NO. 06-0880

IN THE

SUPREME COURT

OF TEXAS

_____

JOHN DOE,

Petitioner

v.

BRINKMANN INVESTMENTS, INC.,
BRINKMANN INVESTMENTS, INC. d/b/a BRINKMANN ROOFING CO.,
BRINKMANN ROOFING & SHEETMETAL CO., INC., and
ANTHONY DELMONICO,

Respondents

PETITION FOR REVIEW

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JOHN DOE

NO. 06-0880

JOHN DOE,

Petitioner

v.

**BRINKMANN INVESTMENTS, INC.,
BRINKMANN INVESTMENTS, INC. d/b/a BRINKMANN ROOFING CO.,
BRINKMANN ROOFING & SHEETMETAL CO., INC., and
ANTHONY DELMONICO,**

Respondents

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STATEMENT OF THE CASE

Nature of the case. The underlying case was a suit brought by Petitioner for personal injuries proximately caused by the negligence and/or recklessness of Respondents. Petitioner was an independent contractor involved in a project to break up roofing tile and haul it off of a project site, at Respondents' direction. Petitioner developed asbestosis as a result of exposure to asbestos on that project.

Proceedings in the trial court. Petitioner filed suit on July 9, 2004 in the 126th District Court of Travis County, Texas. Respondents each filed motions for summary judgment on the grounds of expiration of the statute of limitations. The Honorable Lora J. Livingston, Judge Presiding, signed a summary judgment in favor of Respondents on March 9, 2005. Upon Petitioner's motion for rehearing and reconsideration, Judge Livingston upheld her decision on April 22, 2005.

Proceedings in the appellate court. Petitioner filed notice of appeal on May 19, 2005, in the Third Court of Appeals. Petitioner was the appellant and Respondents were the appellees. After briefs were submitted by all parties, a panel consisting of Justice B. A. Smith, Justice Puryear, and Justice Pemberton considered the appeal. The panel rendered judgment on August 25, 2006, and issued a Memorandum Opinion affirming summary judgment on the basis of the statute of limitations. Justice Puryear authored the opinion for the panel. The opinion is available at the following citation: *King v. Brinkmann Invs.*, No. 03-05-00316-CV, 2006 Tex. App. LEXIS 7546.

Petitioner now files this Petition for Review to the Supreme Court of Texas.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal because the decision of the Third Court of Appeals conflicts with this Court's decision in *Childs v. Haussecker*, 974 S.W.2d 31 (Tex. 1998), Nos. 97-0231 and 97-0324, consolidated, as well as decisions from the Sixth and Fourteenth Courts of Appeals, in *Youngblood v. U.S. Silica Co.*, 130 S.W.3d 461 (Tex. App.—Texarkana 2004, pet. denied) and *Dixon v. E.D. Bullard Co.*, 138 S.W.3d 373 (Tex. App.—Houston [14th Dist.] 2004, pet. granted, judgm't vacated w.r.m.). Tex. Gov't Code § 22.001(a)(2). In brief, the Supreme Court opinion in *Childs* has determined the circumstances under which the statute of limitations begins to run for a latent occupational disease such as asbestosis, and when a genuine issue of material fact exists so as to preclude a summary judgment on the statute of limitations. The Third Court of Appeals decision, affirming summary judgment, runs directly contrary to the factual analysis and legal principles set forth in this case, and subsequent cases.

In addition, the Supreme Court has jurisdiction over this appeal because the Third Court of Appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected. Tex. Gov't Code § 22.001(a)(6). It has chosen to ignore Supreme Court precedent and instead rely on two appellate court decisions, both of which are inapplicable to this case, and one of which relied for authority on an appellate decision that was subsequently reversed and remanded by this Court.

ISSUE PRESENTED FOR REVIEW

Based on the evidence and testimony in the record, does there exist a genuine issue of material fact to preclude Respondents from being granted summary judgment on the basis of statute of limitations, pertaining to when Petitioner knew or should have known that he had an asbestos-related disease?

