

NO. 20-0268

In the Texas Supreme Court

In re Kuraray America, Inc.,
Relator.

Original Proceeding From Cause No. 2018-62973
In the 234th Judicial District Court of Harris County, Texas
Honorable Lauren Reeder, Presiding Judge

RELATOR'S BRIEF ON THE MERITS

NORTON ROSE FULBRIGHT US LLP
Jeffrey S. Wolff
State Bar No. 21865900
jeffrey.wolff@nortonrosefulbright.com
Katherine D. Mackillop
State Bar No. 10288450
katherine.mackillop@nortonrosefulbright.com
Peter C. Tipps
State Bar No. 24070748
peter.tipps@nortonrosefulbright.com
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151

Counsel for Relator Kuraray America, Inc.

IDENTITIES OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 55.2(a), Relator Kuraray America, Inc. provides the following list of all parties and the names and addresses of their counsel:

1. Relator is Kuraray America, Inc.
2. Trial and appellate counsel for Relator is Norton Rose Fulbright US LLP, Jeffrey S. Wolff, Katherine D. Mackillop, and Peter C. Tipps, 1301 McKinney, Suite 5100, Houston, Texas 77010-3095.
3. Respondent is the Honorable Lauren Reeder, Presiding Judge of the 234th Judicial District Court of Harris County, Texas.
4. Real Parties in Interest/Plaintiffs are the Plaintiffs in the MDL case *In re Kuraray America, Inc.*, Cause No. 2018-62973 in the 234th Judicial District Court of Harris County, Texas. See List of Plaintiffs for a listing of all Real Parties in Interest/Plaintiffs, Exhibit A at the end of this Brief.
5. Trial counsel for Real Parties in Interest. Liaison Counsel for Plaintiffs are:

The Lanier Law Firm
Mark Lanier
Lawrence P. Wilson
Kevin Parker
6810 FM 1960 West
Post Office Box 691448
Houston, TX 77069

John Arthur Daspit
Robert Morse
Kiernan McAlpine
Daspit Law Firm
440 Louisiana Street, Suite 1400
Houston, TX 77002

Randall O. Sorrels
Sorrels Law
5300 Memorial Dr., Suite 270
Houston, Texas 77007

In addition, *see* List of Plaintiffs' Counsel, with the specific plaintiffs each represents, at Exhibit B at the end of this Brief. Addresses of all counsel are listed in the Certificate of Service.

TABLE OF CONTENTS

	Page
IDENTITIES OF PARTIES AND COUNSEL	i
STATEMENT OF THE CASE.....	vii
STATEMENT OF JURISDICTION.....	ix
ISSUES PRESENTED.....	x
SWORN RECORD	x
THE REASONS THAT THE COURT SHOULD GRANT REVIEW.....	1
STATEMENT OF FACTS	2
A. After an Accident, Plaintiffs Requested All Information on Kuraray Employees' Cell Phones	2
B. To Justify the Requests, Plaintiffs Claim That the Board Operators Were Distracted by Cell Phone Use and That This Distraction Was a Cause of the Accident	3
C. The Trial Court Ordered Production of Cell Phone Data for Months Prior to the Accident	5
D. Kuraray Produced All Cell Phone Data for the Day of the Accident, Which Showed That the Board Operators Were Not Distracted by Their Cell Phones	6
1. The R-1201 Reactor's Temperature Drops at 12:53 a.m.....	7
2. The High Pressure Alarms Begin Sounding at 8:51 a.m.....	7
3. The Accident Occurs at 10:28 a.m.	9
E. Misunderstandings About the March 26 Order Led to Further Motions, Another Order and a Mandamus Which Was Later Dismissed	9
1. A Term in the March 26 Oral Order Led to a Motion to Reconsider	9
2. The Trial Court Denied the Motion to Reconsider, Prompting a Mandamus Which Was Later Dismissed.....	12

F. The Trial Court Revised the Production Order, Resulting in This Mandamus Proceeding.....	13
SUMMARY	15
ARGUMENT AND AUTHORITIES.....	17
I. Standard of Review	17
II. The Trial Court Abused Its Discretion in Ordering Production of Irrelevant Cell Phone Usage Data For Months Before the Accident.....	17
A. Discovery Has Long Been Confined by Relevance	17
B. Before this Case, Texas Courts Prohibited Discovery of Cell Phone Data Beyond the Immediate Time of the Accident	19
C. Mere Assertions of Gross Negligence Do Not Affect the Scope of Permissible Cell Phone Discovery.....	21
D. The Trial Court’s Order Violates Texas Law by Requiring Production of Irrelevant Cell Phone Data.....	22
III. Kuraray Lacks an Adequate Remedy on Appeal	28
CONCLUSION	30
CERTIFICATE OF COMPLIANCE.....	31
CERTIFICATION	31
CERTIFICATE OF FILING AND SERVICE	32
Exhibit A List of plaintiffs/real parties in interest	34
Exhibit B List of Plaintiffs’ Counsel	35
APPENDIX.....	37
INDEX TO APPENDIX	37

