

CAUSE NO. E-198972

LOUIS GEST

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IN THE DISTRICT COURT OF

VS.

JEFFERSON COUNTY, TEXAS

CHEVRON U.S.A. INC., ET AL

172<sup>ND</sup> JUDICIAL DISTRICT

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**DEFENDANT THE GOODYEAR TIRE & RUBBER COMPANY'S  
HYBRID MOTION FOR SUMMARY JUDGMENT**

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TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW The Goodyear Tire & Rubber Company (hereinafter referred to as "Goodyear"), Defendant herein, to file this, its Hybrid Motion for Summary Judgment pursuant to pursuant to TRCP 166a(b) and 166a(i) and in support thereof would show the Court as follows:

**BACKGROUND**

Plaintiff, Louis Gest ("Gest") filed this case on September 9, 2016. He alleges that he was exposed to benzene and benzene containing mixtures while working on a premise owned by Goodyear. Plaintiff claims that his exposure was generally a result of the Defendants failure to provide him with a safe workplace. He has asserted various causes of action against the Defendants generally, including claims for negligence, strict products liability, breach of warranty, misrepresentation, gross negligence and malice/willful act.<sup>1</sup>

Gest alleges benzene exposure caused his myelodysplastic syndrome ("MDS"), a hematopoietic illness similar to leukemia. MDS is not a "signature disease" of benzene exposure. Most MDS cases present spontaneously (without known cause). But smoking and

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<sup>1</sup> *Exhibit A*

ionizing radiation are major risk factors for MDS. Gest has a documented smoking history of 40-80 pack per year. MDS is a dose response disease.

Plaintiff's time on a Goodyear premise was very brief and his alleged potential exposure was even more limited since he admitted that he could not have been exposed during his first (of two) jobs on the Goodyear premise. Chapter 95 precludes all of Plaintiff's claims against Goodyear.

While working on the Goodyear premise he was working as an independent contractor for Brown & Root doing pipe welding as part of an improvement to the Goodyear facility. Plaintiffs' negligence-based claims<sup>2</sup> are governed exclusively by Chapter 95 of the Texas Civil Practice & Remedies Code. Under that statutory framework, Goodyear cannot be held liable for Gest's injuries or death unless he demonstrates two things:

- (1) Goodyear exercised or retained control over the details of Gest's work, **and**
- (2) Goodyear had actual knowledge of the alleged dangerous condition of Gest's work but failed to warn him.

In this case, the summary-judgment evidence proves that Goodyear did not exercise or retain control over the details of Gest's work and it did not have actual knowledge of the alleged dangerous condition of that work. As a result, Goodyear is entitled to summary judgment on Plaintiff's negligence-based claims, as well as all derivative claims arising therefrom.

Goodyear is separately entitled to a no-evidence summary judgment on *all* of Plaintiffs' causes of action because Plaintiffs cannot present evidence sufficient to support each of the essential elements as to any cause of action against Goodyear. Put simply, because Plaintiff cannot show a right to relief under either summary-judgment standard, this Court should render summary judgment in favor of Goodyear on all of Plaintiff's claims against it.

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<sup>2</sup> These claims include ordinary negligence, premises liability, negligence per se, and gross negligence.

## SUMMARY JUDGMENT EVIDENCE

The traditional portion of Goodyear's hybrid motion for summary judgment is supported by the following, attached evidence which is incorporated herein by reference:

**Exhibit A** – Plaintiffs' First Amended Petition.

**Exhibit B** – Excerpts from Transcript of Deposition of Louis Gest.

## RELEVANT FACTUAL BACKGROUND

From approximately 1970 to 2005 Gest worked at various chemical and refining facilities where he was allegedly exposed benzene and benzene containing mixtures.<sup>3</sup> Gest claims that one of the facilities at which he worked was the Goodyear plant on Highway 225 in Houston, Texas where he worked on two brief occasions.<sup>4</sup> More Specifically, Gest testified that he worked at the Goodyear facility on two separate occasions of approximately one month each during 1975 and 1976.<sup>5</sup> On the first occasion (one month) he worked at Goodyear as a cherry picker operator.<sup>6</sup> During the month he worked as a cherry picker operator he did not work around, and was not exposed to any benzene containing products.<sup>7</sup> He later worked at Goodyear for one month as a pipe welder.<sup>8</sup>

Gest was never an employee of Goodyear but was instead an independent contractor employed by Brown & Root during both occasions he worked at the Goodyear facility.<sup>9</sup> While employed by Brown & Root he worked as a welder doing shutdowns at various plants.<sup>10</sup> During his shutdown work he was involved with removing/replacing piping and associated equipment

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<sup>3</sup> Exhibit A at ¶ 31-33; Exhibit B at 28:22-29:10.

<sup>4</sup> Exhibit B at 98:5-10.

<sup>5</sup> Exhibit B at 99:1-100:10.

<sup>6</sup> Exhibit B at 98:5-16 and 101:10-18.

<sup>7</sup> Exhibit B at 101:19-102:1 and 194:9-15.

<sup>8</sup> Exhibit B at 102:2-7.

<sup>9</sup> Exhibit B at 176:15-177:4 and 177:18-21 and 185:2-14 and 194:16-21.

<sup>10</sup> Exhibit B at 33:16-36:1.

within the facilities.<sup>11</sup> This work involves changes to the piping layout or replacement of worn out piping/equipment.<sup>12</sup>

During his second occasion at the Goodyear facility Gest worked for Brown & Root as a pipe welder doing a shutdown.<sup>13</sup> He worked with on a crew of Brown & Root employees comprised of a helper, pipe fitter and a pipe welder [Gest].<sup>14</sup> He was a certified, professional journeyman welder.<sup>15</sup> He did not need instruction on how to do his job. In fact, Gest agreed that one of the reasons that a company would hire a contractor such as Brown & Root was because of their expertise in pipe fitting and welding.<sup>16</sup> Neither Brown & Root nor Gest needed instruction from Goodyear on how to do their job.

Gest alleges exposure to benzene and benzene containing mixtures while working on the Goodyear premise, but he did not work directly with these mixtures. Another Brown & Root crew [cleaning crew] working at Goodyear was involved with the cleaning of the pipes that were removed by the fitters/welders.<sup>17</sup> The Brown & Root cleaning crew placed the pipe in a liquid filled cleaning vat, would scrub it clean and would bring the cleaned, reconditioned pipe back to the pipe fitters/welders for installation.<sup>18</sup> It was the residue of the cleaning solution used by the Brown & Root cleaning crew to which Mr. Gest was allegedly exposed.<sup>19</sup> When discussing this same type of exposure at other facilities he generally admitted he did not know from where the benzene was obtained.<sup>20</sup>

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<sup>11</sup> Exhibit B at 34:14-35:11.

<sup>12</sup> Id.

<sup>13</sup> Exhibit B at 102:2-7 and 194:16-195:2.

<sup>14</sup> Exhibit B at 198:13-199:20.

<sup>15</sup> Exhibit B at 27:11-38:9 and 358:3-359:14.

<sup>16</sup> Exhibit B at 280:6-13.

<sup>17</sup> Id.

<sup>18</sup> Exhibit B at 200:5-201:12.

<sup>19</sup> Exhibit B at 203:10-204:17 and 206:1-16.

<sup>20</sup> Exhibit B at 70:9-17.

## SUMMARY OF ARGUMENT

This case has been on file since 2016 and an adequate time for discovery has passed. The case is set for trial in October 2019. Defendant is entitled to a summary judgment for the following reasons:

1. Plaintiff's negligence-based claims are subject to Chapter 95 of the Texas Civil Practices and Remedies Code because Gest is making a claim against premise owner, Goodyear for injuries that arose out of his work as a contractor carrying out repairs or improvements to real property; and
2. Gest was an experienced, certified welder working that did not require supervision. There is no evidence that Goodyear as premise owner exercised or retained some control over the operative details, manner or method in which Gest's work was performed; and
3. Goodyear as premise owner did not have actual knowledge of the alleged danger or condition resulting in the personal injury to Gest; and
4. There is no evidence to support Plaintiff's claims for strict products liability, misrepresentation, breach of warranty, gross negligence or malicious/willful act.

## ARGUMENTS AND AUTHORITY

### **I. Traditional Motion for Summary Judgment.**

#### **A. Standard of Review**

This is a hybrid motion for summary judgment. The Texas Supreme Court has approved the use of a hybrid motion for summary judgment. *See Binur v. Jacobo*, 135 S.W.3d 646, 650–51 (Tex. 2004). Goodyear files this motion under both a traditional and no-evidence standard.

Under the traditional standard, a movant is entitled to summary judgment if it shows there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c). The movant may meet this burden by showing that there is no genuine issue of material fact concerning one or more essential elements of the plaintiff's cause of action or by establishing each element of an affirmative defense as a matter of law. *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990). If the defendant disproves

an element of the plaintiff's cause of action as a matter of law, summary judgment is appropriate. *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996).

**B. Chapter 95 limits a property owner's liability for negligence-based claims.**

The rule in Texas has long been that a premises owner generally "has no duty to see that an independent contractor performs work in a safe manner."<sup>21</sup> In 1996, the Texas Legislature codified that rule into Chapter 95 as part of a sweeping tort-reform package. Chapter 95 establishes a statutory, default rule of non-liability for premises owners when a contractor's employee is injured or dies as a result of the condition or use of an improvement on which the individual is working.<sup>22</sup> Section 95.002 specifically states that "[t]his chapter applies to a claim:

- (1) against a property owner... for personal injury [or] death... to... an... employee of a contractor or subcontractor; and
- (2) that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement."<sup>23</sup>

If those requirements are met, Chapter 95 preempts all other common-law negligence claims and become a plaintiff's "sole means of recovery."<sup>24</sup> Just as importantly, if Chapter 95 applies, Goodyear is by default not liable for Gest's personal injuries or death arising from Goodyear's alleged failure to provide him with a safe workplace.<sup>25</sup> The only exception to that

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<sup>21</sup> *Ellwood Tex. Forge Corp. Jones*, 214 S.W.3d 693, 698 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2007, pet denied); *Redinger v. Living, Inc.* 689 S.W.2d 415, 418 (Tex. 1985).

<sup>22</sup> *Montoya v. Nichirin-Flex U.S.A., Inc.*, 417 S.W.3d 507, 510-11 (Tex. App.—El Paso 2013, no pet.)

<sup>23</sup> TCPRC § 95.002(1)-(2).

<sup>24</sup> *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 561 (Tex. 2016); *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 50-51 (Tex. 2015) (holding that Chapter 95 applies "to all negligence claims that arise from either a premises defect or the negligent activity of a property owner or its employees..."); *Kelly v. LIN Television*, 27 S.W.3d 564, 569-70 (Tex. App.—Eastland 2000, pet. denied) (holding that Chapter 95 encompasses assertions of negligence, negligence per se, res ipsa loquitur, and negligent misrepresentation).

<sup>25</sup> TCPRC § 95.003

rule is if Plaintiffs prove both elements under section 95.0003.<sup>26</sup> More specifically, Goodyear cannot be held liable for Gest's injuries or death unless:

- (1) Goodyear exercise[d] or retain[ed] some control over the manner in which the work [was] performed, other than the right to order the work to start or stop to inspect progress or receive reports; **and**
- (2) Goodyear had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.<sup>27</sup>

In this case, the summary-judgment evidence establishes not only that Chapter 95 applies to Plaintiff's claims against Goodyear but also that Plaintiff cannot demonstrate the "control" and "actual knowledge" necessary to impose a duty of care upon Goodyear.

### **C. Chapter 95 applies to Plaintiffs' claims against Goodyear**

Broken down to its basics, Chapter 95 applies to this case if Plaintiff is:

- (i) asserting a claim against a property owner;
- (ii) for personal injury (or death) to an employee of a contractor working on the property;
- (iii) that arises from the condition or use of an improvement to real property that Gest constructed, repaired, renovated, or modified.

These requirements are met in this case.

#### **i. Plaintiff is asserting a "claim" against a "property owner."**

Chapter 95 defines "claim" to mean "a claim for damages caused by negligence...."<sup>28</sup>

Chapter 95 defines "property owner" to mean a "person or entity that owns real property primarily used for commercial or business purposes."<sup>29</sup>

Here, Plaintiff's live pleading establishes that this element is satisfied. Regarding the "claim" requirement, Plaintiffs' petition indisputably makes a claim for damages against

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<sup>26</sup> See, e.g., *Phillips v. Dow Chem. Co.*, 186 S.W.3d 121, 132-33 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2005, no pet.) (noting that when "chapter 95 applies to [a plaintiff's] claims, [the plaintiff] must present evidence demonstrating triable issues of fact concerning both required elements of section 95.003 to overcome that statute's general rule of nonliability.").

<sup>27</sup> TCPRC § 95.002(1)-(2) (emphasis added).

<sup>28</sup> TCPRC § 95.002(1).

<sup>29</sup> TCPRC § 95.002(3).

Goodyear for its alleged “negligence [and] gross negligence.”<sup>30</sup> Regarding the “property owner” requirement, Plaintiffs again indisputably allege that the incident occurred on Goodyear’s premise—namely its plant in Houston, Texas.<sup>31</sup>

**ii. Plaintiff’s claims are for “personal injury [or] death” of an “employee of a contractor.”**

Plaintiff’s pleadings and testimony establish this element. With respect to the nature of his claims, Plaintiff latest petition claims that “The negligence Defendants [including Goodyear] ... was a proximate cause of Louis Gest’s disease and damages alleged herein.”<sup>32</sup> Plaintiff has also testified that he was working as an employee of Brown & Root, a contractor working on the Goodyear premise.<sup>33</sup>

For purposes of Chapter 95, a “contractor” is one who contracts to do work for, or supply goods to, another.<sup>34</sup> It is “someone who makes improvements to real property.”<sup>35</sup> In this regard, Gest’s testimony makes clear that his injuries occurred while employed by Brown & Root (an independent contractor) to help improve the Goodyear facility by removing and replacing piping and equipment within the plant.<sup>36</sup>

**iii. Plaintiffs’ claims arise from the condition or use of an improvement which Gest was constructing, repairing, renovating, or modifying.**

Although Chapter 95 does not contain a definition of “improvement,” the Supreme Court of Texas broadly defines it for purposes of Chapter 95 to include “all additions to the freehold except for trade fixtures [that] can be removed without injury to the property.”<sup>37</sup> The term “condition” is defined as “either an intentional or an inadvertent state of being,” while the term

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<sup>30</sup> Exhibit A at ¶ 32-34, 38-42 and 50-51.