STATEMENT OF THE FACTS

The memorandum opinion of the Third Court of Appeals correctly summarizes the nature of the case. The opinion, however, omitted certain facts crucial to the analysis, which Petitioner presents, among others, below.

Once Petitioner was given reason to believe, in late 1995, that he had been exposed to asbestos while working on a roofing project for Respondents, he filed a worker's compensation claim in 1996, out of an abundance of caution; however, the claim was denied and resulted in no benefits (CR 43-76).

Over the next several years, Petitioner suffered from a variety of seemingly unconnected symptoms, including respiratory ailments and flu-like symptoms, blurry vision, and gastrointestinal and bowel problems (CR 5-6, 78). Despite informing his doctors of his exposure while a contractor for Respondents, none of his doctors concluded that his symptoms were the result of an asbestos-related illness (CR 6, 271-272). Petitioner saw a number of doctors for his various symptoms between 1995 and 2003 (CR 271-272, also at App. Tab 4). The doctors could diagnose nothing more concrete than "chronic cough" (CR 77) or "reactive airway disease" (CR 78).

Finally, on August 18, 2003, Dr. Roger A. Casama determined that the symptoms Petitioner suffered from were due to pulmonary asbestosis (CR 13-15, also at App. Tab 5). This was the first time that Petitioner was provided any objective verification that his symptoms were actually caused by an asbestos-related illness (App. Tab 4).

Petitioner filed suit on July 9, 2004, less than a year later (CR 2-15). Respondents

filed motions for summary judgment, asserting that there was no genuine issue of fact and that Petitioner's claim was time-barred as a matter of law (CR 24-78, 208-262).

In addition to the medical records in evidence, Petitioner submitted a sworn affidavit in response to Respondents' motion for summary judgment (App. Tab 4). He testified that despite his numerous visits to doctors and his explanation that he had been exposed to asbestos at work, none of the doctors could provide him an opinion that he was suffering from an asbestos-related illness (App. Tab 4). August 18, 2003 was the first time any doctor could provide him concrete reason to believe that his symptoms were in fact the result of an asbestos-related disease (App. Tab 4, Tab 5).

Despite all of the foregoing evidence and testimony, the trial court granted summary judgment (CR 198). Upon rehearing, the trial court upheld its ruling (CR 279). Petitioner was then forced to pursue an appeal to the Third Court of Appeals (CR 280-282). The Third of Court of Appeals affirmed, via a memorandum opinion authored by Justice Puryear, joined by Justice B. A. Smith and Justice Pemberton (App. Tab 3).

SUMMARY OF THE ARGUMENT

Petitioner presents his case to this Court for review on the grounds that the trial court and Third Court of Appeals erred by rejecting established Supreme Court jurisprudence in asbestosis and related latent occupational disease cases.

This Court has held that if a plaintiff diligently sought medical treatment for his symptoms, and testifies that no doctor has given him objective verification that his symptoms were the result of an asbestos-related illness over a period of time, then a fact issue exists as to what the plaintiff knew or should have known. Even if the plaintiff has previously filed a worker's compensation claim alleging that he believed he had a specific asbestos-related disease, the genuine issue of fact remains.

Petitioner's case is predicated upon even stronger facts than those presented in that Supreme Court opinion and the appellate court decisions following that precedent. In those cases, the plaintiffs filed worker's compensation claims or gave testimony that they had specific latent occupational diseases, e.g., asbestosis. Those plaintiffs saw doctors for as many as 20 years before receiving medical diagnoses of the particular diseases causing their symptoms. In one case, there existed a gap as large as 10 years during which the plaintiff failed to seek medical treatment. However, in all of those cases, the courts held a genuine issue of material fact existed because reasonable minds could differ as to what the plaintiffs knew or should have known before the date of actual diagnosis.

By contrast, only an eight-year period elapsed between Petitioner's worker's compensation claim and his lawsuit. There is no medical record in evidence in which

Petitioner was either diagnosed or given reason to believe he had asbestosis, prior to August 18, 2003. There has also been no argument by Respondents that Petitioner failed to exercise diligence in seeking medical treatment in that eight-year period. The trial court and Third Court of Appeals' grant of summary judgment against Petitioner is a rejection of Supreme Court precedent, and such an error of law as to create inconsistency, uncertainty, and unfairness to Petitioner, as well as future litigants.