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Christus Health Southeast Texas</i> , 399 S.W.3d 343 (Tex. App.—Beaumont 2013, orig. proceeding).....	20
<i>In re CSX Corp.</i> , 124 S.W.3d 149 (Tex. 2003) (orig. proceeding)	18, 29
<i>In re Indeco Sales, Inc.</i> , No. 09-14-00405-CV, 2014 WL 5490943 (Tex. App.—Beaumont Oct. 30, 2014, orig. proceeding)	20, 21
<i>In re Moor</i> , No. 14-12-00933-CV, 2012 WL 5463193 (Tex. App—Houston [14th Dist.] Nov. 8, 2012, orig. proceeding)	15, 20, 29
<i>In re National Lloyds Ins. Co.</i> , 449 S.W.3d 486 (Tex. 2014) (orig. proceeding)	17, 18
<i>In re National Lloyds Ins. Co.</i> , 507 S.W.3d 219 (Tex. 2016) (orig. proceeding)	17, 28
<i>In re National Lloyds Ins. Co.</i> , 532 S.W.3d 794 (Tex. 2017) (orig. proceeding)	18
<i>In re Padilla</i> , No. 03-18-00477, 2018 WL 4087733 (Tex. App.—Austin, Aug. 28, 2018, orig. proceeding).....	<i>passim</i>
<i>In re Shipman</i> , 540 S.W.3d 562, 565-66 (Tex. 2018) (orig. proceeding)	17
<i>Parker v. Bill Melton Trucking</i> , No. 3:15-CV-2528, 2017 WL 6554139 (N.D. Tex. Feb. 3, 2017).....	21
<i>Tilton v. Marshall</i> , 925 S.W.2d 672, 683 (Tex. 1996)	29

TXI Trans. Co. v. Hughes,
224 S.W.3d 870 (Tex. App.—Fort Worth 2007), *rev'd on other*
grds, 306 S.W.3d 230 (Tex. 2010)19, 27, 28

Walker v. Packer,
827 S.W.2d 833 (Tex. 1992) (orig. proceeding)17

Rules and Statutes

TEX. R. CIV. P. 192.3(a)17, 18, 28

TEX. R. EVID. 40118

STATEMENT OF THE CASE

Trial Court. This case arises out of an accident at a plant in Pasadena, Texas, owned by Kuraray America, Inc. Plaintiffs claim injuries from the accident. A number of cases were filed in several district courts in Harris County and have been consolidated in a Multidistrict Litigation proceeding, styled *In re Kuraray America, Inc.*, Cause No. 2018-62973, in the 234th Judicial District Court of Harris County, Texas. Judge Lauren Reeder, the Respondent, is presiding judge of the 234th Court and is the current pretrial judge appointed by the MDL Panel.

After a series of motions and interim orders (March 26, June 28) concerning the production of cell phone data from cell phones of Kuraray employees, then-pretrial Judge Moore's final order on the subject, signed on September 20, 2019, directed Kuraray to produce cell phone usage data for three Kuraray employees for the four months before the accident and for two Kuraray employees for the month and a half before the accident. 2R1027/16, 2R1881, 3R2313-16 (App. 1, 2, 3).¹ This order was entered despite (1) uncontroverted evidence that the purported reason for the production, an allegation that the Kuraray employees were distracted by cell phone use at the time of the accident, was wrong, and (2) no Texas case has required

¹ These orders were issued by Judge Daryl Moore, the former pretrial judge. After he left the bench, the MDL Panel assigned the MDL proceeding to Judge Lauren Reeder of the 234th Judicial District Court of Harris County, Texas. SR1-3 (App. 7) (a Supplemental Sworn Record ("SR") was filed on April 22, 2021). Judge Reeder confirmed Judge Moore's rulings in orders dated March 31 and April 19, 2021. SR4-5 (App. 5, 6).

the production of cell phone data to show that “distraction” caused an accident for a period longer than a few hours before the accident.

Court of Appeals. On October 11, 2019, Kuraray filed a petition for writ of mandamus in the Fourteenth Court of Appeals, in *In re Kuraray America, Inc.*, Cause No. 14-19-00797-CV. On October 17, the Court of Appeals requested a response be filed November 15, 2019. On March 12, 2020, the Fourteenth Court of Appeals (Justices Jewell, Bourliot and Zimmer) denied the requested relief in a two-paragraph Memorandum Opinion, stating no reasons for the denial. *In re Kuraray America, Inc.*, No. 14-19-00797-CV (Tex. App.—Houston [14th Dist.] March 12, 2020, orig. proceeding) (App. 4).

Supreme Court. On April 6, 2020, Kuraray filed a petition for writ of mandamus in this Court. On May 15, 2020, this Court ordered Real Parties in Interest to file a response by June 15, 2020. No response was filed.

Relator’s mandamus petition initially challenged a discovery order issued by the Honorable Daryl Moore, Judge of the 333rd Judicial District Court of Harris County. 3R2313-36. Judge Moore left the bench in December 2020. On January 22, 2021, this Court entered an abatement order, asking that the parties “notify this Court of all events affecting the status of this case, including when the successor judge has ruled in accordance with Texas Rule of Appellate Procedure 7.2(b). The parties shall file a status report by April 22, 2021.” On February 1, 2021, the MDL

Also available as part of the eCourse

[2023 eConference on State and Federal Appeals](#)

First appeared as part of the conference materials for the
33rd Annual Conference on State and Federal Appeals session
"Persuasive Oral Argument Techniques"