<sup>31</sup> Exhibit A at ¶ 13(a); and Exhibit B at 98:5-10.

<sup>32</sup> Exhibit A at ¶ 38-40.

<sup>33</sup> Exhibit B at 176:15-177:4 and 177:18-21 and 185:2-14 and 194:16-21.

<sup>34</sup> *First Tex. Bank v. Carpenter*, 491 S.W.3d 729, 731-32 (Tex.2016).

<sup>35</sup> *Id.*

<sup>36</sup> Exhibit B at 34:14-35:11.

<sup>37</sup> *Abutahoun*, 463 S.W.3d at 512.



“use” is defined as “to put or bring into action or service; to employ for or apply to a given purpose.”<sup>38</sup> With respect to the terms “constructs,” “repairs,” “renovates,” or “modifies”—courts have adopted and applied their ordinary meanings:

- construct – to build or form by putting together parts; frame; devise[;]
- repair – to restore to a good or sound condition after decay or damage; mend: . . . to restore or renew by any process of making good, strengthening, etc.[;]
- renovate – to restore to good condition; make new or as if new again; repair[; and]
- modify – to change somewhat the form or qualities of; alter partially.”<sup>39</sup>

Based on the above definitions, this element is also satisfied. In particular, Gest testified that he was at Goodyear’s plant working as a pipe welder removing and replacing pipe and associated equipment during a shutdown.<sup>40</sup> Importantly, Gest testified that the residue/substance that he was alleged exposed while at Goodyear was on/in the pipes he was working on.<sup>41</sup> Plaintiff’s claims therefore arise from the condition or use of an improvement which Gest was constructing, repairing, renovating, and modifying.

**D. Because Chapter 95 applies, Goodyear cannot be held liable for Gest’s injuries or death.**

Under Chapter 95’s framework, Plaintiff must establish that Goodyear controlled the details of Gest’s work **and** had actual knowledge of the danger he was encountering during that work, but nonetheless failed to adequately warn of that danger.<sup>42</sup> Plaintiff cannot meet that burden.

***i. Goodyear did not exercise or retain control over the details of Gest’s work.***

Control for purposes of Chapter 95 is defined “in a very precise manner.”<sup>43</sup> Whether it exists is a question of law and may be proved in two ways: (1) a contractual right of control, or

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<sup>38</sup> *Id.*

<sup>39</sup> *Montoya*, 417 S.W.3d at 512.

<sup>40</sup> Exhibit B at 34:14-35:11 and 102:2-7 and 194:16-195:2.

<sup>41</sup> Exhibit B at 203:10-206:6.

<sup>42</sup> TCPRC § 95.003(1)-(2) (emphasis added).

<sup>43</sup> *Ellwood Tex. Forge Corp.*, 214 S.W.3d at 700.

(2) an exercise of actual control.<sup>44</sup> In this case, there is no evidence of a contractual agreement. Thus, Plaintiffs must prove that Goodyear exercised actual control over the manner in which Gest performed his work.<sup>45</sup>

In order to prove actual control, Plaintiff must show that Goodyear exercised a degree of control that was **more than** a “general right to order the work stopped or resumed, to inspect its progress or receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations.”<sup>46</sup> Further, the degree of control must be more than simply directing when and where an independent contractor is to perform its work.<sup>47</sup> Instead, Plaintiff must show that Goodyear exercised control over the actual manner, means, methods, or operative details of Gest’s work.<sup>48</sup> And most importantly, the alleged control must relate to the activity that caused the injury.<sup>49</sup> A general supervisory control that does not relate to the activity causing injury is insufficient.<sup>50</sup>

In this case, the summary-judgment evidence establishes that Goodyear did not exercise control over the manner, means, methods, and operative details of Gest’s work. As explained above, Gest was a certified journeyman welder working for Brown & Root.<sup>51</sup> He worked on a crew with other Brown & Root helpers, fitters, welders and cleaners.<sup>52</sup> The Brown & Roots crew(s) carried out their work without help from Goodyear.

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<sup>44</sup> *Chi Energy, Inc. v. Urias*, 156 S.W.3d 873, 879 (Tex. App.-El Paso 2005, pet. Denied); *Ellwood Tex. Forge Corp.*, 214 S.W.3d at 700 (citing *Dow Chem. Co v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002)).

<sup>45</sup> *Arsement v. Spinnaker Exploration Co., LLC*, 400F.3D 238, 252 (5<sup>TH</sup> Cir. 2005) (citing *Bright*, 89 S.W.3d at 606).

<sup>46</sup> *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999)

<sup>47</sup> *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 792 (Tex. 2006)

<sup>48</sup> *Ellwood Tex. Forge Corp.*, 214 S.W.3d at 700; *Abarca v. Scott Morgan Residential, Inc.*, 305 S.W.3d 110, 124 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2009, pet denied).

<sup>49</sup> *Bright*, 89 S.W.3d at 606

<sup>50</sup> *Perez v. Embree Const. Group, Inc.*, 228 S.W.3d 875, 881 (Tex. App.-Austin 2007, pet. denied).

<sup>51</sup> Exhibit B at 27:11-38:9 and 358:3-359:14.

<sup>52</sup> Exhibit B at 198:13-199:20.

Plaintiff has offered no evidence establishing that Goodyear exercised the requisite level of control over the methods and operative details of Gest's work. Put simply, Plaintiff has not, and cannot show the requisite level of actual control. As a result, Chapter 95 precludes Plaintiff's negligence-based claims against Goodyear thus giving it a right to summary judgment on those claims.

**ii. Goodyear did not have actual knowledge of the alleged danger or condition of Gest's work.**

The element of "actual knowledge" is no less exacting in its level of proof than the element of control. To prove actual knowledge, Plaintiffs must show that Goodyear had "knowledge that the dangerous condition existed at the time of the accident."<sup>53</sup> The allegedly dangerous condition was created by the Brown & Root crew(s) with which Gest was working.<sup>54</sup> There is no evidence that Goodyear had any knowledge regarding the manner or method by which these professionals carried out their work for Brown & Root. The requisite knowledge cannot be shown through mere "awareness of a potential problem," or even "knowledge that an activity is potentially dangerous" as neither showing amounts to "actual knowledge of an existing danger."<sup>55</sup> It cannot be shown through mere "awareness of a potential problem," or even "knowledge that an activity is potentially dangerous" as neither showing amounts to "actual knowledge of an existing danger."<sup>56</sup> Nor can it be shown through constructive knowledge, or

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<sup>53</sup> See, e.g., *Fifth Club, Inc.*, 196 S.W.3d at 792 (explaining that club's act in telling security personnel where to remove a patron was no evidence of "control" because the security personnel "retained the right to remove [patron] by whatever method he chose."); *Exhibit A* at 164:11-16 (explaining that Fish corrected his work).

<sup>54</sup> *Exhibit B* at 200:5-201:12 and 203:10-204:17 and 206:1-16.

<sup>55</sup> *Ineos USA, LLC*, 505 S.W.3d at 568; *City of Corsicana v. Stewart*, 249 S.W.3d 412, 414-15 (Tex. 2008); *Oiltanking Houston, L.P.*, 502 S.W.3d at 212; *Ellwood*, 214 S.W.3d at 700

<sup>56</sup> *Dyall*, 152 S.W.3d at 709 n. 18; *City of Denton v. Paper*, 376 S.W.3d 762, 767 (Tex. 2012); *Sampson v. University of Texas at Austin*, 500 S.W.3d 380, 392, 395 (Tex. 2016).

what a person should have known.<sup>57</sup> Put simply, “actual knowledge of a dangerous condition is what a person actually knows.”<sup>58</sup>

In this case, there is no evidence suggesting that at the time of Gest’s work at the Goodyear plant, Goodyear had actual knowledge of an existing danger associated with that work—namely the danger of being exposed to benzene-containing materials. Thus, Chapter 95 precludes Plaintiffs’ negligence-based claims against Goodyear, which therefore entitles Goodyear to summary judgment on Plaintiff’s claims for negligence, negligent misrepresentation and gross negligence.

## **II. No Evidence Motion**

### **A. Standard of Review**

This is a hybrid motion for summary judgment. Under a no-evidence standard, summary judgment is appropriate when a party fails to produce evidence regarding one or more elements of its claim. *See* TEX. R. CIV. P. 166a(i); *see also In re Colonial Pipeline Co.*, 968 S.W.2d 938, 942 (Tex. 1998). Rule 166a(i) of the Texas Rules of Civil Procedure provides that:

After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

TEX. R. CIV. P. 166a(i). When the defendant moves for summary judgment and the plaintiff is unable to produce competent summary judgment evidence raising a genuine issue of material fact, summary judgment should be granted in favor of the defendant. *Esco Oil & Gas, Inc. v. Sooner Pipe & Supply Corp.*, 962 S.W.2d 193, 197 n.3 (Tex. App. – Houston [1st Dist.]

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<sup>57</sup> *Id.*; *Oiltanking Houston, L.P.*, 502 S.W.3d 212.

<sup>58</sup> *Oiltanking Houston, L.P.*, 502 S.W.3d at 212.

1998, pet. denied); *Pena v. Phon Son Van*, 960 S.W.2d 101, 105 (Tex. App. – Houston [1st Dist.] 1997, no writ).

*i. There is no evidence of strict product liability*

To recover under any strict product liability theory Plaintiff must first establish that Goodyear designed, manufactured, marketed, sold or otherwise placed a product into the stream of commerce. The Plaintiffs have no evidence that Goodyear designed, manufactured, marketed, sold or otherwise placed the benzene containing products into the stream of commerce. This is a fatal defect to all of his strict product liability theories.

Plaintiff has asserted a claim for strict product liability based upon an alleged design defect with the solvents to which Gest was allegedly exposed. To prevail on a design defect claim, a claimant must not only establish that the defendant designed the product and/or placed the product into the stream of commerce, but must also show that the product was defectively designed so as to be unreasonably dangerous, taking into consideration the utility of the product and the risk involved in its use.<sup>59</sup> To prevail on a design defect theory, a plaintiff must prove the defendant could have provided a safer alternative design and that the alleged defect was the producing cause of Plaintiff's injuries.<sup>60</sup> "An alternative design is 'safer' only if it would have (1) significantly reduced the *risk* of the claimant's injuries without substantially impairing its utility and (2) been economically and technologically feasible at the time."<sup>61</sup> To

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<sup>59</sup> See *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 257 (Tex. 1999) (citing *Am. Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 432 (Tex. 1997)).

<sup>60</sup> *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d at 328, 335 (Tex. 1998), cert. denied, 526 U.S. 1040 (1999).

<sup>61</sup> *Hamid v. Lexus*, 369 S.W.3d 291, 299 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (citing § 82.005(b); *Smith v. Aqua-Flo, Inc.*, 23 S.W.3d 473, 477 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (footnote omitted)).

prove a safer alternative design under this definition, a party necessarily must compare the risk created by the original design with the risks created by the alternative design.<sup>62</sup>

Plaintiff has not offered any evidence that Goodyear designed a benzene containing product, that Goodyear placed the product into the stream of commerce or that Goodyear's alleged design of the benzene containing product rendered it unreasonably dangerous. In addition, there is no evidence that a safer alternative design existed, particularly during the time that plaintiff alleges he was exposed. Lastly, there is no evidence that the allegedly defective design was a producing cause of Gest's illness. Plaintiff therefore cannot establish a defective design claim either in strict liability or in negligence.

Plaintiff has also asserted a product liability claim for a marketing defect based upon failure to provide adequate warnings. Texas courts recognize that a claim for "marketing defect" is actually a failure to warn claim.<sup>63</sup> Marketing defect means the failure to give adequate warnings of the product's dangers that were known, or should have been known, or failure to give adequate instructions to avoid such dangers, which failure renders the product unreasonably dangerous as marketed.<sup>64</sup> In this case, Plaintiff has failed to establish Goodyear placed the alleged product into the stream of commerce; failed to offer evidence establishing what, if any dangers were known by Goodyear; and failed to offer any evidence that Goodyear's instruction on the use of the product were inadequate to avoid such damagers. As a result, Goodyear is entitled to summary judgment on Plaintiff's product liability claim for marketing defect.

***ii. There is no evidence of misrepresentation***

Plaintiff's claims based upon negligent misrepresentation would be precluded by TCPRC Chapter 95, as established above. But, to the extent that Plaintiff has alleged that Goodyear

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<sup>62</sup> *Id.*

<sup>63</sup> *Lone Star Gas Co. v. Lemond*, 897 S.W.2d 755, 756 (Tex. 1995) (citation omitted).

<sup>64</sup> *Id.*

made intentional misrepresentations or fraudulent representations relating to the benzene containing products to which Gest was allegedly exposed, there is no evidence to support these claims. In order to recover for misrepresentation/fraud, a Plaintiff must show that:

- (1) Defendant made a representation to a plaintiff;
- (2) the representation was material;
- (3) the representation was false;
- (4) when the defendant made the representation, defendant knew that the representation was false or, made the representation recklessly, as a positive assertion and without knowledge of its truth;
- (5) defendant made a representation with the intent plaintiff act upon it;
- (6) plaintiff relied on the representation; and
- (7) the representation caused the plaintiff's injury.<sup>65</sup>

In order for Plaintiff to succeed with this cause of action he must first demonstrate that Goodyear made one or more representations to him about benzene containing products to which he was allegedly exposed while on the Goodyear premise. There is no evidence that any representations, fraudulent or otherwise were made by Goodyear to Gest. Further, there is no evidence establishing that Gest relied on any such representations, if any were made. As a result, their claim based upon misrepresentation must fail.

***iii. There is no evidence of breach of warranty***

Plaintiff has also alleged that Goodyear warranted, either expressly or impliedly, that their products were merchantable, when in fact they were not. Under Texas law, the Texas Business and Commerce Code ("UCC") governs warranties relating to the sale of goods.<sup>66</sup> To recover for breach of express warranty, Plaintiff must prove:

- (1) Goodyear made an express affirmation of fact or promise relating to the product in question;
- (2) the affirmation or promise became part of the basis of the bargain;

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<sup>65</sup> *In Re First Merit Bank*, 52 S.W.3d 749, 758 (Tex. 2001); *Formosa Plastics, Corp. USA v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 47 (Tex. 1998).

<sup>66</sup> *See Bruce Foods Corp. v. Tex. Gas Serv.*, No. EP-13-CV-231-KC, 2014 WL 652312, at \*14 (W.D. Tex. Feb. 19, 2014); TEX. BUS. & COM. CODE § 2.102.