The Third Court of Appeals instead relied on two appellate court cases in support of its decision. Both cases are easily distinguishable and inapplicable to the present dispute. The first case dealt with whether the plaintiff exercised due diligence in serving the defendant with citation once the lawsuit was filed. The lawsuit itself was timely filed, and Petitioner will show his filing date was also timely under that court's standard. Respondents have made no argument that Petitioner failed to exercise due diligence in serving citation once suit was filed; thus, the Third Court of Appeals' reliance upon this case is misplaced. The second case did not even involve asbestosis or related diseases, but exposure to toxic fumes causing nervous system disorders. The Supreme Court has held that a different judicial analysis applies to asbestos and related cases than to other occupational exposures. More importantly, this appellate opinion relied primarily on another appellate decision from which petition for review was pending at the time. That pending opinion was subsequently reversed and remanded by this Court.

For these reasons, Petitioner respectfully urges this Court to exercise its jurisdiction and to hear this case on the merits, after which it will become clear that summary judgment should be reversed and this case should be remanded for trial.

ARGUMENT

A. Standard of Review and Applicable Test

In order to affirm summary judgment, the Court must find that there is no genuine issue of material fact and that Respondents are entitled to judgment as a matter of law. *See Cate v. Dover Corp.*, 790 S.W.2d 559, 562 (Tex. 1990). All doubts about the existence of a genuine issue of material fact must be resolved against Respondents. *See Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). All evidence and reasonable inferences are to be viewed in the light most favorable to Petitioner, and all doubts are to be resolved in his favor. *See Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995).

When summary judgment is based upon the affirmative defense of statute of limitations, Respondents bear the burden of conclusively proving all the elements of that defense. *See Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997). Respondents also bear the burden of negating the discovery rule exception to the statute of limitations. *See id.* Respondents must prove either that the discovery rule does not apply as a matter of law, or that there exists no genuine issue of fact regarding when Petitioner discovered or should have discovered the nature of his injury. *See Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990).

This Court has established that the discovery rule applies as a matter of law to asbestosis and related latent occupational disease cases. *See Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643, 650-51 (Tex. 2000) ("In *Childs v. Haussecker*, we held

for the first time that the discovery rule applies to claims for latent occupational diseases."). Thus, Respondents can prevail only if there is no genuine issue of fact as to when Petitioner knew or should have known the nature of his injury. *See Burns*, 786 S.W.2d at 267. As set forth below, Respondents cannot meet this burden.

This Court has established the applicable, definitive test for the statute of limitations in asbestosis and related latent occupational disease cases:

> [A] latent occupational disease cause of action should not be deemed to accrue absent some objective verification of a causal connection between injury and toxic exposure, provided that the failure to obtain that verification is not occasioned by a lack of due diligence.

Childs v. Haussecker, 974 S.W.2d 31, 43 (Tex. 1998).

This Court and subsequent appellate courts have applied this test and found genuine issues of fact in cases with fact records far less sympathetic for the plaintiffs than for Petitioner. To preserve consistency in the law and this state's jurisprudence, this Court must correct the trial court's error and reverse the Third Court of Appeals.

B. The Facts of Petitioner's Case Warrant Reversal Even More So than in the Case of *Childs v. Haussecker*, and its Progeny

