No. 21-598

In the Supreme Court of the United States

DIPANKAR CHANDRA

v.

LEONARDO DRS, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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PETITIONER

QUESTION PRESENTED FOR REVIEW

Can the judgment of the court below, which granted Respondents' Motion for Summary Judgment regarding Petitioner's claims for negligence, gross negligence, premises liability, and products liability be reconciled with the motion for summary judgment standards as outlined in Federal Rules of Civil Procedure 56 and Texas Rules of Civil Procedure 166a?

PARTIES TO THE PROCEEDING

Petitioner:

1. Dipankar Chandra

Respondents:

1. Leonardo DRS, Inc. and
2. DRS Network & Imaging Services, LLC

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A.4. Chandra v. Leonardo DRS, Inc. and DRS Network & Imaging Services, LLC, 06-20-00056-CV (Court of Appeals, Sixth Appellate District of Texas at Texarkana, November 24, 2020) Memorandum Opinion Affirming Trial Court Summary Judgment.

A.5. Chandra v. Leonardo DRS, Inc. and DRS Network & Imaging Services, LLC, No. 06-20-00056-CV (Court of Appeals, Sixth Appellate District, State of Texas, December 15, 2020) Denial of Motion for Rehearing.

A.6. Chandra v. Leonardo DRS, Inc. and DRS Network & Imaging Services, LLC, DC-19-03484 (116th District Court, Dallas County, June 17, 2020) Order and Final Judgment.

A.7. Photograph of Zero Leak Reactor

A.8. Photograph of Zero Leak Reactor Upright

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A.10. Flimsy Tellurium Epitaxial Reactors

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court for the State of Texas in this case.

OPINIONS BELOW

The Supreme Court of Texas in Dipankar Chandra v. Leonardo DRS, Inc. and DRS Network & Imaging Services, LLC denied Petitioner's Petition for Review, which is reproduced in the appendix to this petition as A.1. The Texas Supreme Court also denied Petitioner's Motion for Rehearing, which is reproduced in appendix to this petition as A.2. The

Court of Appeals Sixth Appellate District of Texas affirmed the judgment of the 116th District Court of Dallas County, Texas (Tx. Ct. No. DC-19-03484), which is reproduced in the appendix to this petition as A.3. Petitioner's Motion for Rehearing was also denied by the Sixth Appellate Court of Appeals for the State of Texas, which is reproduced in the appendix to this petition as A.5 and A.4. The

final Order in the 116th Judicial District Court of Dallas County, Texas, which granted Respondent's Motion for Summary Judgment, is reproduced in the appendix to this petition as A.6.

STATEMENT OF JURISDICTION

The entry of the final judgment in the Supreme Court of Texas, denying Petitioner's Motion for Rehearing was on May 28, 2021. This Petition for a Writ of Certiorari has been filed pursuant to Rule 13, within 90 days after entry of the judgment of the Texas Supreme Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254, 1257, and 1331.

STATUTORY PROVISIONS INVOLVED

This case involves the proper interpretation of toxic tort injuries and the summary judgment standard from Federal Rules of Civil Procedure 56.

STATEMENT OF THE CASE

Petitioner worked for Respondents from September 1998 to November 2009. Petitioner was diagnosed with colon cancer in 2006. Petitioner work location and entity was not listed on Respondents' attached worker's compensation insurance policies and therefore not covered by worker's compensation coverage. Petitioner proposed a new design for the reactors to eliminate the leak in the reactors to his management. It is well-established that mercury telluride and cadmium telluride have a causal relationship to many health conditions including colon cancer and prostate cancer.

Slow Destruction of the Immune system by continuous exposure to extremely small quantities of Cadmium is a separate, independent, extremely well known and well established result from medical research, totally separate from onset of lower body cancers. And the incubation period is even longer - between 15 and 20 years. In other words, Prostate Cancer itself becomes diagnosable after 15 years, and then does not manifest itself as another reincarnation as dangerously degraded immunity. The Immunity was degrading itself steadily and slowly and dangerously over 15 + years from a direct impact of Cadmium, separately and independently from Prostate Cancer (incubation period 15 years). That reaction is why Cadmium is called both as an ultra toxin and ultra-carcinogen, not just an ultra toxin by itself or ultra carcinogen by itself. Both can obviously happen simultaneously, independent of each other.

