

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 REPLY 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.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
SUMMARY	1
CORRECTING PLAINTIFFS’ ERRONEOUS STATEMENTS OF THE UNDISPUTED FACTS.....	4
ARGUMENT	7
I. Mandamus Relief Is Properly Granted on Undisputed Facts.....	7
II. The Trial Court Abused Its Discretion in Ordering Production of Cell Phone Usage Data for Months Before the Accident.....	11
A. Relevance, the Touchstone for Permissible Discovery, Was Not Satisfied Here.....	11
B. Once Kuraray Produced Cell Phone Usage Data for the Day of the Accident, Whether Kuraray Enforced Its Cell Phone Policy in the Preceding Months Became Irrelevant	12
1. The Plaintiffs’ Own Recitation of Cell Phone Use on the Day of the Accident Confirms No Evidence of Distraction	13
2. Under Texas Law and the Undisputed Facts Here, Months of Pre-Accident Cell Phone Use Is Irrelevant.....	15
C. Possession of a Cell Phone at the Time of an Accident Does Not Justify Production of Months of Cell Phone Data	19
D. Plaintiffs’ Attempt to Distinguish Texas Law Fails	20
E. A Partial Limit of an Extraordinarily Broad Production Request Does Not Render a Discovery Order Impervious to Review	24
III. Kuraray Lacks an Adequate Remedy at Law.....	25
CONCLUSION	29
CERTIFICATE OF COMPLIANCE.....	30

TABLE OF CONTENTS
(continued)

	Page
CERTIFICATION	30
CERTIFICATE OF FILING AND SERVICE	30

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Christus Health</i> , 399 S.W.3d 343 (Tex. App.—Beaumont 2013, orig. proceeding).....	23
<i>Christus Health Southeast Texas v. Licatino</i> , 352 S.W.3d 556 (Tex. App.—Beaumont 2011, no pet.).....	10
<i>City of Keller v. Wilson</i> , 168 S.W.3d 802 (Tex. 2005)	9, 10
<i>In re ExxonMobil Corp.</i> , 635 S.W.3d 631 (Tex. 2021)(orig. proceeding)	3
<i>Ford Motor Co. v. Castillo</i> , 279 S.W.3d 656 (Tex. 2009)	15, 16
<i>In re Indeco</i> , No. 09-14-00405-CV, 2014 WL 5490943 (Tex. App.—Beaumont Oct. 30, 2014, orig. proceeding).....	23
<i>In re K&L Auto Crushers</i> , 627 S.W.3d 239 (Tex. 2021) (orig. proceeding)	3
<i>Lunsford v. Morris</i> , 746 S.W.2d 471 (Tex. 1988) (orig. proceeding), <i>overruled on other grds, Walker v. Packer</i> , 827 S.W.2d 833 (Tex. 1992).....	16
<i>In re Memorial Hermann</i> , 464 S.W.3d 686 (Tex. 2015) (orig. proceeding)	16
<i>In re Moor</i> , No. 14-12-00933, 2012 WL 5463193 (Tex. App.—Houston [14th Dist.] Nov. 8, 2012, orig. proceeding).....	23
<i>In re National Lloyds Ins. Co.</i> , 507 S.W.3d 219 (Tex. 2010) (orig. proceeding)	16

<i>In re National Lloyds Ins. Co.</i> , 532 S.W.3d 794 (Tex. 2017) (orig. proceeding)	16, 22
<i>In re Padilla</i> , No. 03-18-00477, 2018 WL 4087733 (Tex. App.—Austin, Aug. 28, 2018, orig. proceeding).....	15, 20, 21
<i>Parker v. Bill Melton Trucking</i> , No. 3:15-CV-2528, 2017 WL 6554139 (N.D. Tex. Feb. 3, 2017).....	22, 23
<i>St. Joseph Hosp. v. Wolff</i> , 94 S.W.3d 513 (Tex. 2002).....	9
<i>In re State Farm Lloyds</i> , 520 S.W.3d 595 (Tex. 2017) (orig. proceeding)	3
<i>Texas & N. O. R. Co. v. Burden</i> , 203 S.W.2d 522 (Tex. 1947)	10
<i>Tilton v. Marshall</i> , 925 S.W.2d 672 (Tex. 1996)	25
<i>TXI Trans. Co. v. Hughes</i> , 224 S.W.3d 870 (Tex. App.—Fort Worth 2007), <i>rev'd on other grds</i> , 306 S.W.3d 230 (Tex. 2010)	22
<i>In re UV Logistics</i> , No. 12-20-00196-CV, 2021 WL 306205 (Tex. App.—Tyler Jan. 29, 2021, orig. proceeding).....	23, 24
Rules and Statutes	
Tex. R. Civ. P. 192.3(a)	22
Tex. R. Evid. 402	23
Tex. R. Evid. 803	22

SUMMARY

The Court should adopt the following common-sense rule that also comports with bedrock discovery principles: discovery of cell phone use at the time of an incident is permissible on allegations that it may be the cause of the incident. Discovery of cell phone use beyond the time of the incident depends upon the evidence of cell phone use at the time of the accident—*i.e.*, if there was no negligent cell phone use at the time of the incident, discovery of cell phone use beyond the time of the incident is irrelevant and cannot be compelled. This rule allows all relevant cell phone usage to be discovered and avoids unnecessary (because of irrelevancy) discovery of months of pre-incident cell phone usage.

Here, in response to Plaintiffs' discovery request premised on their claim that cell phone use was a cause of the accident, Kuraray produced all cell phone use from 5:30 p.m. the day before the accident until 10:28 a.m. the next day when the accident happened (a period of almost 17 hours). That production conclusively established that those working on the 1200 line during that period were not distracted by their cell phones, thereby rendering cell phone usage for months before the accident irrelevant and thus not discoverable.

Plaintiffs do not, because they cannot, claim that Kuraray's recounting of the cell phone use is incorrect. Instead, they claim that because—(1) Jeremy Neal, the 1200 line operator on the overnight shift immediately before the accident, had *ten*

seconds of cell phone use in the five hours from when the temperature in the reactor started to drop until the end of his shift; (2) Troy Moorer, the operator on the 1200 line from 5:30 a.m. to 10:28 a.m. the morning of the accident, spent perhaps *ten seconds* looking at one five-word text and responding with a four-word text nearly an hour before the incident; and (3) both Joe Jones, an additional operator on the 1200 line from 10:00 a.m. until 10:28 a.m. when the accident happened, and Joe Zoller, the supervisor who was in the control room from 10:00 a.m. until 10:28 a.m., had *no* cell phone activity during that time—production of all of these witnesses’ cell phone usage for months before the accident was proper.

Perhaps there will be cases in which the evidence of cell phone use rises to the level of distraction worthy of discovery on pre-incident usage, but this is indisputably not that case. And, importantly for Texas discovery law, if discovery of months of pre-accident cell phone use is allowed in circumstances such as those present here, then a drastic increase in expensive and wasteful discovery of cell phone use by parties and witnesses in negligence cases is inevitable.

Plaintiffs’ claim that mandamus relief is improper in any dispute concerning relevance of discovery is not backed by Texas law. Instead, as explained below, if the facts of the cell phone use are not disputed (as here) and the cell phone use cannot be rationally described as rising to the level of distraction (as here), then any further discovery of cell phone use is not relevant and thus not discoverable.

Also available as part of the eCourse

[eSupplement to the 35th Annual Health Law Conference](#)

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