In *Childs*, the plaintiff began his employment in 1961. 974 S.W.2d at 34. In 1967, he began experiencing severe respiratory problems and began seeking medical treatment. *See id.* In mid-1968, he formed his own firmly held opinion that he was suffering from silicosis. *See id.* at 35. In late 1968, he filed a worker's compensation claim affirmatively stating that his workplace exposure had caused him "severe and permanent damage to [his] lungs and chest and glands and soft tissues of the chest, neck,

and face, and had caused [him] to have the disease of silicosis." *See id.* (emphasis added). The plaintiff even testified under oath, during that suit, that he always believed he had work-related silicosis. *See id.* at 48 (Hecht, J., dissenting). Furthermore, as early as mid-1968, the plaintiff knew that other co-workers had similar health problems, including one who had died specifically as a result of silicosis. *See id.* at 35. There was no record of the plaintiff seeking treatment between 1978 and 1988, as his symptoms grew and worsened. *See id.* at 46. Dr. McKenna, a lung specialist, formally diagnosed the plaintiff with work-related silicosis in April of 1990. *See id.* at 35. Upon the filing of plaintiff's suit, the trial court granted summary judgment and held that the claim was barred by the statute of limitations. *See id.* at 36. Despite the elapsing of more than 22 years between the lawsuit and the date the plaintiff filed his worker's compensation claim and testified under oath that he thought he had work-related silicosis, despite the fact that his suspicions were confirmed by a co-worker's death from silicosis, and despite the absence of diligence on his part in seeking treatment for a full decade between 1978 and 1988, this Court still held that a genuine issue of fact existed as to whether he knew or should have known that he was suffering from silicosis or a related disease before his date of diagnosis in April 1990. *See id.* at 46. In the present case, Petitioner began his employment in early 1995, and began experiencing symptoms in late 1995 (CR 5). In 1996, he filed a worker's compensation claim alleging asbestos exposure, but not once in the record of documents submitted to the Texas Worker's Compensation Commission did Petitioner affirmatively allege that he had "asbestosis" (CR 43-76). The claim was ultimately denied and resulted in no benefits (CR 43-76). He diligently continued to seek

medical treatment to understand the nature of his symptoms from 1996 throughout 2003 (App. Tab 4). Petitioner was a lone independent contractor, and therefore had no co-workers with whom to compare health problems (CR 5-6). On August 18, 2003, Petitioner learned for the first time that he had an asbestos-related disease, known as pulmonary asbestosis (App. Tab 4, Tab 5). He then filed suit less than a year later, on July 9, 2004 (CR 215). Therefore, only eight years elapsed between the date of his worker's compensation claim and the date of his lawsuit, as opposed to 22 years in *Childs*. 974 S.W.2d at 35-36. Furthermore, Petitioner never stated in his worker's compensation claim that he believed he had asbestosis, whereas the plaintiff in *Childs* pled and testified in deposition in his worker's compensation claim that he specifically had "the disease of silicosis." *See id.* at 35 (emphasis added). Clearly, for the Third Court of Appeals to ignore the *Childs* precedent and to affirm summary judgment against Petitioner is a miscarriage of justice requiring reversal by this Court.

In *Dixon v. E.D. Bullard Co.*, 138 S.W.3d 373 (Tex. App.—Houston [14th Dist.] 2004, pet. granted, judgm't vacated w.r.m.), the Fourteenth Court of Appeals decided a similar case, applying the *Childs* precedent. In *Dixon*, the plaintiff worked as a sandblaster for the defendants from 1971 to 1985. 138 S.W.3d at 374-75. He began having such shortness of breath that he was unable to work from April of 1990. *See id.* at 381 (Hudson, J., dissenting). He entered a hospital in November of 1996, complaining of nausea, vomiting, shortness of breath, and coughing up green sputum. *See id.* at 378. The December 1996 discharge diagnosis stated, among other things, "silicosis secondary to twelve-year history of sandblasting." *See id.* (emphasis added). He received another