- (3) Gest relied on the affirmation or promise;
- (4) the product failed to comply with the affirmation or promise;
- (5) Gest was injured by this failure; and (6) the failure was the proximate cause of Gest's injuries.<sup>67</sup>

Plaintiff cannot recover for breach of express warranty because he has failed to produce evidence that Goodyear made an express affirmation of fact or promise that formed the basis of the bargain. He has also failed to produce evidence establishing that Gest relied upon an affirmation or promise.

To prevail on a breach of the implied warranty of merchantability claim, Gest must prove that:

- (1) Goodyear sold or leased the product to Gest;
- (2) the product was unmerchantable;
- (3) Gest notified Goodyear of the breach; and
- (4) Gest suffered injury.<sup>68</sup>

To be merchantable, goods must be, *inter alia*, "fit for the ordinary purposes for which such goods are used." TEX. BUS. & COM. CODE § 2.314(b)(3). Gest has failed to produce evidence that the alleged benzene containing products were provided by Goodyear or that they were unmerchantable. "A product which performs its ordinary function adequately does not breach the implied warranty of merchantability merely because it does not function as well as the buyer would like, or even as well as it could."<sup>69</sup> Accordingly, Gest cannot recover for breach of implied warranty of merchantability.

To recover for breach of the implied warranty of fitness for a particular purpose, Gest must prove that:

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<sup>67</sup> See, e.g., *Woodhouse v. Sanofi-Aventis U.S. LLC*, No. EP-11-CV-113-PRM, 2011 WL 3666595, at \*6-7 (W.D. Tex. June 23, 2011) (citing *Great Am. Prod. v. Permabond Int'l, a Div. of Nat'l Starch and Chem. Co.*, 94 S.W.3d 675, 681 (Tex. App.—Austin 2002, pet. denied)).

<sup>68</sup> *Equistar Chems., L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 867 (Tex. 2007) (citation omitted).

<sup>69</sup> *Gen. Motors Corp. v. Brewer*, 966 S.W.2d 56, 57 (Tex. 1998).



- (1) Goodyear had reason to know any particular purpose for which the benzene containing products were required at the time of contracting; and
- (2) Gest was relying on Goodyear's skill or judgment to select or furnish suitable goods.<sup>70</sup>

An implied warranty of fitness for a particular purpose does not arise unless the particular purpose differs from the usual and ordinary use of the goods. *See* Tex. Bus. & Com. Code Ann. § 2.315 cmt. 2 (“A ‘particular purpose’ differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business.”).

Gest cannot prevail on a breach of implied warranty of fitness for a particular purpose claim because:

- (1) According to Gest, the product at issue was not used for a non-ordinary purpose (he allegedly believed that cleaning tools was an ordinary purpose for the benzene containing products);
- (2) Gest did not communicate any particular purpose to Goodyear at the time of sale, assuming that was such a transfer occurred, which Goodyear denies; and
- (3) There is no evidence that Gest relied on Goodyear's advice or judgment relating to fitness of the alleged benzene containing products for use as a cleaning solvent for tools or other equipment.<sup>71</sup>

Lastly, the statute of limitations for a breach of implied warranty claim is four years.<sup>72</sup> The cause of action for breach of implied warranty accrues upon the delivery of goods, regardless of when Plaintiff discovers the defects in the goods.<sup>73</sup> Plaintiff worked on the Goodyear premise in 1975 and 1976.<sup>74</sup> He did not file his Original Petition until 2016. Any cause of action based upon the alleged breach of an implied warranty would be barred by the

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<sup>70</sup> *Bass v. Stryker Corp.*, 669 F.3d 501, 516 (5th Cir. 2012).

<sup>71</sup> *Chandler v. Gene Messer Ford, Inc.*, 81 S.W.3d 493, 503 (Tex. App.-Eastland 2002, pet. denied) (“The particular purpose must be a particular non-ordinary purpose.”)

<sup>72</sup> *Mahler Interests, L.P. v. DMAC Construction, Inc.*, 503 S.W.3d 43, 49 (Tex. App- Houston [1th Dist.] 2016, no writ); *PPG Industries, Inc. v. JMB/Houston Centers Partners Limited Partnership*, 146 SW3d 79, 92 (Tex. 2004).

<sup>73</sup> *Id.*

<sup>74</sup> Exhibit B at 99:1-100:10.

applicable statute of limitations. In sum, Plaintiff has not produced any evidence to support his breach of warranty claim.

*iv. There is no evidence of gross negligence, malice or willful act*

A party must first be found negligent before it can be found grossly negligent. *General Motors v. Sanchez*, 997 S.W. 2d 584, 595 (Tex. 1999). To the extent that there is no evidence of negligence as to a defendant, there is also no evidence of gross negligence.

Alternatively, the malice/gross negligence claims against Goodyear should be dismissed independently of the negligence claims. A plaintiff must provide sufficient evidence of the following, by clear and convincing evidence, in order to support a claim against a defendant for gross negligence:

- (1) when viewed objectively, an act or omission on the part of the defendant involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and
- (2) that the defendant had an actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Tex. Civ. Prac. & Rem. Code §§ 41.0001(7) (B) (i)-(ii), 41,003(a); *Transp. Ins. Co. v. Moriel*, 879 S.W. 2d 10, 23 (Tex. 1994). Here, plaintiff has presented no evidence of negligence. Additionally, plaintiff has provided no evidence to support the objective element of gross negligence, specifically, that any act or omission by Goodyear involved “an extreme degree of risk.” Furthermore, plaintiff has provided no evidence of the subjective elements of its gross negligence claims, specifically, that Goodyear had actual awareness of any risk involved with its alleged acts or omissions, or that Goodyear “proceeded with conscious indifference to the rights, safety, or welfare of others.”

Plaintiff has also plead malice/willful injury as basis for recovery of exemplary damages, but in order to prevail on this, Plaintiff must prove “[Goodyear’s] specific intent to cause

substantial injury or harm to Gest.”<sup>75</sup> Plaintiff has failed to offer any evidence that Goodyear intended to cause substantial injury to Gest. Without evidence of intent to cause injury Goodyear is entitled to summary judgment.

WHEREFORE, PREMISES CONSIDERED, Defendant The Goodyear Tire & Rubber Company respectfully requests the Court to grant its Motion for Summary Judgment on the Plaintiff’s negligence, strict products liability, breach of warranty, misrepresentation, and gross negligence claims, and grant it any and all other further relief to which it may be justly entitled.

**SHEEHY, WARE & PAPPAS, P.C.**

By:         /s/ James L. Ware        

James L. Ware  
State Bar No. 20861800  
jware@sheehyware.com  
Wesley T. Sprague  
State Bar No. 00785029  
wsprague@sheehyware.com

2500 Two Houston Center  
909 Fannin Street  
Houston, Texas 77010  
(713) 951-1000 – Telephone  
(713) 951-1199 – Facsimile

*Attorneys for Defendant,  
The Goodyear Tire & Rubber Company*

3539272

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<sup>75</sup> TRCP §41.001(7).



**PLAINTIFF'S FIRST AMENDED PETITION**

NOW COMES Louis Gest, hereinafter referred to as Plaintiff, complaining of CHEVRON U.S.A., INC., LYONDELL CHEMICAL COMPANY, LYONDELL REFINING COMPANY LLC, SHELL OIL COMPANY, SHELL OIL PRODUCTS COMPANY LLC, MOTIVA ENTERPRISES LLC, SAUDI ARAMCO ENERGY VENTURES – U.S. LLC, SAUDI REFINING, INC., AIR PRODUCTS AND CHEMICALS, INC., CBS CORPORATION, BAYER CROPSCIENCE, INC., HERCULES INCORPORATED, ASHLAND INC., BP PRODUCTS NORTH AMERICA INC., BP AMOCO CHEMICAL COMPANY, E.I. DU PONT DE NEMOURS AND COMPANY, ATLANTIC RICHFIELD COMPANY, EXXON MOBIL CORPORATION, AIR LIQUIDE USA LLC, AIR LIQUIDE AMERICA L.P., VALERO ENERGY CORPORATION, VALERO REFINING-TEXAS, L.P., VALERO REFINING AND MARKETING COMPANY, DIAMOND SHAMROCK REFINING COMPANY, THE GOODYEAR TIRE & RUBBER COMPANY, and MARATHON OIL CORPORATION, hereinafter collectively referred to as Defendants, and for causes of action would respectfully show this Court and Jury the following:

**DISCOVERY CONTROL PLAN**

1. Plaintiff requests that this case be governed by a discovery control plan as provided in Rule 190 and be conducted under Level 3 of this Rule.

**PARTIES**

2. Plaintiff, LOUIS GEST and resides in Santa Fe, Texas.
3. Defendant, CHEVRON U.S.A. INC. is a Pennsylvania Corporation doing business in the State of Texas and may be served with process through its registered agent for service: Prentice-Hall Corp System, Inc., 211 E. 7<sup>th</sup> Street, Suite 620, Austin, Texas 78701.

4. Defendant, LYONDELL CHEMICAL COMPANY is a Delaware Corporation doing business in the State of Texas with its headquarters in Houston, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

5. Defendant, LYONDELL REFINING COMPANY LLC is a Delaware Corporation doing business in the State of Texas with its headquarters in Houston, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

6. Defendant, SHELL OIL COMPANY is a Delaware Corporation doing business in the State of Texas with its headquarters in Houston, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

7. Defendant, SHELL OIL PRODUCTS COMPANY LLC is a Delaware Corporation doing business in the State of Texas with its headquarters in Dallas, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

8. Defendant, MOTIVA ENTERPRISES LLC is a Delaware Corporation doing business in the State of Texas with its headquarters in Houston, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

9. Defendant, SAUDI ARAMCO ENERGY VENTURES – U.S. LLC is a Delaware Corporation doing business in the State of Texas with its headquarters in Houston, Texas and

may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

10. Defendant, SAUDI REFINING, INC. is a Delaware Corporation doing business in the State of Texas with its headquarters in Houston, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

11. Defendant, AIR PRODUCTS AND CHEMICALS, INC. is a Delaware Corporation doing business in the State of Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

12. Defendant, CBS CORPORATION is a Delaware Corporation doing business in the State of Texas and may be served with process through its registered agent for service: Corporation Service Company d/b/a CSC-Lawyers Inco, 211 E. 7<sup>th</sup> Street, Suite 620, Austin, Texas 78701.

13. Defendant, BAYER CROPSCIENCE, INC. is a Delaware Corporation doing business in the State of Texas. This Defendant has agreed to accept service of process by and through its counsel of record, A.M. Landry III, of the law firm Gray Reed, 1300 Post Oak Blvd. #2000, Houston, Texas 77056.

14. Defendant, HERCULES INCORPORATED is a Delaware Corporation doing business in the State of Texas and may be served with process through its registered agent for service: CT Corp System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

15. Defendant, ASHLAND INC. is a Kentucky Corporation doing business in the State of Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

16. Defendant, BP PRODUCTS NORTH AMERICA INC. is a Maryland Corporation doing business in the State of Texas with its headquarters in Houston, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

17. Defendant, BP AMOCO CHEMICAL COMPANY is a Delaware Corporation doing business in the State of Texas with its headquarters in Houston, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

18. Defendant, E.I. DU PONT DE NEMOURS AND COMPANY is a Delaware Corporation doing business in the State of Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

19. Defendant, ATLANTIC RICHFIELD COMPANY is a Delaware Corporation doing business in the State of Texas with its headquarters in Houston, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

20. Defendant, EXXON MOBIL CORPORATION is a New Jersey Corporation doing business in the State of Texas with its headquarters in The Woodlands, Texas and may be served with process through its registered agent for service: Corporation Service Company d/b/a CSC-Lawyers Inco, 211 E. 7<sup>th</sup> Street, Suite 620, Austin, Texas 78701.



21. Defendant, AIR LIQUIDE USA LLC is a Delaware Corporation doing business in the State of Texas with its headquarters in Houston, Texas and may be served with process through its registered agent for service: Capitol Corporate Services, Inc., 206 E. 9<sup>th</sup> Street, Suite 1300, Austin, Texas 78701.

22. Defendant, AIR LIQUIDE AMERICA L.P. is a Delaware Corporation doing business in the State of Texas with its headquarters in Houston, Texas and may be served with process through its registered agent for service: Capitol Corporate Services, Inc., 206 E. 9<sup>th</sup> Street, Suite 1300, Austin, Texas 78701.

23. Defendant, VALERO ENERGY CORPORATION is a Delaware Corporation doing business in the State of Texas with its headquarters in San Antonio, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

24. Defendant, VALERO REFINING-TEXAS, L.P. is a Texas Corporation doing business in the State of Texas with its headquarters in San Antonio, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

25. Defendant, VALERO REFINING AND MARKETING COMPANY is a Delaware Corporation doing business in the State of Texas with its headquarters in San Antonio, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

26. Defendant, DIAMOND SHAMROCK REFINING COMPANY, L.P. is a Delaware Corporation doing business in the State of Texas and may be served with process

through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

27. Defendant, THE GOODYEAR TIRE & RUBBER COMPANY is an Ohio Corporation doing business in the State of Texas and may be served with process through its registered agent for service: Corporation Service Company d/b/a CSC-Lawyers Inco, 211 E. 7<sup>th</sup> Street, Suite 620, Austin, Texas 78701.

28. Defendant, MARATHON OIL CORPORATION is a Delaware Corporation doing business in the State of Texas with its headquarters in Houston, Texas and may be served with process through its registered agent for service: CT Corporation System, 1999 Bryan St., Suite 900, Dallas, Texas 75201.

#### **JURISDICTION & VENUE**

29. Venue is proper in this cause of action in Jefferson County, Texas pursuant to §15.002(a)(1) of the Texas Civil practice and Remedies Code because a substantial part of the events or omissions occurred in this county. This Court has jurisdiction over the controversy because the damages exceed the minimal jurisdiction limits of this Court. Pleading further, all Defendants have maintained and do maintain sufficient minimum contact with the State of Texas to place themselves under and within the general and specific jurisdiction of the State of Texas such that the State of Texas may and does have “Long Arm” jurisdiction over these Defendants pursuant to the statutes and Constitution of the State of Texas and the United States of America. Further, Defendants conducted, and continue to conduct business activity in this county which gave rise to these claims. Venue is therefore proper against all Defendants because Plaintiff’s claims against all Defendants arise out of the same series of transactions or occurrences.