Respondent made no changes to the environment despite knowing that three of its employees developed cancer, knowing that a leak was occurring, reviewing a design from Petitioner for a reactor that would not leak, having knowledge of the connection between mercury telluride/cadmium telluride and cancer, and being asked on multiple occasions by Petitioner to redesign the reactor or otherwise implement other safety measures to prevent mercury telluride and cadmium telluride exposures. Copies of the leak reactors are attached as Appendix A.7-A.10. After surviving his 2006 colon cancer with permanent medical consequences, which he still deals with to this day, Petitioner was diagnosed with prostate cancer in

2018. All three technicians who developed cancer along with Petitioner, have now passed.

The district court granted summary judgment for Respondents. Petitioners filed a motion for reconsideration of the district court's decision. The district court denied Petitioner's motion for reconsideration. Petitioners timely filed their notice of appeal with the Sixth Circuit Court of Appeals, which affirmed the decision of the district court. Thereafter, Petitioners filed a Motion for Rehearing, which was denied by the Sixth Appellate District, Court of Appeals. Petitioner then appealed to the Texas Supreme Court. The Texas Supreme Court denied Petitioner's Petition for Review, and also denied the Motion for Rehearing. Petitioner then filed this Petition for a Writ of Certiorari.

REASONS WHY REVIEW SHOULD BE GRANTED

1. Review Should Be Granted Because The Judgment Of The Courts Below Is In Conflict With The Definition of the Federal and Texas Motion for Summary Judgment Standard.

Summary judgment is appropriate where, considering all the allegations in the pleadings, depositions, admissions, answers to interrogatories, and affidavits, and drawing inferences in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56 (a). The 2007 Advisory Committee Notes state:

> "It is established that although there is no discretion to enter summary judgment when there is a genuine issue as to any material fact, there is discretion to deny summary judgment when it appears that there is no genuine issue as to any material fact. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256 –257 (1948)."

Fed. Rule Civ. Proc. § 56 – Advisory Notes.

By the language of this case as well as its legislative use as support of an Advisory Committee Note under Rule 56 (a), it is clear that the legislative intent was a bias towards denying summary judgment. Based on the language of the *Kennedy* case in the Advisory Committee Note, courts should immediately deny summary judgment if there is even one genuine issue of material fact. At the same time, courts also have discretion to deny summary judgment even if there is no genuine issue of material fact.

A dispute is genuine if the evidence is such that a reasonable juror could find for the non-moving party. *E.g., David-Lynch, Inc. v, Moreno*, 667 F.3d 539, 549 (5th Cir. 2012). Finally, it is not the function of the trial judge "to weigh evidence, assess credibility, or determine the most reasonable inference to be drawn from the evidence. Those are functions of the trier of fact." *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987)("The Supreme Court has not, however, approved summary judgments that rest on

credibility determinations...[and] the Court reminds district judges not to invade the role of the jury.").

A. TWCA Claim

Petitioner's injury was directly as a result of Respondents' acts/omissions during Petitioner's employment with Respondents. Respondent wholly failed to defend their position against Petitioner's TWCA claim. Moreover, Respondents' defense of limitations failed. Finally, Petitioner established causality directly from Respondents' acts/omissions.

Here, Petitioner's TWCA case should have survived summary judgment as it does not exempt employers from common law liability for intentional injuries. *Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665, 666 (Tex. 1981). The TWCA, however, does not bar an employee from suing his employer upon a claim of intentional tort. Respondents' argument that the TWCA does not apply fails for two reasons: (1) Respondents acts/omissions constitutes an intentional injury because the employer knew it would cause certain injury; and (2) Petitioner did not work at a worksite or entity of Respondents' that was covered by the TWCA.

DRS STS in Texas working without TWCA, forced Petitioner to keep on working with HgCdTe growth with varying Cd, with a significant fraction with very high Cd levels, to grow SWIR (Short Wavelength Infra-Red) devices which have combined defense applications and a host of other applications, including in communication and data transfer. Cadmium release rates from the melt increased by greater than 300 % during these growths of HgCdTe thin films from melts

containing almost an order of magnitude higher Cadmium levels due to dissociative sublimation and leaking Teflon O-rings. Appendix A.7-A.10.

The leaking reactors, pictured in Appendix A.7-A.10, also show separately the steel high pressure chamber encapsulating the Zero Leak Reactor. The Zero Leak Reactor has no leaks and can contain up to 100 + atmospheres of pressure. As pointed out, also pictured separately is the flimsy Tellurium saturated reactors placed on the two sides of the controllers. Clearly visible through these reactors, with one fragile glass cylinder between the operator and the ultra-toxic and ultra-carcinogenic vapors, are hints of the steel rods and tubes going through the degrading O-rings. Appendix A.7-A-10.