formal diagnosis of silicosis in late April or early May of 1998, and then filed for disability benefits in June 1999. *See id.* at 379. He did not file his lawsuit until March 8, 2000. *See id.* at 374. Among the evidence he submitted in response to the defendant's motion for summary judgment was an affidavit testifying that he was not diagnosed with silicosis or any occupational lung disease until late April or early May 1998. *See id.* at 379. However, his own testimony in deposition by the defendants established that he knew he had pneumonia in 1996 and that it was connected with silicosis. *See id.* at 378. He also testified in deposition that he "had heard the word silicosis" in the late 1980's in connection with his treatment. *See id.* at 379 (emphasis added). Despite medical records as far back as 1996 specifically diagnosing silicosis, the appellate court held a fact issue existed as to what the plaintiff knew or should have known by March 1998 (two years prior to filing suit in March 2000), and it reversed the trial court's summary judgment. *See id.* at 380-81 (citing *Childs* in support of the proposition that there remained a fact question as to when Dixon knew or should have known his illness was work-related). In the present case, Petitioner also submitted a sworn affidavit in response to Respondents' motions for summary judgment, testifying that he was never told or given reason to believe he suffered from asbestosis or an asbestos-related disease (App. Tab 4). He testified that it was not until August 18, 2003 that a doctor told him he suffered from an asbestos-related disease, i.e., pulmonary asbestosis (App. Tab 4, Tab 5). Moreover, there are no medical records to contradict this testimony, whereas a clear conflict existed in *Dixon*. 138 S.W.3d at 378-79. Respondents have produced no medical record mentioning or suggesting "asbestosis" prior to the August 18, 2003 diagnosis, to support

summary judgment (CR 24-78, 208-262). For the Third Court of Appeals to affirm summary judgment against Petitioner (App. Tab 3), despite *Childs* and its progeny, is an error of law requiring review and reversal by this Court.

In *Youngblood v. U.S. Silica Co.*, 130 S.W.3d 461 (Tex. App.—Texarkana 2004, pet. denied), the Sixth Court of Appeals decided a similar case. In *Youngblood*, the plaintiff worked for the defendants from 1959 to 1999, during which time he was exposed to both silica and asbestos. 130 S.W.3d at 465. In the late 1980's he began experiencing initial respiratory problems. *See id.* In 1992, his chest X-rays began showing abnormal findings. *See id.* The plaintiff testified it was never stated or suggested that he had silicosis at that time. *See id.* Despite persistent coughing and shortness of breath, and additional abnormal X-rays in 1997, the plaintiff still maintained he was given no notice of asbestos-related or silica-related disease. *See id.* at 465-66. In December 1997, he was diagnosed by Dr. Peter Petroff with both silicosis and asbestosis. *See id.* at 465. He then filed suit on August 28, 1998. *See id.* at 466. The trial court granted the defendants' motion for summary judgment, stating that the statute of limitations barred the plaintiff's claim. *See id.* The record showed that Dr. Gail Stockman made a differential diagnosis of "either silicosis or tuberculosis" in 1992, and that Dr. Randy Erwin made a differential diagnosis of "granulomatous disease, including fungal disease, sarcoidosis, or silicosis," on May 16, 1995. *See id.* (emphasis added). The plaintiff submitted a sworn affidavit in response to summary judgment, testifying that he could not have known he had silicosis until Dr. Petroff's diagnosis in December 1997, and that he denied knowledge of any of the previous differential diagnoses of Dr.

Erwin or Dr. Stockman. *See id.* at 466-67, 469. Despite these clear differences in the record, the court ruled that the affidavit had to be considered in determining whether a fact issue existed. *See id.* at 470. The court ultimately found that the plaintiff had exercised diligence in seeking treatment between 1992 and 1997, and more importantly that, "assuming Youngblood's testimony is believable (as we must in reviewing a grant of summary judgment, in which all evidence is viewed in the light most favorable to the nonmovant)," the plaintiff could not be held to have sufficient knowledge as a matter of law to erase all genuine issues of fact. *See id.* at 471 (emphasis added) (citing the *Childs* holding that the statute of limitations cannot be determined as a matter of law if reasonable minds could differ about the conclusions to be drawn from the fact record). In the present case, Petitioner also exercised due diligence in seeking treatment from 1995 to 2003 (App. Tab 4); Respondents have not argued otherwise (CR 24-78, 208-262). Petitioner also submitted a sworn affidavit in response to summary judgment, testifying that he had no reason to know, prior to August 18, 2003, that he suffered from asbestosis or any related disease (App. Tab 4). Respondents have not produced any medical record before 2003 suggesting or stating that Petitioner suffered from asbestosis (CR 24-27, 208-262), as opposed to the 1992 and 1995 medical diagnoses in the *Youngblood* record. 130 S.W.3d at 466. Viewing the evidence in the light most favorable to Petitioner, it was clear error for the Third Court of Appeals to affirm summary judgment and find no genuine issue of fact as to what Petitioner knew or should have known (App. Tab 3).