30. There is no basis for removal of this case to Federal Court. Defendants Lyondell Chemical Company, Lyondell Refining Company LLC, Shell Oil Company, Shell Oil Products Company LLC, Motiva Enterprises LLC, Saudi Aramco Energy Ventures – U.S. LLC, Saudi Refining, Inc., BP Products North America, Inc., BP Amoco Chemical Company, Atlantic Richfield Company, Exxon Mobil Corporation, Air Liquide USA LLC, Air Liquide America L.P., Valero Energy Corporation, Valero Refining-Texas, L.P., Valero Refining and Marketing Company, Diamond Shamrock Refining Company, L.P. and Marathon Oil Corporation are citizens of the State of Texas pursuant to 28 U.S.C. §1441(b). There is no federal question at issue pursuant to 28 U.S. C. §1441(b). There is no diversity of citizenship pursuant to 28 U.S.C. §1441 and 28 U.S.C. §1332, because one or more of the Defendants is a citizen of the State of Texas. *See* 28 U.S.C. §1441(b) and 28 U.S.C. §1332(c).

#### **FACTS**

31. Plaintiff, Louis Gest was employed as a chemical plant and refinery worker and pipefitter from 1970 through 2005. Throughout this time, Mr. Gest worked his craft at facilities in Texas owned and/or operated by Defendants Chevron U.S.A. Inc., Lyondell Chemical Company, Lyondell Refining Company LLC, Shell Oil Company, Shell Oil Products Company LLC, Motiva Enterprises LLC, Saudi Aramco Energy Ventures – U.S. LLC, Saudi Refining, Inc., Air Products and Chemicals, Inc., CBS Corporation, Bayer CropScience, Inc., Hercules Incorporated, Ashland Inc., BP Products North America, Inc., BP Amoco Chemical Company, E.I. du Pont de Nemours and Company, Atlantic Richfield Company, Exxon Mobil Corporation, Air Liquide USA LLC, Air Liquide America L.P., Valero Energy Corporation, Valero Refining-Texas, L.P., Valero Refining and Marketing Company, Diamond Shamrock Refining Company, L.P., The Goodyear Tire & Rubber Company and Marathon Oil Corporation.

32. Specifically, Louis Gest worked and was exposed to benzene and benzene-containing mixtures at the following locations: Port Arthur Refinery in Port Arthur, Texas; Beaumont Refinery, Chemical and Plant in Beaumont, Texas; Houston Refining in Houston, Texas; Shell Deer Park Refinery in Deer Park, Texas; Air Products & Chemicals Plant in Pasadena, Texas; Charter International Oil Refinery in Pasadena, Texas; Stauffer Chemicals Plant in Houston, Texas; Texas City Refinery in Texas City, Texas; Du Pont Chemical Plant in La Porte, Texas; ExxonMobil Baytown Refinery in Baytown, Texas; Air Liquide Plant in Pasadena, Texas; Diamond Shamrock Refinery in Houston, Texas; Valero Houston Refinery in Houston, Texas; and Goodyear Chemical Plant in Houston, Texas. In the course of his work, Louis Gest was exposed, through inhalation, ingestion and dermal contact, to harmful levels of benzene and benzene-containing mixtures at Defendants' facilities.

33. Defendants, Chevron U.S.A. Inc., Shell Oil Company, Shell Oil Products Company LLC, Motive Enterprises LLC, Saudi Aramco Energy Ventures-U.S. LLC and Saudi Refining, Inc. owned, operated, and/or through a series of mergers and acquisitions are ultimately responsible for liabilities arising from the Port Arthur Refinery. Defendant, Exxon Mobil Corporation owned and/or operated the Beaumont Refinery, Chemical and Plant and ExxonMobil Baytown Refinery. Defendants Lyondell Chemical Company, Lyondell Refining Company LLC, and Atlantic Richfield Company owned, operated, and/or through a series of mergers and acquisitions are ultimately responsible for liabilities arising from Houston Refining. Defendants Shell Oil Company and Shell Oil Products Company owned and/or operated the Shell Deer Park Refinery. Defendant Air Products and Chemicals, Inc. owned and/or operated Air Products & Chemicals. Defendant CBS Corporation acquired Charter International Oil Company which owned and/or operated the Charter International Oil Refinery. Defendant Bayer

CropScience, Inc. owned, operated, and/or through a series of mergers and acquisitions are ultimately responsible for liabilities arising from the Stauffer Chemicals Plant. Defendants, BP Products North America Inc. and BP Amoco Chemical Company owned and/or operated the Texas City Refinery. Defendant, E.I. Du Pont de Nemours and Company owned and/or operated the Du Pont chemical facility. Defendants Air Liquide USA LLC and Air Liquide America L.P. owned and/or operated the Air Liquide Facility. Defendants, Valero Energy Corporation, Valero Refining-Texas, L.P., Valero Refining and Marketing Company owned and/or operated the Valero Houston Refinery, Texas City Refinery, Port Arthur Refinery, and owned, operated and/or through a series of mergers and acquisitions with Defendant Diamond Shamrock Refining Company, L.P. are ultimately responsible for liabilities arising from the Diamond Shamrock Plant. Defendant, The Goodyear Tire & Rubber Company owned and/or operated the Goodyear Chemical Plant. Defendant Marathon Oil Corporation owned and/or operated the Texas City Refinery.

34. While performing his duties, Mr. Gest was exposed to benzene and benzene-containing mixtures utilized, supplied and/or manufactured by Defendants. Each Defendant herein is liable in their capacities as a premises owner, distributor, operator, supplier and/or transporter of benzene and benzene-containing mixtures, and as such retained the right to control, exercise control and duty to warn Louis Gest.

35. Each Defendant is liable in their capacity for manufacturing, selling, marketing, distributing, designing, and/or placing in the stream of commerce benzene and benzene-containing mixtures that were defective, hazardous and/or carcinogenic. Each Defendant is further liable in capacities as general contractor, subcontractor, premise owners, premise operator, supplier, manufacturer, as an entity that marketed benzene and benzene-containing

mixtures, as an entity that retained the right to control or exercised control over Louis Gest, and/or creator of dangerous conditions.

36. Each Defendant was aware, or should have been aware, of the dangers associated with exposures to benzene and benzene-containing mixtures at the premises where Louis Gest worked. Nevertheless, Defendants failed to warn employees, invitees, and contractors of the dangers associated with occupational exposure to benzene and benzene-containing mixtures and required workers, such as Louis Gest to work with or in proximity to hazardous substances without the necessary precautions to avoid dangerous exposures to benzene and benzene-containing mixtures.

37. As a direct and proximate result of his exposure to benzene and benzene-containing mixtures Plaintiff, Louis Gest developed myelodysplastic syndrome (MDS) including multiple related adverse blood and bone marrow effects, cellular abnormalities, anemia, genotoxic effects and resultant DNA and chromosomal damage as diagnosed on or about September 10, 2014.

#### **COUNT ONE - NEGLIGENCE**

38. All of the allegations contained in the previous paragraphs are re-alleged herein.

39. Plaintiff will show that he was exposed to a toxic, harmful and deadly situation by all Defendants in this case. Plaintiff alleges, as more specifically set out below, that he contracted an illness, and such illness was proximately caused by Defendants' negligent acts, and by his exposure to benzene and benzene-containing mixtures designed, produced, manufactured, marketed, placed into the stream of commerce, or sold or used by Defendants.

40. The negligence of Defendants or, where applicable, the employee or the agent of Defendants, was a proximate cause of Louis Gest's disease and damages alleged herein.

41. Defendants knew, or with the exercise of ordinary and reasonable care ought to have known, that the benzene and benzene-containing mixtures they manufactured, used, sold, designed, supplied, distributed, relabeled, resold or procured, were poisonous, toxic and extremely harmful to human health. Defendants owed a duty to Louis Gest and breached their duty and were therefore negligent in the following respects, among others, and such negligence was the proximate cause of the pain, suffering and illness of Louis Gest and of the damages sustained by Louis Gest:

- a. Defendants knew that the benzene and benzene-containing mixtures they utilized, distributed, designed, supplied, marketed, manufactured and/or put into the stream of commerce were deleterious, poisonous, carcinogenic, and highly harmful to the body and health of Louis Gest; notwithstanding which, Defendant failed to take any precautions or to warn Louis Gest of the dangers and harm to which he was exposed while handling these products;
- b. Defendants knew that the benzene and benzene-containing mixtures used by or in proximity to Louis Gest were carcinogenic, deleterious, and highly harmful to his body and health and that Louis Gest would not have known of such dangerous properties; notwithstanding which, Defendants failed to provide Louis Gest with sufficient knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances to protect him from being damaged by exposure to such products;
- c. Defendants knew that the benzene and benzene-containing mixtures used by or in proximity to Louis Gest contained carcinogenic and highly harmful substances to the human body and health; notwithstanding which, Defendants failed to take any precautions or to exercise care by placing any warnings or cautions in the areas where the products were located or on the containers of such products or the products themselves to warn the handlers thereof of the dangers to health in coming into contact with these products;
- d. Defendants knew that the benzene and benzene-containing mixtures used by or in proximity to Louis Gest contained deleterious and carcinogenic substances; notwithstanding which, Defendants failed to take reasonable care to warn Louis Gest of said danger and/or to instruct Louis Gest in proper handling of said products or to take proper precautions or exercise

- care to protect Louis Gest from harm, and failed to timely adopt and enforce any safety plan and method of handling these dangerous products;
- e. Defendants knew or should have known that the benzene and benzene-containing mixtures they introduced into the stream of commerce were toxic and/or carcinogenic and failed to adequately warn;
  - f. Defendants created dangerous conditions on their premises;
  - g. Defendants failed to keep their premises in a reasonably safe condition;
  - h. Defendants failed to give adequate warnings of the dangerous conditions on their premises;
  - i. Defendants failed to protect invitees, such as Louis Gest, from the hazards associated with exposure to these toxic and carcinogenic chemicals and substances;
  - j. Defendants failed to medically monitor or perform industrial hygiene monitoring for Louis Gest;
  - k. Defendants supplied benzene and benzene-containing mixtures with marketing, design, and/or manufacturing defects;
  - l. Defendants committed acts or omissions while having a right to control;
  - m. Defendants failed to properly exercise the right to control;
  - n. Defendants failed to provide a safe place to work;
  - o. Defendants failed to provide adequate safety equipment;
  - p. Defendants failed to monitor chemical and toxic substance levels in the workplace;
  - q. Defendants negligently failed to adopt and enforce a reasonable and safe industrial hygiene plan for benzene and benzene-containing mixtures;
  - r. Defendants negligently failed to provide Louis Gest with visible, understandable warnings that were adequate to convey the severity of the risks;
  - s. Defendants negligently failed to take reasonable care to warn Louis Gest of the latency period concerning diseases caused by exposure to benzene and benzene-containing mixtures;



- t. Defendants negligently failed to take reasonable care to warn Louis Gest of bystander exposure;
- u. Defendants negligently failed to warn Louis Gest about the risk of developing cancer;
- v. Defendants negligently failed to warn Louis Gest about the risk of developing cancer and diseases of the blood;
- w. Defendants negligently failed to warn Louis Gest that there is no known safe level of exposure to benzene and benzene-containing mixtures;
- x. Defendants negligently failed to fund medical and scientific studies to determine if there ever was a safe level of exposure to benzene and benzene-containing mixtures;
- y. Defendants negligently failed to provide benzene and benzene-containing mixtures safe for human beings;
- z. Defendants negligently failed to test their benzene and benzene-containing mixtures;
- aa. Defendants negligently failed to research the world literature concerning health hazards relating to benzene and benzene-containing mixtures;
- bb. Defendants negligently failed to warn and counsel individuals exposed to benzene and benzene-containing mixtures; and
- cc. Defendants negligently committed wrongful acts that gave rise to Louis Gest's injuries and resulting damages.

42. Such other acts or omissions of negligence are also acts of gross negligence, malice and/or strict products liability, and were a proximate and producing cause of Louis Gest's injuries damages, including damages for reasonable and necessary past and future medical expenses, past and future pain and suffering and mental anguish, physical impairment, and disfigurement.

### **COUNT TWO - STRICT PRODUCT LIABILITY**

43. All of the allegations contained in the previous paragraphs are re-alleged herein.

44. The benzene and benzene-containing mixtures to which Louis Gest was exposed were designed, produced, manufactured, marketed, sold and/or otherwise put into the stream of commerce by Defendants, and were used for their intended purpose.

45. Plaintiff will further show that the benzene and benzene-containing mixtures in question were defective and not reasonably fit for the purposes and uses for which they were intended at the time they left the hands of the Defendants in that the products were unreasonably dangerous for their intended use and Defendants failed to give the users adequate warnings or instructions concerning the benzene and benzene-containing mixtures' dangers that were known or should have been known to the Defendants by the application of reasonably developed skill and foresight. This failure to warn on the part of the Defendants rendered such products unreasonably dangerous at the time they left the hands of the Defendants and were the proximate cause of the illness and resulting injuries, disabilities, and damages sustained by Plaintiff, Louis Gest.

### **COUNT THREE - BREACH OF WARRANTY**

46. All of the allegations contained in the previous paragraphs are re-alleged herein.

47. Defendants were merchants with respect to their benzene and benzene-containing mixtures. In connection with the manufacture, design, assembly, sales, supply, delivery, handling, marketing, advertising and instructing in the use benzene and benzene-containing mixtures, Defendants warranted, either expressly or impliedly, that their products were merchantable, when in fact they were not. These products were unfit for the ordinary purposes or uses for which they were intended, including their use and handling by human beings. Further, Defendants breached express and implied warranties under the Texas Uniform Commercial Code.

**COUNT FOUR - MISREPRESENTATION**

48. All of the allegations contained in the previous paragraphs are re-alleged herein.

49. In addition, Defendants misrepresented material facts concerning the character or quality of their benzene and benzene-containing mixtures upon which Louis Gest relied, and therefore are liable to Plaintiff.

**COUNT FIVE - GROSS NEGLIGENCE**

50. All of the allegations contained in the previous paragraphs are re-alleged herein.

51. The actions and inactions of Defendants, and or alternatively the employees or agents of Defendants, and their predecessors-in-interest, whether taken separately, or together, were of such a character as to constitute a pattern or practice of intentional wrongful conduct and/or malice resulting in the illness and damages to Louis Gest. More specifically, Defendants, or alternatively the employees or agents of Defendants, and their predecessors-in-interest, consciously and/or deliberately engaged in fraud, wantonness and/or malice with regard to Louis Gest. Defendants had actual awareness of the extreme degree of risk associated with exposure to the benzene and benzene-containing mixtures they utilized, manufactured, processed, and/or distributed, and nevertheless proceeded with conscious indifference to the rights, safety, and welfare of Louis Gest by failing to act to minimize or eliminate these risks. Therefore, Defendants are guilty of gross negligence for which they should be held liable in punitive and exemplary damages to Plaintiff.

