompson,* the original blameless ignorance rule, if someone is a DES baby, and is born with a birth defect and maybe they know about the injury as a child, but it isn't until 12 years later that everyone finds out that DES was the cause of this horrible monstrosity and the DES people may have known about it, but hid it, or examples like that, if in fact those are the cases, yes, I think it's reasonable to go forward with that kind of case, and it's reasonable for the discovery rule to apply.

BAKER: But that's a fraudulent concealment as opposed to the discovery rule?

THOMPSON: No, sir, I believe it is not fraudulent concealment.

BAKER: But you said in your example that they knew about it and they concealed it.

THOMPSON: If they knew about it but didn't disclose it. But that actually isn't relevant to whether or not the discovery rule should apply. It should apply until they learn of the cause of it. Maybe one of the reasons they didn't learn of the cause science may not have caught up, or they may have the hid the danger.

BAKER: _____ make the argument that if it's fraudulent concealment that you could and should have a longer time before you have reason to know what you should know?

THOMPSON: And the *Robek* case was a case of fraud in which this court first really talked

about the discovery rule for discovering the fraud. I don't think it's necessary in this particular case to discuss whether or not you need fraudulent concealment. I believe that I have not abused the example respectfully. But what I believe is in this particular case if we start taking an allowance that the discovery rule is only going to apply the date that someone first has symptoms, this court in the *Granell* case talked about maybe there's a cause of action for cigarette smoking for an addiction issue under very specific circumstances, is the first cough that a smoker has going to put him on notice that he better file that claim?

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REBUTTAL

LAWYER: When does the inquiry start, that is the test. Not when it's completed, not that we know we have silicosis, when does the duty to inquire start? He had symptoms in August 31, 1989, he says that;'s when there was the first manifestation of the disease. He felt badly enough as Justice Enoch pointed out to go see a lawyer and filed a claim. We do not encourage the frivolous filing of worker's comp. claims. He obviously felt badly enough that he pursued this. There is no claim in this case that the ultimate lawsuit for silicosis the third-party action today is any different than the subject for worker's comp. claim.

We would ask that the court reverse the opinion of the CA.