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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLER

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

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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.

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