**COUNT SIX - MALICE, WILLFUL ACT  
AND/OR OMISSION OR GROSS NEGLIGENCE**

52. All of the allegations contained in the previous paragraphs are re-alleged herein.

53. Plaintiff will show that his injuries and resulting damages were directly and proximately caused by the fraud, malice, willful acts and/or omissions, or gross neglect of

Defendants herein, their agents, servants, employees, managers, superintendents, supervisors and officers. Plaintiff will further show that if each of the acts of negligence, alleged by Plaintiff did not independently constitute fraud, malice, willful acts and/or omissions, or gross neglect then certainly all of the said acts or omissions combined and in the aggregate constituted fraud, malice, willful acts and/or omissions, or gross neglect and were the proximate causes of Plaintiff's injuries and damages. Viewed objectively from the standpoint of Defendants, the acts or omissions involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and of which Defendants had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety or welfare of others. Thus, Plaintiff sues for exemplary damages in an amount in excess of the jurisdictional limits of this Court.

#### **RELIEF SOUGHT**

54. Plaintiff, Louis Gest was diagnosed with myelodysplastic syndrome on September 10, 2014, and continues to undergo extensive treatment for his disease. The conduct of Defendants, as alleged hereinabove, was a direct, proximate and producing cause of the injuries and illness to Louis Gest, and the following general and special damages that Plaintiff sustained:

- a. Reasonable and necessary medical expenses incurred by Louis Gest in the past;
- b. Reasonable and necessary medical expenses to be incurred by Louis Gest in the future;
- c. The conscious physical pain and suffering and mental anguish sustained by Louis Gest in the past and future;
- d. The physical impairment suffered by Louis Gest;
- e. The disfigurement suffered by Louis Gest;
- f. Loss of earnings suffered by Louis Gest, past and future;

- g. The mental anguish suffered by Louis Gest due to his injuries and illness; and
- h. Plaintiff seeks punitive and exemplary damages.

Pursuant to Tex. R. Civ. P. 47, Plaintiff seeks monetary relief of over \$1,000,000.00. Plaintiff further demands judgment for all other relief justly entitled.

#### **JURY DEMAND**

55. Plaintiff hereby requests a trial by jury. The jury fee has been paid contemporaneously with the filing of the Original Petition.

#### **REQUEST FOR DISCLOSURE**

56. Pursuant to Rule 194.3(a) of the Texas Rules of Civil Procedure, Plaintiff requests that each Defendant disclose, within fifty (50) days of the service of this request, the information or material described in Rule 194.2(a)-(k) of the Texas Rules of Civil Procedure.

#### **CONCLUSION**

WHEREFORE, PREMISES CONSIDERED, Plaintiff demands that Defendants answer herein as the law directs, and that upon final hearing, this Court enter Judgment against Defendants, both jointly and separately, for actual, special and exemplary or punitive damages together with interest thereon at the legal rate, costs of court, and for other such additional and further relief, special and general, at law and in equity, which the Plaintiff shows just and proper in accordance with the law.

Respectfully submitted,

*/s/ Keith E. Patton*

By: \_\_\_\_\_  
**SHRADER & ASSOCIATES, L.L.P.**  
Keith E. Patton  
Texas Bar No. 24032821  
David J. Baluk  
Texas Bar No. 24078186  
3900 Essex Lane, Suite 390  
Houston, Texas 77027

Telephone: (713) 782-0000  
Facsimile: (713) 571-9605  
Email: [keith@shraderlaw.com](mailto:keith@shraderlaw.com)  
Email: [david@shraderlaw.com](mailto:david@shraderlaw.com)

And

Andrew J. Dupont  
Timothy A. Burke  
LOCKS LAW FIRM  
The Curtis Center  
601 Walnut St., Suite 720 E  
, PA 19106  
(215) 893-0100  
(215) 893-3444  
[adupont@lockslaw.com](mailto:adupont@lockslaw.com)  
[tburke@lockslaw.com](mailto:tburke@lockslaw.com)

**ATTORNEYS FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record via e-service on this 6<sup>th</sup> day of March, 2019.

*/s/ Eugene R. Egdorf*

---

Eugene R. Egdorf

1 CAUSE NO. E-198972

- - -

2 LOUIS GEST : IN THE  
 3 Plaintiff, : DISTRICT COURT  
 : OF  
 4 vs. : JEFFERSON  
 : COUNTY, TEXAS  
 5 CHEVRON U.S.A., INC., :  
 et al. : 172nd JUDICIAL  
 6 Defendants. : DISTRICT  
 :

- - -

7 Friday, February 22, 2019

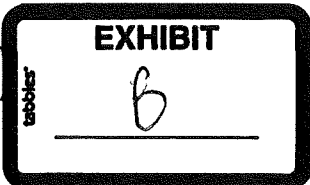
- - -

8  
 9 Videotaped deposition of LOUIS GEST,  
 10 taken pursuant to Notice, at the Law Offices  
 11 of Shrader & Associates, LLP, 3900 Essex  
 12 Lane, Suite 390, Houston, Texas 77027,  
 13 beginning at 9:32 a.m. before Brigitte A.  
 14 Strain, a Federally Approved Registered  
 15 Professional Reporter and Notary Public.

- - -

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17  
18  
19  
20  
21  
22

23 VERITEXT LEGAL SOLUTIONS  
 MID-ATLANTIC REGION  
 1801 Market Street - Suite 1800  
 24 Philadelphia, Pennsylvania 19103



1 APPEARANCES:  
2  
3 LOCKS LAW FIRM, LLC  
4 BY: TIMOTHY BURKE, ESQUIRE  
5 The Curtis Center, Suite 720E  
6 601 Walnut Street  
7 Philadelphia, Pennsylvania 19106  
8 215.893.0100  
9 TBurke@lockslaw.com  
10 Counsel for Plaintiff  
11  
12 BENCKENSTEIN & OXFORD, L.L.P.  
13 BY: HUBERT OXFORD, IV, ESQUIRE  
14 3535 Calder Avenue, Suite 300  
15 Beaumont, Texas 77706  
16 409.951.4721  
17 Hoxfordiv@benoxford.com  
18 Counsel for Defendant Air Liquide USA, LLC  
19 and Air Liquid America, LP  
20  
21 CRAIN, CATON & JAMES  
22 BY: JAMES E. SMITH, ESQUIRE  
23 Five Houston Center  
24 1401 McKinney Street  
25 Suite 1700  
26 Houston, Texas 77010  
27 713.752.8620  
28 JSmith@craincaton.com  
29 Counsel for Defendants Valero Energy  
30 Corporation, Valero Refining-Texas, LP,  
31 Valero Refining and Marketing Company, and  
32 Diamond Shamrock Refining Company, LP  
33  
34

1 APPEARANCES (continued):  
2 MEHAFFY WEBER  
3 BY: JAMES MARTINGANO, ESQUIRE  
4 One Allen Center  
5 500 Dallas Street, Suite 1200  
6 Houston, Texas 77002  
7 713.655.1200  
8 Jamesmartingano@mehaffyweber.com  
9 Counsel for Defendant E.I. Du Pont De  
10 Nemours and Company and ExxonMobil  
11 Corporation  
12  
13 REED SMITH  
14 BY: GRACE HEARN, ESQUIRE  
15 811 Main St., Suite 1700  
16 Houston, Texas 77002  
17 713.4693650  
18 GHearn@reedsmith.com  
19 Counsel for Defendants Saudi Refining,  
20 Inc., Shell Oil Company and Shell Oil  
21 Products Company, LLC, and Motiva  
22 Enterprises, LLC  
23  
24 SHEEHY, WARE & PAPPAS, P.C.  
25 BY: JAMES L. WARE, ESQUIRE  
26 909 Fannin Street  
27 Suite 2500  
28 Houston, Texas 77010  
29 713.951.1151  
30 JWare@sheehyware.com  
31 Counsel for Defendant Goodyear Tire &  
32 Rubber Company  
33  
34 STRONG, PIPKIN, BISSELL & LEDYARD  
35 BY: JOHN W. BRIDGER, ESQUIRE  
36 4900 Woodway Drive  
37 Suite 1200  
38 Houston, Texas 77056  
39 713.210.4380  
40 JBridger@strongpipkin.com  
41 Counsel for Defendant Chevron U.S.A., Inc.  
42  
43  
44

1 APPEARANCES (continued):  
2  
3 GRAY, REED & MCGRAW  
4 BY: A.M. ANDY LANDRY, III, ESQUIRE  
5 1300 Post Oak Blvd.,  
6 Suite 2000  
7 Houston, Texas 77056  
8 713.986.7124  
9 ALandry@grayreed.com  
10 Counsel for Defendant AKZO Nobel  
11 Chemicals, LLC  
12  
13 HUNTON ANDREWS KURTH LLP  
14 BY: JOSEPH BLIZZARD, ESQUIRE  
15 1445 Ross Avenue  
16 Suite 3700  
17 Dallas, Texas 75202  
18 214.659.4588  
19 Jblizzard@andrewskurth.com  
20 Counsel for Defendants Atlantic Richfield  
21 Company, BP Amoco Chemical Company and BP  
22 Products North America, Inc.  
23  
24 JOHNSON, TRENT, & TAYLOR, L.L.P.  
25 BY: TIMOTHY "PEPPER" BURNS, ESQUIRE  
26 919 Milam, Suite 1700  
27 Houston, Texas 77002  
28 713.860.0544  
29 PBurns@johnsontrent.com  
30 Counsel for Defendant Air Products and  
31 Chemicals, Inc.  
32  
33 JORDAN, LYNCH & CANCIENNE, PLLC  
34 BY: WALTER LYNCH, ESQUIRE  
35 1330 Post Oak Blvd., Suite 2575  
36 Houston, Texas 77056  
37 713.955.4026  
38 Wlynch@jlcfirm.com  
39 Counsel for Defendant Marathon Oil  
40 Corporation  
41  
42  
43  
44

1 ALSO PRESENT:  
2 Stephanie Fisher,  
3 Video Technician  
4  
5 Susan Gest  
6  
7  
8  
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INDEX

1

2 TESTIMONY OF: LOUIS GEST

3 By Mr. Burke.....10, 385

4 By Mr. Ware.....132

By Mr. Blizzard.....230

5 By Mr. Bridger.....287, 382

By Mr. Oxford.....321

6 By Mr. Landry.....340

By Mr. Martingano.....354

7 By Mr. Smith.....364

By Mr. Burns.....366

8 By Ms. Hearn.....375

9

EXHIBITS

10

11 EXHIBIT NUMBER DESCRIPTION PAGE MARKED

12 P-1 Armed Forces of the United States, Report of Transfer Or Discharge Bates 521 23

13

14 P-2 Social Security Earnings Record 27

15

16 P-3 Handwritten List of Companies worked 39

17

18

19

20

21

22

23

24

DEPOSITION SUPPORT INDEX

1

2 INSTRUCTION NOT TO ANSWER:

3 Page Line

4 (None)

5

6 REQUEST FOR PRODUCTION OF DOCUMENTS:

7 Page Line Description

8 (None)

9

9 STIPULATIONS:

10 Page Line

11 287 5

12

13 QUESTIONS MARKED:

14 Page Line

15 (None)

16

17

18

19

20

21

22

23

24

1 VIDEO TECHNICIAN: Good morning

2 everyone. Today's date is Friday,

3 February 22, 2019. We are officially

4 on the record at approximately 9:32

5 a.m.

6 Please note that the

7 microphones are sensitive, and may

8 pick up whispering, private

9 conversations and cellular

10 interference. Please turn off all

11 cell phones, or place them away from

12 the microphones, as they can

13 interfere with the deposition audio.

14 Audio and video recording will

15 continue to take place until all

16 parties agree to go off the record.

17 This is media unit one, in the

18 video recorded deposition of Louis

19 Gest, taken by counsel for plaintiff

20 in the matter of Louis Gest versus

21 Chevron U.S.A., Inc., et al., filed

22 in the District Court of Jefferson

23 County. Case Number E-198972.

24 This deposition is being held

1 at Shrader & Associates, LLP, located

2 at 3900 Essex Lane, Suite 390,

3 Houston, Texas 77027.

4 My name is Stephanie Fischer

5 from the firm Veritext, and I am the

6 videographer.

7 The court reporter is Brigitte

8 Strain from the firm Veritext.

9 Starting with the noticing

10 attorney, will counsel please state

11 your name and affiliation for the

12 record.

13 MR. BURKE: Tim Burke for the

14 Plaintiff, Locks Law Firm.

15 MR. WARE: Jim Ware for

16 Defendant, The Goodyear Tire and

17 Rubber Company.

18 MR. BLIZZARD: Joe Blizzard

19 for ARCO and BP.

20 MR. BRIDGER: John Bridger for

21 Chevron.

22 MR. OXFORD: Buford Oxford for

23 Air Gas.

24 MR. LANDRY: Andy Landry for

Page 26

1 had a list of what goes in it and you  
 2 assemble it.  
 3 Q. Okay. Do you think you were  
 4 exposed to any toxic chemicals while  
 5 working?  
 6 A. I don't think so.  
 7 Q. No. Okay. How long did you  
 8 work at GE?  
 9 A. Approximately a year.  
 10 Q. About a year?  
 11 A. They went on strike.  
 12 Q. They went on strike?  
 13 A. And I hadn't been able -- I  
 14 wasn't in line to join the union yet. So  
 15 they went on strike and I had to start  
 16 looking for something else.  
 17 Q. Yeah. Because you weren't a  
 18 member of the union?  
 19 A. I couldn't cross the picket  
 20 line neither, so, you know, it was a -- they  
 21 can get rough on you when you do that, so I  
 22 just went and got another job.  
 23 Q. Okay. And you said you went  
 24 and got another job. What job was that?