Additionally, this Court has recognized that the typical latency period in asbestosis cases is 15 to 25 years. *See Pustejovsky*, 35 S.W.3d at 646. As such, the eight-year

period between Petitioner's exposure and ultimate diagnosis of pulmonary asbestosis is unusually short (CR 5-6, App. Tab 4, Tab 5). No doctor during that period could connect Petitioner's various respiratory, gastrointestinal, and visual ailments to an asbestos-related illness (App. Tab 4). For Respondents to argue, and for the Third Court of Appeals to agree (App. Tab 3, at pg. 7), that Petitioner knew or should have known, no more than three (3) years from exposure, that he had an asbestos-related disease as opposed to a variety of seemingly unconnected symptoms, strains credulity.

C. The Third Court of Appeals Committed a Fundamental Error of Law in Relying upon the Cases of *Zacharie* and *Roberts*

Finally, the Third Court of Appeals placed its reliance upon two decisions from the Fourth Court of Appeals: *Zacharie v. U.S. Natural Res., Inc.*, 94 S.W.3d 748 (Tex. App.—San Antonio 2002, no pet.) and *Roberts v. Lain*, 32 S.W.3d 264 (Tex. App.—San Antonio 2000, no pet.) (App. Tab 3, at pg. 8). However, the dispute in *Zacharie* is inapplicable to the present case, and *Roberts* relied for its primary authority upon an appellate decision that was subsequently reversed and remanded by this Court.

In *Zacharie*, the plaintiff worked for the defendants from 1958 to 1995, during which time she inhaled airborne substances. 94 S.W.3d at 751. Between 1995 and 1998, the plaintiff consulted several doctors with regard to her chronic symptoms. *See id.* On January 20, 1999, she consulted Dr. Peter A. Petroff, whose report of findings stated that she was suffering from "pneumoconiosis, probably silicosis" as a result of her exposure to silica and asbestos products "over many years." *See id.* (emphasis added). The plaintiff filed suit on January 19, 2001, one day less than two years from the date of that

report. *See id.* However, the defendants were not served with citation until June 28, 2001. *See id.*

The court in *Zacharie* held that the date of accrual of the plaintiff's cause of action was January 20, 1999, the date of Dr. Petroff's report. *See id.* at 753. The court's reasoning was that although Dr. Petroff did not definitively diagnosis silicosis, his statement that it was "pneumoconiosis, probably silicosis," as a result of years of exposure to workplace substances, was sufficient to put the plaintiff on notice that she had an injury that was likely work-related. *See id.* (citing *Childs* for the proposition that a plaintiff need not have a confirmed medical diagnosis in order for a cause of action to accrue). As such, the court found that the plaintiff's lawsuit, filed on January 20, 2001, was indeed timely. *See id.* Petitioner has no argument with the court's reasoning. Petitioner's fact record is even stronger than the plaintiff's record in *Zacharie*, since the first time "asbestosis" was even hinted at, let alone confirmed, was August 18, 2003 (App. Tab 4, Tab 5), and Petitioner filed his lawsuit less than a year later, on July 9, 2004 (CR 2-15). Accordingly, Petitioner has met the statute of limitations requirement under the *Zacharie* analysis. 94 S.W.3d at 753. The actual dispute in *Zacharie* centered on the plaintiff's diligence in serving the defendants with citation; the court made no argument that the lawsuit itself was untimely. *See id.* ("Although Martha timely filed her petition on January 19, 2001, one day before the limitations period ran, we next must consider if she exercised due diligence in serving the Defendants."). The court ultimately found that the plaintiff's counsel had no valid excuse for over five months' delay in picking up and serving the citations upon the defendants. *See id.* at 754-55. As such, the trial court did