Based on his expertise, Petitioner has compiled the release rates with new O-rings on three separate days, which widely differ from each other. The information is provided as follows:

RELEASE RATES WITH NEW O-RINGS			
	Day 1	Day 2	Day 3
Release of Cadmium within the first 60 minutes	9.7 gms	11.2 gms	10.6 gms
Release of Cadmium within 60 minutes and 120 minutes	11.2 gms	10.4 gms	11.7 gms
Release of Mercury within the first 60 minutes	77.4 gms	81.2 gms	74.3 gms
Release of Mercury within 60	72.3 gms	74.3 gms	84.7 gms

minutes and 120 minutes			
Release of Arsenic within the first 60 minutes	2.8 gms	3.1 gms	3.7 gms
Release of Arsenic within 60 minutes and 120 minutes	3.7 gms	2.8 gms	3.4 gms
Release of Tellurium within the first 60 minutes	73.2 gms	68.4 gms	78.6 gms
Release of Tellurium within 60 minutes and 120 minutes	78.3 gms	74.7 gms	81.2 gms

The vindictiveness and irresponsibility of DRS STS in Texas working without TWCA are also apparent from the fact that at least in the SWIR Range, alternatives to HgCdTe existed, in the form of III-V semiconductors, like InGaP (Indium Gallium Phosphide) and InGaAs (Indium Gallium Arsenide).

B. Statute of Limitations

Second, Petitioner's claims are not barred by the statute of limitations because Petitioner filed the original cause of action with the trial court within 2 years of being diagnosed with prostate cancer in 2018. Tex. Civ. Prac. & Rem. Code §16.003(a) (The statute of limitations for a personal injury case is two years.) Petitioner was diagnosed with prostate cancer in 2018. Petitioner filed this cause of action on March 11, 2019, well within his statute of limitations.

C. Causation of Injuries/Damages

Finally, Respondents' acts/omissions directly caused Petitioner's injuries. Chandra advanced as a renowned expert in liquid Mercury Cadmium Telluride and its extremely high vapor pressures over the system. Chandra has written numerous articles on related matters. Chandra received the recognition of his knowledge and progress and originality in all forms of single crystal and epitaxial film growth for Mercury Cadmium Telluride by winning a prestigious and seminal USRA Fellowship at the National Aeronautics and Space Administration to further develop crystal growth technology. Based on his knowledge and experience, he has outlined the leak rates for the reactors as follows:

LEAK RATES FROM TELLURIUM SATURATED EPITAXIAL REACTOR 1			
	Set 1	Set 2	Set 3
Release of Cadmium within the first 60 minutes	19.4gms	17.6gms	22.1gms
Release of Cadmium within 60 minutes and 120 minutes	24.2gms	21.4gms	Reactor shut down to repair crack
Release of Cadmium within 120 minutes and 180 minutes	Reactor shut down to repair crack	Reactor shut down to repair crack	Reactor shut down to repair crack
Release of Mercury within the first	94.2gms	91.3gms	112.8gms

60 minutes			
Release of Mercury within 60 minutes and 120 minutes	127.6gms	132.4gms	Reactor shut down to repair crack
Release of Mercury within 120 minutes and 180 minutes	Reactor shut down to repair crack	Reactor shut down to repair crack	Reactor shut down to repair crack
Release of Arsenic within the first 60 minutes	6.1gms	5.4gms	8.8gms
Release of Arsenic within 60 minutes and 120 minutes	7.8gms	8.6gms	Reactor shut down to repair crack
Release of Arsenic within 120 minutes and 180 minutes	Reactor shut down to repair crack	Reactor shut down to repair crack	Reactor shut down to repair crack
Release of Tellurium within the first 60 minutes	85.7gms	92.7gms	105.7gms
Release of Tellurium within 60 minutes and 120 minutes	103.7gms	110.4gms	Reactor shut down to repair crack

Release of Tellurium within 120 minutes and 180 minutes	Reactor shut down to repair crack	Reactor shut down to repair crack	Reactor shut down to repair crack

These contain 6 - 20 grams of Cadmium, 3 - 4 grams of Arsenic, 70 - 100 grams of Mercury and 60 - 90 grams of Tellurium. They are all in their hyper carcinogenic elemental form due to dissociative sublimation and the presence of hydrogen. Under normal circumstances, 0.06 microgram of the Cadmium, 0.10 microgram of Arsenic, 0.08 microgram of Mercury and 0.10 microgram of Tellurium can cause lower body cancers. So the reactors are releasing each, between, 10 million to 500 million times the dosages required to cause cancer. A growth run lasts for 8 hours or longer. So the total release is 8 times or more the values given above.