Page 27

1 A. It was on Pinemount and -- I  
 2 can't think of the name of the outfit now. I  
 3 wasn't there for very long. I did start  
 4 welding school there.  
 5 Q. Okay. So if I were to hand  
 6 you, Mr. Gest, a copy of your Social  
 7 Security records that were obtained in this  
 8 case, would that be able to refresh your  
 9 recollection as to who some of your  
 10 employers might be that you might not  
 11 remember?  
 12 A. Yeah.  
 13 Q. Okay. I'm going to mark as  
 14 Exhibit 2 previously produced Social  
 15 Security records.  
 16 - - -  
 17 (Whereupon the document was  
 18 marked, for identification purposes,  
 19 as Exhibit Number P-2.)  
 20 - - -  
 21 BY MR. BURKE:  
 22 Q. Mr. Gest, any time you are  
 23 having trouble remembering the name of an  
 24 employer --

Page 28

1 A. Okay.  
 2 Q. -- if that would help to  
 3 refresh your recollection, please take a  
 4 look at that. And take a second to look  
 5 that over and just tell me if it's accurate.  
 6 A. Okay. Oh, man.  
 7 (Discussion held off the  
 8 record.)  
 9 BY MR. BURKE:  
 10 Q. Okay. So Mr. Gest, after you  
 11 left GE, you said that you went and worked  
 12 --  
 13 A. Yeah.  
 14 Q. -- for another company. If you  
 15 go to page two, I see that the GE is  
 16 reflected, that you were employed there from  
 17 '67 to '68. And then when you left there --  
 18 that takes us to page -- to the end of page  
 19 two and into page three. And there's -- you  
 20 have quite a number of employers.  
 21 A. Oh, yes.  
 22 Q. So my understanding is that  
 23 this case is about your alleged exposure to  
 24 a chemical called benzene. Is that right?

Page 29

1 A. Right.  
 2 Q. Do you claim to have exposure  
 3 to benzene at every single one of these  
 4 employers?  
 5 A. No.  
 6 Q. Okay. So maybe today we'll  
 7 just focus on some of the ones that you can  
 8 remember --  
 9 A. Okay.  
 10 Q. -- using benzene at.  
 11 And after you left GE, did you  
 12 get any additional professional training?  
 13 A. Do what now?  
 14 Q. After you left GE, did you get  
 15 any additional --  
 16 A. Yeah, I went to a welding  
 17 school.  
 18 Q. You went to welding school?  
 19 A. Uh-huh.  
 20 Q. Where did you go to welding  
 21 school?  
 22 A. It was here in Houston. I  
 23 can't remember the name of the street now.  
 24 They went out of business. It's a welder.

1 Q. So you went to welding school,  
 2 it subsequently went out of business?  
 3 A. Uh-huh.  
 4 Q. Okay. But you got your welding  
 5 certificate?  
 6 A. Right.  
 7 Q. Okay. And how long was that  
 8 course?  
 9 A. I think I was there three  
 10 months.  
 11 Q. Three months?  
 12 A. Uh-huh.  
 13 Q. Okay.  
 14 A. I took half the course. I  
 15 finished structural and didn't get into pipe  
 16 until later.  
 17 Q. Until later? Okay. So after  
 18 you got a certificate in welding, did your  
 19 career change into that of a welder?  
 20 A. Yes.  
 21 Q. Okay. And what was your first  
 22 job as a welder out of welding school?  
 23 A. The first, it would be H.P.  
 24 Zachary.

1 Q. H.P. Zachary? What did you do  
 2 for H.P. Zachary?  
 3 A. I was a structural welder for  
 4 them in a power plant in Bastrop.  
 5 Q. In Bastrop?  
 6 A. Uh-huh.  
 7 Q. And what year was that?  
 8 A. That had to have been 1971, I  
 9 think. Somewhere around there.  
 10 Q. Around '71?  
 11 A. Uh-huh.  
 12 Q. Okay. And so you -- as a  
 13 welder for H.P. Zachary, you said that you  
 14 were doing structural welding. What kind of  
 15 welding is that?  
 16 A. It's strictly on anything  
 17 that's non-pipes. Just like a building,  
 18 putting up iron and stuff.  
 19 Q. Would that be mostly new  
 20 construction?  
 21 A. Yes.  
 22 Q. Okay.  
 23 A. Brand new construction, yes.  
 24 Q. And how long do you think you

1 were with H.P. Zachary?  
 2 A. One year.  
 3 Q. One year? Okay.  
 4 A. Close.  
 5 Q. And did you build any new  
 6 construction buildings while with H.P.  
 7 Zachary?  
 8 A. I worked on them.  
 9 Q. Worked on them?  
 10 A. Right.  
 11 Q. Okay. In Bastrop?  
 12 A. Uh-huh.  
 13 Q. Okay. So after you left H.P.  
 14 Zachary, where did you go?  
 15 A. I went to Brown & Root in  
 16 Ingleside, Texas, DuPont plant.  
 17 Q. DuPont plant?  
 18 A. Brand new.  
 19 Q. Brand new. So you were -- my  
 20 understanding is. You were building a brand  
 21 new --  
 22 A. Yes.  
 23 Q. You say plant. Was it a  
 24 refinery, was it a plant, what --

1 A. It was a chemical plant.  
 2 Q. A chemical plant?  
 3 A. Uh-huh.  
 4 Q. But there were no chemicals in  
 5 it at the time --  
 6 A. No.  
 7 Q. -- you were there?  
 8 A. No.  
 9 Q. Because it was brand new?  
 10 A. No, it was brand new. And I  
 11 worked mostly on installing grating and  
 12 stuff like that.  
 13 Q. Okay. So you were with a  
 14 company called Brown & Root, you said?  
 15 A. Uh-huh.  
 16 Q. How long do you think you were  
 17 employed with Brown & Root in total?  
 18 A. You talking about that job?  
 19 Q. No, I just mean as an  
 20 employer, throughout the -- throughout the  
 21 entirety of your career.  
 22 A. Maybe five years.  
 23 Q. Five years. Okay.  
 24 A. Yep.

Page 34

1 Q. If you were to look at your  
 2 Social Security records, on page six.  
 3 A. Uh-huh.  
 4 Q. It shows here that you had  
 5 employment in '72, '73, '74, '75, '76, '77  
 6 and '80. Do you have any reason to dispute  
 7 those years of employment with Brown & Root?  
 8 A. No.  
 9 Q. Do you think that's an  
 10 accurate --  
 11 A. It was off and on.  
 12 Q. Okay.  
 13 A. Shutdowns.  
 14 Q. Shutdowns. Okay. So what is  
 15 -- what is a shutdown?  
 16 A. A shutdown for a chemical  
 17 plant runs on their schedule. And maybe  
 18 they have a scheduled shutdown where they go  
 19 in and replace worn out. They'll shut it  
 20 down for a month, somewhere around there,  
 21 two months maybe.  
 22 Q. When you say shut it down,  
 23 what's shut down?  
 24 A. They shut down the plant.

Page 35

1 They quit operating it and bring it down.  
 2 And they'll replace piping or anything that  
 3 they need to replace and put it back on  
 4 line.  
 5 Q. So why would piping need to be  
 6 replaced at a refinery?  
 7 A. It wears out.  
 8 Q. Wears out how?  
 9 A. Well, they might put something  
 10 new in, and it might be a piping change.  
 11 And it might because some of it wore out.  
 12 Q. Okay.  
 13 A. They run at a very high heat,  
 14 very high pressure.  
 15 Q. So when you say wore out,  
 16 would it be like a pipe has broken, is it  
 17 leaking, is it dirty?  
 18 A. It could be, but it very  
 19 seldom ever leaked. But they do wear out  
 20 and the 90s and stuff like that wear out  
 21 first in anything.  
 22 Q. Okay. So my understanding is  
 23 that you then -- when you left H.P. Zachary,  
 24 then you became a welder for Brown & Root?

Page 36

1 A. Uh-huh.  
 2 Q. And you said you were working  
 3 shutdowns?  
 4 A. That was new construction  
 5 only, the first one.  
 6 Q. The first one. Okay. So what  
 7 is the first one that you did?  
 8 A. DuPont.  
 9 Q. DuPont. Okay. So what you  
 10 described earlier, building the DuPont  
 11 plant, you were technically employed by  
 12 Brown & Root; is that right?  
 13 A. Uh-huh.  
 14 Q. Okay.  
 15 A. And I worked for -- I worked  
 16 at DuPont, but I was employed by --  
 17 Q. Brown & Root?  
 18 A. -- Brown & Root.  
 19 Q. So your paychecks came from --  
 20 A. Brown & Root.  
 21 Q. -- Brown & Root.  
 22 So after you finished building  
 23 the DuPont plant, did you work any shutdowns  
 24 after that?

Page 37

1 A. If I remember right, I went to  
 2 Charter Oil. It was pretty close after  
 3 that.  
 4 Q. To where?  
 5 A. To Charter Oil.  
 6 Q. Charter --  
 7 A. I went to a company that would  
 8 test me on pipe.  
 9 Q. Okay.  
 10 A. And that was --  
 11 Q. They would test you on pipe?  
 12 A. Yeah.  
 13 Q. Okay. What do you mean by  
 14 that?  
 15 A. Well, I couldn't get tested at  
 16 pipe. I was working for him as a structural  
 17 welder and they kept me as a structural  
 18 welder for Brown & Root. And I had to go  
 19 somewhere else to get tested on pipe,  
 20 certified.  
 21 Q. Okay. Certified. So despite  
 22 having a welding certificate, you had to get  
 23 another certificate?  
 24 A. You had to have a -- yeah,

Page 38

1 pipe. There's a lot more pay and better.  
 2 Q. Okay. So there's more pay in  
 3 welding pipe?  
 4 A. More demand.  
 5 Q. Okay. And so, do you remember  
 6 around the time that you had to get  
 7 certified in pipe?  
 8 A. Yeah, that would have been  
 9 probably '72, '73, somewhere in there.  
 10 Q. Around '72?  
 11 A. Yeah.  
 12 Q. Okay. So after you got  
 13 certified as a pipe welder, what was your  
 14 first job as a pipe welder?  
 15 A. Each job you get to be  
 16 certified.  
 17 Q. Each job you have to be  
 18 certified?  
 19 A. You have to test.  
 20 Q. Okay. So what was the first  
 21 refinery at which you were a pipe welder?  
 22 A. Probably Crown.  
 23 Q. Crown?  
 24 A. It's either Crown or Charter.

Page 39

1 I think it was Crown.  
 2 Q. Okay. Now if you were to --  
 3 now my understanding from what you said  
 4 earlier is that you prepared a list --  
 5 A. Right.  
 6 Q. -- before you came in today of  
 7 refineries?  
 8 A. Right.  
 9 Q. Now, would that list help you  
 10 to refresh your recollection?  
 11 A. Sure.  
 12 Q. Okay. Do you want to take a  
 13 look at that?  
 14 A. Yeah.  
 15 Q. We can mark that as Plaintiffs  
 16 3.  
 17 A. Yeah.  
 18 - - -  
 19 (Whereupon the document was  
 20 marked, for identification purposes,  
 21 as Exhibit Number P-3.)  
 22 - - -  
 23 MR. OXFORD: Object to form.  
 24 THE WITNESS: This I did for

Page 40

1 my benefit. My memory's not as good  
 2 as it used to be.  
 3 Yep. Crown's number one on  
 4 the list.  
 5 BY MR. BURKE:  
 6 Q. Okay. And do you know what  
 7 year you were at Crown?  
 8 A. It would have been like '72.  
 9 '71, '72, around there, because I stayed at  
 10 Brown & Root for a year or so.  
 11 Q. And what do you --  
 12 MR. OXFORD: Excuse me. Can  
 13 you pass around his list?  
 14 MR. BURKE: Yes, sure.  
 15 MR. BRIDGER: Do you have  
 16 copies?  
 17 MR. BURKE: No. He prepared  
 18 it before he came in today.  
 19 MR. BURNS: Why don't we make  
 20 a copy of it.  
 21 (Discussion held off the  
 22 record.)  
 23 VIDEO TECHNICIAN: We're  
 24 officially off the record at

Page 41

1 approximately 9:55 a.m.  
 2 (Whereupon there was a recess  
 3 in the proceeding.)  
 4 VIDEO TECHNICIAN: This is the  
 5 beginning of tape three. We are  
 6 officially back on the record at  
 7 10:08 a.m.  
 8 BY MR. BURKE:  
 9 Q. Mr. Gest, just a second ago we  
 10 were discussing that one of the first  
 11 refineries that you worked at in a welding  
 12 capacity during the shutdown was Crown  
 13 Petroleum. Is that right?  
 14 A. I believe so.  
 15 Q. What did you do while you were  
 16 at Crown Petroleum?  
 17 A. Well, we repaired and replaced  
 18 pipe.  
 19 Q. Repaired and replaced pipe?  
 20 A. Uh-huh.  
 21 Q. Okay. And so what was your  
 22 official title?  
 23 A. Pipe welder.  
 24 Q. Pipe welder?

Page 70

1 A. Oh, sure. If you ever smell  
 2 it, you'll know it.  
 3 Q. So did it look the same as  
 4 what you were using at Shell?  
 5 A. Uh-huh.  
 6 Q. So you know for sure that it  
 7 was the same chemical?  
 8 A. Uh-huh.  
 9 Q. Right. Now where did you guys  
 10 get the benzene from at the Exxon plant?  
 11 A. I don't know.  
 12 Q. You don't know?  
 13 A. I wouldn't have known that.  
 14 Q. But, I mean, if you needed  
 15 more benzene, where would you go?  
 16 A. I wouldn't know. I didn't get  
 17 them. I was --  
 18 Q. So you just used it.  
 19 A. I was on the welding side.  
 20 Q. You didn't get it.  
 21 A. And they were on the cleaning  
 22 side.  
 23 Q. Okay.  
 24 A. Now the only thing I had in

Page 71

1 contact with them was if somebody was gone  
 2 and I'd help them bring it in to where I was  
 3 welding or something like that.  
 4 Q. Did you ever have to clean  
 5 your tools?  
 6 A. Uh-huh.  
 7 Q. And what -- how would you  
 8 clean your tools while you were at Exxon?  
 9 A. Usually I don't have many  
 10 tools but we did have a few and I used the  
 11 same thing they used. You know, like the  
 12 fitters would know what it was. You know, I  
 13 worked with them. 90 percent of the time I  
 14 worked with a fitter. They took care of  
 15 most of that.  
 16 Q. Okay.  
 17 A. But if I had two of them on,  
 18 then I might help them clean theirs or  
 19 something like that.  
 20 Q. Okay.  
 21 A. That was the contact I had.  
 22 Q. So when you were cleaning your  
 23 tools, did you use a gallon container in the  
 24 same way you did at Shell, or how -- how was

Page 72

1 the benzene that you used stored?  
 2 A. Yeah, I would say it was a  
 3 gallon -- it would have been a gallon  
 4 container because I don't remember.  
 5 Q. Now, when you say a gallon  
 6 container is that like a coffee --  
 7 A. It was either a gallon or a  
 8 five gallon. Most of what they had brought  
 9 over was five gallon, but they might have  
 10 put it in smaller ones.  
 11 Q. And was this an open, kind of  
 12 like a coffee can gallon --  
 13 A. No. It was closed.  
 14 Q. Closed?  
 15 A. It had a lid on it.  
 16 Q. It had a lid. Okay. And when  
 17 you cleaned your tools would you take the  
 18 lid off?  
 19 A. No, it has -- usually it had  
 20 an opening on it or something, if I remember  
 21 right.  
 22 Q. Can you pour it over --  
 23 A. You're asking a lot of  
 24 detailed questions.