not err in finding lack of due diligence and time-barring the claim as a matter of law. *See id.* at 755. Petitioner has no quarrel with this analysis; it is merely inapplicable to the present dispute. He timely filed his lawsuit under the standard set forth in *Zacharie*, and there is no evidence in the fact record that he failed to exercise due diligence in serving Respondents with citation. Respondents have made no argument of lapse in service of citation (CR 24-78, 208-262). That the Third Court of Appeals would cite *Zacharie* in support of summary judgment (App. Tab 3, at pg. 8), when it clearly supports Petitioner's position, is puzzling, and constitutes an error of law requiring reversal by this Court.

In *Roberts*, the plaintiff worked for the defendants from 1971 to 1992, during which time he worked with industrial solvents. 32 S.W.3d at 267. As early as 1974, he developed a variety of symptoms, including rashes, dizziness, burning in the eyes, shortness of breath, and sleep disturbance. *See id.* By 1990, his symptoms included weight loss, severe headaches, nausea, anxiety, and memory loss. *See id.* In 1995, the plaintiff filed suit for intentional infliction of emotional distress, based on acts of harassment and intimidation by his supervisor. *See id.* at 267-68. In 1997, he amended his suit to include a claim for negligent exposure to the toxic chemicals, causing nervous system damage. *See id.* at 268. The court was called upon to decide only the issue of summary judgment as to the negligent exposure claim. *See id.* The court relied on the appellate court decision of *Pustejovsky v. Pittsburgh Corning Corp.*, 980 S.W.2d 828 (Tex. App.—San Antonio 1998, pet. granted), and held that it controlled the case:

> Southern Pacific contends that the discovery rule is not applicable to the instant dispute because Roberts manifested injuries in the early 1970's from his occupational exposure to SP 250 and SP 310. It argues that Roberts'

> claim for negligent exposure accrued almost twenty years before he filed the instant suit, notwithstanding the fact that he did not know the full extent of his injuries flowing from such exposure. … We agree with Southern Pacific's position, finding that this court's recent decision in *Pustejovsky v. Pittsburgh Corning Corp.*, 980 S.W.2d 828 (Tex. App.—San Antonio 1998, pet. pending), involving the application of the "single-action rule" in the context of a latent occupational disease case, controls the instant dispute.

Id. at 269.

As the court recognized, petition for review was pending to the Supreme Court at the time it relied upon the *Pustejovsky* appellate decision. *See id.* Subsequently, that decision was reversed and remanded by this Court in the above-mentioned case of *Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643 (Tex. 2000). This Court explicitly reversed the appellate court's analysis and reasoning as to the "single-action rule." 35 S.W.3d at 652-53. In doing so, the Court also held that asbestos-related claims deserved special analysis not given to other toxic-exposure tort cases:

> We limit our holding to asbestos-related diseases resulting from workplace exposure for several reasons. We have considered on other occasions arguments that established doctrine and procedures must change to accommodate asbestos litigation, and some occasions made those changes. … We are unaware of any other toxic-exposure torts currently in litigation that present these circumstances.

Id. at 653-54.

Accordingly, not only did the *Roberts* opinion rely for primary authority upon an appellate court case that was subsequently reversed and remanded by this Court, but it dealt with chemicals and nervous system disorders wholly unrelated to asbestos-type diseases. That the Third Court of Appeals relied on *Roberts* is inexplicable, and constitutes a fundamental error of law requiring reversal by this Court.

PRAYER

For all of the reasons set forth above, Petitioner respectfully requests the Supreme Court to grant this Petition for Review, to request briefs on the merits from the parties, to set this case for oral argument, and upon oral argument to reverse the judgment of the Third Court of Appeals as well as the underlying judgment of the 126th District Court of Travis County from which appeal was sought, and to remand this cause of action to the District Court of Travis County for a trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this *Petition for Review* has been served upon the following parties, by and through their counsel of record, in the manner indicated below, on this 6th day of November, 2006:

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APPENDIX

INDEX OF DOCUMENTS ATTACHED