RELEASE DURING MWIR GROWTH			
	Day 1	Day 2	Day 3
Release of Cadmium within the first 60 minutes	18.6 gms	20.3 gms	17.8 gms
Release of Cadmium within 60 minutes and 120 minutes	20.4 gms	17.4 gms	22.7 gms
Release of Mercury within the first 60 minutes	76.3 gms	84.2 gms	71.7 gms

Release of Mercury within 60 minutes and 120 minutes	82.6 gms	77.3 gms	86.3 gms
Release of Arsenic within the first 60 minutes	3.3 gms	3.8 gms	3.1 gms
Release of Arsenic within 60 minutes and 120 minutes	4.1 gms	2.8 gms	3.7 gms
Release of Tellurium within the first 60 minutes	71.3 gms	74.7 gms	71.2 gms
Release of Tellurium within 60 minutes and 120 minutes	78.6 gms	73.2 gms	77.4 gms

These leak rates were communicated to DRS by the sole inventor and expert on Tellurium saturated epitaxial reactors, Chandra, in September 1998, during the transfer of Defense Systems and Electronics Group of Texas Instruments through Raytheon to DRS Sensors and Targeting Systems. DRS ignored these bits of vital information communicated to DRS by Chandra during the following 11 years. Chandra designed and built a totally leak tight reactor and demonstrated its massive producibility. Without any explanation or discussion, DRS STS destroyed the leak tight reactor.

Petitioner has direct knowledge that manufacturing of the films was invented, developed and demonstrated by Chandra to be possible from a range of epitaxial processes, Tellurium rich epitaxy, Mercury rich epitaxy, Metal Organic

Chemical Vapor Deposition, and Molecular Beam Epitaxy. Volume production is possible more directly from the Liquid Phase Epitaxy processes, which include the Tellurium rich epitaxial reactors, and the Mercury rich epitaxial reactors. Chandra invented and developed both types of the Liquid Phase Epitaxy process for the high volume growth of the Mercury Cadmium Telluride films – Tellurium Rich and Mercury Rich.

During substrate loading, this transfer chamber is disconnected from the reactor, and after closing of the transfer chamber valve, the transfer chamber is flushed with hydrogen to drive out air, and then the valve connecting this to the main reactor is opened, the substrate holder assembly holding the substrate, inside of which there is a stirrer, are all lowered to the melt container. The melt container may be superficially protected by a loose lid, all made of glass, and which can be opened or closed by another glass rod going through the top of the reactor, which is the same as the top of the transfer chamber.

There are at least three relatively flimsy O-ring joints separating the dangerous vapors in the reactor from the outside air in the laboratory. As O-rings degrade, they leak. Furthermore, two O-rings are constantly experiencing contaminated hot glass rods and tubes being withdrawn through them straight out in the outside ambient air fast.

And micro-cracks also form in the relatively flimsy supports holding the melt container with a heavy load of melt to the wall of the reactor. And these micro-cracks allow direct release of all the toxic vapors into outside ambient air fast.

The vapors vaporize by the process of dissociative sublimination. Presence of hydrogen kept the vapors (species) in their reduced elemental stage. Hydrogen does not react with Cadmium, Arsenic, Mercury and Tellurium. When the melt consists of a mixture of tellurium and selenium, the whole laboratory becomes full of dangerous strong rotten egg smell of hydrogen selenide, indicating a concentration of 100 ppm or more, confirming directly our release data on Cadmium, Arsenic, Mercury and Tellurium.

The releases are particularly aided by the presence of a separate Mercury Reservoir below the Melt Container, hydrogen constantly flowing and sweeping up the Mercury vapor to sweep all other vapors, defects/cracks in the glass in these flimsy designs, raising, lowering and rotations of the tubes for homogenizing the melt, determination of the liquids, and the growth itself. During these times, either a solid glass rod is rotating inside a degrading O-ring, releasing toxic vapors or another glass tube is rotating inside another degrading O-ring, frequently accentuated by micro-cracks which may not be spottable. The combined Mercury Reservoir flow upwards, Melt running at > 400 C, Hydrogen flow, dissociative sublimation, Tubes or Rods rotating within degrading O-rings, Micro-cracks, all combine to produce leak rates equivalent to > 50 million times the magnitudes required to onset cancer.

But hydrogen does react with Selenium and Sulphur, forming obnoxious smelling and dangerous vapors like hydrogen selenide or hydrogen sulphide.

Petitioner worked in this environment at Respondents' workplace for a substantial time that it caused him health issues, including but not limited to prostrate and colon cancer. Respondents' failed to provide a safe working environment that directly led to his cancer, which is the basis of the underlying lawsuit.

The evidence with inference in favor of the nonmovant clearly negates Respondents' original motion for summary judgment. Under Rule 56, Petitioner is only required to show one genuine issue of material fact to prevent the granting of summary judgment and here Petitioner has presented several that were simply not acknowledged by the lower courts.

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to review the judgment of the Texas Supreme Court in this case.

Respectfully submitted this 21st day of August, 2021.

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