Page 73

1 Q. This is a deposition. I am  
 2 asking you detailed questions, that's right.  
 3 So, did you pour it on the  
 4 tools?  
 5 A. I guess so. I mean, we got to  
 6 clean them. We might have poured it in the  
 7 bucket and then put the tools in it. I don't  
 8 really recall. You know, that was --  
 9 Q. Do you recall doing it both  
 10 ways, soaking the tools in the bucket and  
 11 pouring it on the tools?  
 12 A. I remember helping the fitters  
 13 clean their tools. You know, so --  
 14 Q. Okay. So you would also help  
 15 fitters clean their tools?  
 16 A. Yeah, yeah. We would work  
 17 together.  
 18 Q. Okay. And was this an  
 19 activity that you did every day, at the end  
 20 of every day?  
 21 A. Yes. And at the end of the  
 22 day, like I said before, they had usually  
 23 somewhere where they could use something  
 24 that wasn't contaminated too, you know,

Page 98

1 have to look through here. There's a --  
 2 Goodyear.  
 3 Q. Goodyear?  
 4 A. Uh-huh. And --  
 5 Q. Where was the Goodyear  
 6 Refinery?  
 7 A. On 225.  
 8 Q. And what did they --  
 9 A. I was -- I think I was there  
 10 twice.  
 11 Q. What did they produce at this  
 12 refinery?  
 13 A. I was a -- the first -- I  
 14 think the first or second, I can't remember.  
 15 One of them I come in as an operator.  
 16 Operator, cherry picker. Probably wouldn't  
 17 hire a welder. And -- yeah, I think it's  
 18 the first one. It was a regular shutdown.  
 19 Where there was -- I was working with a  
 20 fitter and they were the same operation.  
 21 Whatever, they're producing, they're  
 22 cleaning.  
 23 Q. Okay.  
 24 A. Or whatever there's taken out.

Page 99

1 Q. Okay. So do you remember the  
 2 years that you were at Goodyear? You said  
 3 you were there for two -- on two different  
 4 occasions.  
 5 A. Yeah, two different occasions.  
 6 We even went to a Christmas party there.  
 7 Q. How was the Christmas party?  
 8 A. That was invited by the  
 9 company to go there.  
 10 Q. Was it good?  
 11 A. Huh?  
 12 Q. Was it a good party?  
 13 A. Yeah.  
 14 Q. Okay. So what years do you  
 15 think that you were at the Goodyear  
 16 Refinery?  
 17 A. '75 and '76, somewhere around  
 18 there. It wasn't long. I mean, it was fill  
 19 in category shipping --  
 20 Q. So consistent with what you  
 21 testified earlier, do you -- do you think  
 22 that -- Are you able to estimate the number  
 23 of months that you were at Goodyear? And  
 24 let's start with the first time.

Page 100

1 A. Both of them, it wasn't long.  
 2 It was like maybe a month each or something.  
 3 It wasn't that long.  
 4 Q. Okay. So maybe two months  
 5 total?  
 6 A. Uh-huh. I think so.  
 7 Q. And that was on two occasions?  
 8 A. Uh-huh.  
 9 Q. And two different years?  
 10 A. Uh-huh.  
 11 Q. Okay. And you said that you  
 12 were hired as a welder?  
 13 A. Right.  
 14 Q. Okay. And so were the tasks  
 15 that you were performing at Goodyear the  
 16 same as --  
 17 A. One of them was. And then I  
 18 told you I come in as an operator on --  
 19 Q. Right.  
 20 A. And as a --  
 21 Q. Right. So one of the months  
 22 you were an operator.  
 23 A. Uh-huh.  
 24 Q. And the other one you were a

Page 101

1 pipe welder?  
 2 A. Uh-huh.  
 3 Q. So the first time that you  
 4 were there -- Was it the first time that you  
 5 were a --  
 6 A. Yeah.  
 7 Q. -- cherry picker or the  
 8 second?  
 9 A. No, the first time.  
 10 Q. Okay. So tell me what you did  
 11 as a cherry picker, or working on a cherry  
 12 picker. Excuse me.  
 13 A. Yeah. They usually helped me  
 14 out, I'd draw it, doing the cherry  
 15 operation. Actually just be encouraged, I  
 16 guess, to make a paycheck when I did one out  
 17 there. Now, I did some business for them,  
 18 but --  
 19 Q. What were your -- Did you --  
 20 Was there ever an occasion for you to use  
 21 benzene as a cherry picker?  
 22 A. No.  
 23 Q. Okay.  
 24 A. No. I wouldn't have been

Page 102

1 around it.  
 2 Q. Right. So on your second  
 3 occasion there, the next year, when you were  
 4 there for about a month, you said that you  
 5 were hired during a shutdown as a pipe  
 6 fitter or a pipe welder.  
 7 A. Pipe welder.  
 8 Q. Okay. And during that month,  
 9 would you -- how many days a week do you  
 10 think you worked?  
 11 A. I would say seven 12s.  
 12 Q. Okay, seven 12s. Were you  
 13 performing the same types of tasks that you  
 14 described earlier?  
 15 A. Like any other plant.  
 16 Q. Okay. So fitting between --  
 17 A. It was pretty well, you know  
 18 --  
 19 Q. -- pipes?  
 20 A. I went through -- They were  
 21 the ones that were pretty well the same all  
 22 over, and in contact with it. I wouldn't  
 23 have kept on with it. That's the only  
 24 thing, yeah.

Page 103

1 Q. So you sat down and tried to  
 2 remember specifically --  
 3 A. Right.  
 4 Q. -- refineries that you  
 5 remember using benzene at?  
 6 A. Because there's a lot of them  
 7 we didn't, you know.  
 8 Q. Okay.  
 9 A. We didn't go to every plant  
 10 that was using it.  
 11 Q. Okay.  
 12 A. That wasn't --  
 13 Q. Do you remember anybody at  
 14 Goodyear ever giving you any training about  
 15 hazards?  
 16 A. Oh, no.  
 17 Q. And just one thing to discuss.  
 18 When I'm asking a question, if you wouldn't  
 19 mind just letting me finish first before you  
 20 answer --  
 21 A. Right.  
 22 Q. -- because it makes it --  
 23 A. Right.  
 24 Q. -- kind of difficult.

Page 104

1 Because, remember, she's writing down  
 2 everything that you're saying --  
 3 A. She's writing. Okay.  
 4 Q. So when we talk at the same  
 5 time --  
 6 A. Okay. Go ahead.  
 7 Q. -- it just makes it a little  
 8 harder.  
 9 A. Uh-huh.  
 10 MR. BURKE: So can you read  
 11 back my last question?  
 12 - - -  
 13 (Whereupon the court reporter  
 14 read back the pertinent testimony.)  
 15 - - -  
 16 BY MR. BURKE:  
 17 Q. Okay. And I'll ask it again  
 18 just to get a clean -- clean version.  
 19 Do you remember anybody at  
 20 Goodyear ever training you on the health  
 21 hazards of benzene?  
 22 A. No.  
 23 Q. Do you remember any training  
 24 on proper ways to handle or be around the

Page 105

1 chemical benzene?  
 2 A. No.  
 3 Q. And how do you know that you  
 4 were exposed to benzene at Goodyear?  
 5 A. Like I said, I was through  
 6 fitters and other people that made a lot of  
 7 them -- the dip, what they called it.  
 8 Q. Was it the same smell?  
 9 A. Yeah.  
 10 Q. Was the smell and look  
 11 consistent with all the other times you had  
 12 used it?  
 13 A. All those.  
 14 Q. Okay, After you left Goodyear  
 15 on the second occasion, do you remember any  
 16 other refineries that you were caused to use  
 17 benzene?  
 18 A. That was it, down to the --  
 19 Amoco.  
 20 Q. And where was the Amoco  
 21 Refinery?  
 22 A. That was Texas City.  
 23 Q. Okay. In Texas City. Do you  
 24 remember the year you were at Amoco?



Page 174

1 A. Uh-huh.  
 2 Q. And you thought it was in the  
 3 1975 and 197 --  
 4 A. I think it was.  
 5 Q. -- '76, '75, '76?  
 6 A. Somewhere around there.  
 7 Q. Now, that confuses me because  
 8 you've answered some questions in this case  
 9 called Interrogatories in which you said it  
 10 was approximately '76 and '77?  
 11 A. Well, it could have been.  
 12 You're talking about something that's 40  
 13 years ago.  
 14 Q. I mean, I get it. Sometimes I  
 15 can't remember what I ate for dinner last  
 16 night?  
 17 A. When you ask me for a date,  
 18 they all flow together. When I think of  
 19 something, you say Goodyear, and I can  
 20 remember going to a party there, a Christmas  
 21 party there, like I told you.  
 22 Q. Correct.  
 23 A. And I know I was there at that  
 24 time. But, like I said, I was there twice.

Page 175

1 And one time I was an operator and one time  
 2 as a welder. And I can remember things about  
 3 it, but like the time and -- or something  
 4 like that, they're just all floating -- kind  
 5 of go together. Like I remember doing  
 6 things on certain jobs and.  
 7 Q. Well, your handwritten list of  
 8 places --  
 9 A. Okay.  
 10 Q. -- that was marked as Exhibit  
 11 3 also says Goodyear, '76 to '77.  
 12 A. Uh-huh.  
 13 Q. Is that a yes?  
 14 A. Yes, sir.  
 15 Q. When you were testi -- when  
 16 you were answering --  
 17 A. That's probably what it was  
 18 then.  
 19 Q. When you were answering  
 20 questions to your lawyer you were talking  
 21 about '75 and '76.  
 22 A. Okay.  
 23 Q. And that's what confuses me.  
 24 A. Okay.

Page 176

1 Q. So which is it, or do you not  
 2 --  
 3 A. I'd have to look it up. You  
 4 are probably are close to the Social  
 5 Security list as I am. I could tell you  
 6 exactly what it was. But as for being --  
 7 Q. You've got one there. Is that  
 8 it?  
 9 A. No, I think she took it.  
 10 Q. Well, that's her job.  
 11 A. Everybody got to do something.  
 12 Q. It's her job not to let you  
 13 walk off with it.  
 14 A. I know that.  
 15 Q. Now, you never were an  
 16 employee of Goodyear Tire and Rubber  
 17 Company, were you?  
 18 A. No, I wasn't. No.  
 19 Q. So what we'd have to look for  
 20 is an employer who sent you to the Goodyear  
 21 Tire and Rubber company plant. Right?  
 22 A. Do what now?  
 23 Q. To try to figure out this  
 24 date, what year, we'd have to look at an

Page 177

1 employer that would have sent you to the  
 2 Goodyear Tire and Rubber Company.  
 3 A. That would have been Brown &  
 4 Root, I think. In -- Let's see. It don't  
 5 show Goodyear. Okay. These are showing the  
 6 companies. It ain't showing the -- yeah,  
 7 this is showing the companies. It's not  
 8 showing the --  
 9 Q. It's showing the people that  
 10 paid you your paycheck.  
 11 A. I couldn't find out from here.  
 12 It wouldn't show it. And you knew that. I  
 13 didn't -- I didn't know --  
 14 Q. I know I know it. I told you  
 15 that.  
 16 What I want you to do is --  
 17 A. Try to find it?  
 18 Q. Yeah. If you can remember what  
 19 company sent you to the Goodyear plant in  
 20 Houston. Was it Brown & Root or --  
 21 A. It'd be Brown & Root.  
 22 Q. Neuces Shipyard or --  
 23 A. No, it'd be Brown & Root.  
 24 Brown & Root had most of your major

1 Q. What were you doing as  
 2 self-employed?  
 3 A. Self-employed? It was -- back  
 4 in them days, it -- there was a lot of  
 5 pipeline and stuff like that. Now, there was  
 6 a time when I -- I was making a change and  
 7 rigged out a truck. And that's a whole lot  
 8 different work. It's a-. You can go in  
 9 plants with them, but it's a lot less, you  
 10 know.  
 11 Q. When you were self-employed,  
 12 were you working as a welder?  
 13 A. Uh-huh. Yes, sir. Always.  
 14 Q. Okay. But that wasn't at  
 15 Goodyear.  
 16 A. No. No.  
 17 Q. Your --  
 18 A. I was. They wouldn't have let  
 19 me in with the truck at Goodyear.  
 20 Q. Your Social Security Earnings  
 21 show that you worked for Jacobs for a little  
 22 while in the first quarter of 1977. Was  
 23 that at Goodyear?  
 24 A. No.

1 them.  
 2 MR. BLIZZARD: Jim, it's page  
 3 seven.  
 4 MR. WARE: Monday. Okay. I  
 5 found it.  
 6 Thanks everybody.  
 7 THE WITNESS: What year is  
 8 that? You got it.  
 9 BY MR. WARE:  
 10 Q. It says that on page six of  
 11 your Social Security Earnings you worked for  
 12 Mundy in the years '73 and '74?  
 13 A. Uh-huh.  
 14 Q. So now that would have been  
 15 before the time you worked at Goodyear.  
 16 A. Right.  
 17 Q. Okay. So back to Brown & Root.  
 18 And in '76 it says that you worked in the  
 19 first quarter a while and the second  
 20 quarter. In the third quarter you worked  
 21 some for Brown & Root.  
 22 A. Uh-huh.  
 23 Q. Do you know where you were for  
 24 Brown & Root in the first quarter of '76?

1 Q. Your Social Security Earnings  
 2 History show that you worked for Lamb  
 3 Services in 1977 for a period in the second  
 4 and third quarters.  
 5 A. That one's a -- Air Products,  
 6 I believe.  
 7 Q. Okay. Not Goodyear?  
 8 A. No.  
 9 Q. So it looks like we've  
 10 eliminated every employer in that '76, '77  
 11 time frame, except Brown & Root.  
 12 A. And ALJ Mundy.  
 13 Q. Well, what about AJ Mundy?  
 14 A. He said -- I don't know. It  
 15 wasn't -- not all of those are AJ Mundy.  
 16 There were -- I don't think so.  
 17 Q. Where? I don't see them.  
 18 A. Bill Turner. Something.  
 19 There's a few others that, you know --  
 20 Q. I think there's an employer on  
 21 there called Monday. Monday, Inc., or  
 22 something.  
 23 A. Well, I didn't list -- on the  
 24 list here I didn't list one of the -- all of

1 A. No, sir.  
 2 Q. Do you know where you were in  
 3 the second quarter of '76?  
 4 A. No, sir. I don't know if I  
 5 could tell by the Social Security or  
 6 something like that, but in -- you're  
 7 talking about Goodyear. I worked for Brown &  
 8 Root. They would have been the only one that  
 9 would have sent me on a cherry picker to  
 10 there, you know. They hired all the welders  
 11 and didn't need any more, but they sent me  
 12 to operate a cherry picker. And that was  
 13 friends or loyalty, or whatever you want to  
 14 call it, and that's Brown & Root.  
 15 Q. Okay. I'll come back to that.  
 16 But I've --  
 17 A. Okay.  
 18 Q. We've ruled out, you don't  
 19 know the first quarter of '76 or the second  
 20 quarter of '76. So do you know where you  
 21 were for Brown & Root in the third quarter  
 22 of '76?  
 23 A. No. Like I said, I'd have to  
 24 look. I don't -- These all were -- there

Page 194

1 Q. You're up there operating the  
 2 cherry picker --  
 3 A. Uh-huh.  
 4 Q. Where did you drop that pipe?  
 5 A. To where they needed it. It  
 6 might have been a certain part of the plant  
 7 or it could have been a back drop, you know.  
 8 They could have, you know.  
 9 Q. If I understood your earlier  
 10 testimony, you don't believe you were  
 11 exposed to any fumes or fibers or  
 12 particulates --  
 13 A. No.  
 14 Q. -- driving that cherry picker.  
 15 A. No.  
 16 Q. So you said there was a second  
 17 time you remember working at the Goodyear  
 18 plant.  
 19 A. Right.  
 20 Q. Who employed you?  
 21 A. I believe Brown & Root.  
 22 Q. But you don't know when.  
 23 A. No. The time is no.  
 24 Q. And what was your job during

Page 195

1 the second --  
 2 A. I was a pipe welder.  
 3 Q. Now, this is a good time to  
 4 talk about the difference between the  
 5 welders and the fitters.  
 6 A. Sure.  
 7 Q. Explain to the jury what a  
 8 fitter is.  
 9 A. Well, he's the one that takes  
 10 all the measurements and lays it all out.  
 11 And generally, not necessarily, but whoever  
 12 come along could cut it out. Either replace  
 13 it or whatever. But that's their welding  
 14 work, where he'd always do the job. And he  
 15 usually takes a -- and goes gets the  
 16 material and he gets everything going. And  
 17 I really don't have much to do until he gets  
 18 it all laid out and everything.  
 19 Q. And then, by contrast, your  
 20 job as a welder was to do what?  
 21 A. Cut it and then he'll help me.  
 22 He'll do the fitting or he'll help me. And  
 23 then we'd tack it off and he'd leave and I  
 24 pulled it out.

Page 196

1 Q. You said you would cut it.  
 2 A. Sure.  
 3 Q. How would you cut the pipe?  
 4 A. Usually -- Only way would be a  
 5 cutting torch.  
 6 Q. Oxyacetylene torch?  
 7 A. Yes, sir.  
 8 Q. And you'd ignite that and then  
 9 it would cut --  
 10 A. Then you come along and clean  
 11 it up with a grinder.  
 12 Q. And whose job was it to clean  
 13 that up with the grinder?  
 14 A. A helper.  
 15 Q. That's your welder's helper?  
 16 A. Uh-huh.  
 17 Q. That was different than the  
 18 fitter.  
 19 A. Right.  
 20 Q. Now, tell us --  
 21 A. Now, he's there to help both  
 22 of us.  
 23 Q. Right. And you always had a  
 24 helper.

Page 197

1 A. 90 percent of the time.  
 2 Q. On all your jobs as a welder.  
 3 Correct?  
 4 A. Right. It's your team. Yeah.  
 5 Q. Did you ever have to do repair  
 6 of a leak in a pipeline?  
 7 A. Sure. On a pipeline?  
 8 Q. Correct?  
 9 A. That's a lot different from  
 10 being in a chemical plant.  
 11 Q. Sure. But did you ever do  
 12 that?  
 13 A. Repair? No.  
 14 Q. No. Fixing --  
 15 A. I was on the -- I don't want  
 16 to get into it because I really didn't go on  
 17 the job and stuff, but it was a repair. But  
 18 --  
 19 Q. Let's come at it this way.  
 20 A. Yeah.  
 21 Q. Did you ever have to do work  
 22 on a pipeline that was buried inside a  
 23 chemical plant?  
 24 A. Most of it, it wasn't -- I'm

1 going to say -- Necessarily, most of your  
 2 pipe is above ground since a certain time.  
 3 But they quit --  
 4 Q. Okay.  
 5 A. -- making it -- They quit  
 6 putting ground pipe under.  
 7 Q. I want to go back to the  
 8 difference between the welder, the fitter,  
 9 and the helper. You've told us about having  
 10 to work on pipe that had to be cleaned.  
 11 A. Sure. That is from being  
 12 operating and they're shutting it down.  
 13 Q. If it's a shutdown operation  
 14 and there is a process line that needs to be  
 15 patched or replaced, it has to be taken out  
 16 --  
 17 A. Right.  
 18 Q. -- Of the piping structure,  
 19 right?  
 20 A. I wasn't in that part, but --  
 21 Q. Right, but who would take it  
 22 out.  
 23 A. Who? The fitter and the  
 24 helper.

1 A. Yeah, seems to me it would be  
 2 a separate crew though. The crane operators  
 3 and all that stuff, There's always a crew  
 4 for something.  
 5 Q. And it would be that cleaning  
 6 crew that would put it in a vat to be  
 7 cleaned and soaked.  
 8 A. Uh-huh.  
 9 Q. Is that correct?  
 10 A. Sure.  
 11 Q. Or if it had to be ground to  
 12 get coating off --  
 13 A. You wouldn't be grinding it.  
 14 Q. Okay.  
 15 A. They had brushes and scrapers  
 16 and stuff like that.  
 17 Q. And a cleaning crew would be  
 18 the group that would do that?  
 19 A. Right.  
 20 Q. So they handled all of the --  
 21 A. The dirty work.  
 22 Q. The dirty work getting it  
 23 ready for the fitter and the helper to bring  
 24 to you.

1 Q. The fitter and the helper?  
 2 A. They usually had a crew that  
 3 was taking -- they knew -- they had a crew  
 4 that'd do it and the pipefitter and stuff  
 5 that we were working with up here in the  
 6 other area, he -- he wasn't part of the  
 7 cleaning crew. The pipefitter and stuff  
 8 would multiply it, what do we got to cut,  
 9 what do we got to put back on it or  
 10 whatever, you know. And cleaning crews and  
 11 different crews, they just brought it in,  
 12 cleaned it and -- most of the time, I would  
 13 say. It would be cleaned --  
 14 Q. Okay.  
 15 A. -- before we got it.  
 16 Q. I want to make sure I  
 17 understand that now. So who was the  
 18 cleaning crew? Were those other Brown & Root  
 19 employees?  
 20 A. Sure, yes, sir.  
 21 Q. A separate crew of Brown &  
 22 Root people that would grab the pipe, nasty  
 23 as it was, and they would take it to clean  
 24 it?

1 A. Correct.  
 2 Q. Is that correct?  
 3 A. It wouldn't be a hundred  
 4 percent, but they'd be frequently.  
 5 Q. So you, as the welder, waited  
 6 for them to bring the clean, reconditioned  
 7 pipe to you so that you could weld it. Is  
 8 that correct?  
 9 A. Yes, sir.  
 10 Q. It wasn't your job to clean  
 11 it?  
 12 A. No.  
 13 Q. So with respect to welding,  
 14 again, were these pipes mild steel, or  
 15 stainless steel?  
 16 A. Mild steel.  
 17 Q. At Goodyear, I'm talking  
 18 about. Is that correct?  
 19 A. Uh-huh. There could have been  
 20 some stainless. Usually there's a little  
 21 stainless and a lot of carbon, Depending on  
 22 the units you're working in.  
 23 Q. Okay. Now, it sounds to me  
 24 like your welding job required you to hold

Page 202

1 the rod holder and to stick a rod in it.  
 2 A. Uh-huh.  
 3 Q. Get your hood on. Strike the  
 4 arc. And then when you finished you turned  
 5 it over to your helper. Correct?  
 6 A. Well, I would step aside and  
 7 he would grind it.  
 8 Q. Sure.  
 9 A. There were several processes  
 10 of going through it.  
 11 Q. You typically have to make  
 12 several passes to weld two cross rods.  
 13 A. You start off with one type of  
 14 rod, and you end up with a different type.  
 15 Q. Right. You have a stringer  
 16 bead, and you have a filler bead, and a cap  
 17 bead, all of those are different passes  
 18 around the pipe.  
 19 A. There you go. You got it.  
 20 Q. And your job as a welder was  
 21 to weld those passes.  
 22 A. Uh-huh.  
 23 Q. Correct?  
 24 A. And leave them where they

Page 203

1 could be X-rayed and pass.  
 2 Q. And your helper would grind it  
 3 or brush it, whatever needed to be done --  
 4 A. Right.  
 5 Q. -- to get it ready for the  
 6 next?  
 7 A. I would tell him where to  
 8 grind or what to grind, and he would do it,  
 9 what it needed.  
 10 Q. And none of that involved  
 11 using benzene.  
 12 A. No. But, on the other hand,  
 13 when they bring it over, you know how pipe  
 14 is. Pipe's got little areas in it that don't  
 15 ever clean so you just, it would spill out  
 16 there on the floor, you know, right -- They  
 17 could have cleaned it, washed it, whatever  
 18 they want to, and there's always some crap  
 19 in a nook or something that was in there  
 20 that would hold it. And there would be,  
 21 sometimes they'd take rags and clean it,  
 22 you know.  
 23 Q. But you also told us, didn't  
 24 you, that after the cleaning crew finished

Page 204

1 whatever solvents they used, they also  
 2 pressure washed it. Is that correct?  
 3 MR. BURKE: Objection,  
 4 misstates.  
 5 THE WITNESS: If it needed it,  
 6 yes. A lot of times it was too big  
 7 to get up there in the vat and then  
 8 they pressure washed it. A lot of  
 9 times -- 90 percent of the time they  
 10 didn't have a pressure washer. That  
 11 was something that was unusual. But I  
 12 already blew it off, I already  
 13 knowed if they cleaned it and stuff  
 14 like that. They'd be down on the  
 15 ground putting with a bucket and  
 16 cleaning it and anything to get it  
 17 off.  
 18 BY MR. WARE:  
 19 Q. These -- These solvents, of  
 20 whatever name they were, were flammable;  
 21 weren't they?  
 22 A. I don't know. I didn't try to  
 23 --  
 24 Q. You didn't find out?

Page 205

1 A. Well, you know, no. I didn't  
 2 -- I didn't strike no torch to them or  
 3 anything like that. But --.  
 4 Q. Well, that's why --  
 5 A. It was on there and you get  
 6 smoke off of it, so...  
 7 Q. Well, wouldn't that be why  
 8 they washed it with water or dried it with  
 9 air, to get whatever solvent was used off of  
 10 it before it got to you?  
 11 A. You know, you can't  
 12 contaminate the weld.  
 13 Q. Correct.  
 14 A. Okay.  
 15 Q. Because they all have to be  
 16 X-rayed, don't they?  
 17 A. Yes, sir.  
 18 Q. And what happens if they don't  
 19 pass the X-ray?  
 20 A. You do some repair work.  
 21 Q. You cut it out and start over,  
 22 don't you?  
 23 A. Well, you grind it down and  
 24 run back through it, run back over it.

1 Q. So the pipe that was brought  
 2 to you to weld would be free of any oil,  
 3 grease, dirt --  
 4 A. No, it'd be on there. You  
 5 ain't going to get rid of all of it. But,  
 6 like I said, if you had an area to clean,  
 7 you could wire brush it. You know, you got  
 8 grinders that got wire brushes on them.  
 9 We'd buff them. And a lot of times we'd cut  
 10 them and we'd grind the bevel back on them  
 11 and different stuff like that. It very  
 12 rarely had anything on it after we get ready  
 13 to weld.  
 14 Q. Correct.  
 15 A. When they brought it back over  
 16 it was still wet.  
 17 Q. But it would be your -- your  
 18 helper's job to make sure it was clean for  
 19 you to weld.  
 20 MR. BURKE: Objection.  
 21 THE WITNESS: Sure, it was my  
 22 job. I was the one that got to weld  
 23 it. I always give him the job of  
 24 cleaning it.

1 Q. Okay. Now, at Goodyear, did  
 2 Brown & Root give you any instruction about  
 3 any fumes, or fibers, or particulates to  
 4 which you might be exposed while working at  
 5 Goodyear?  
 6 A. No.  
 7 Q. So Brown & Root didn't tell  
 8 you about them?  
 9 A. No.  
 10 Q. Did they give you a medical  
 11 exam before you worked at Goodyear?  
 12 A. Nope.  
 13 Q. Did they test you, fit test  
 14 you for wearing a respirator?  
 15 A. No.  
 16 Q. Did they train you how to wear  
 17 a respirator?  
 18 A. No.  
 19 Q. While working at Goodyear? So  
 20 Brown & Root didn't do any of those things?  
 21 A. No, sir.  
 22 Q. And they were your employer?  
 23 A. Right.  
 24 Q. As best I remember, you said

1 BY MR. WARE:  
 2 Q. Correct.  
 3 A. Okay.  
 4 Q. So whatever tools were used to  
 5 clean it were the helper's tools?  
 6 A. No, the helper didn't ever  
 7 have no tools. The fitter had the tools. A  
 8 helper just --  
 9 Q. Let me ask it this way. You  
 10 wouldn't clean a pipe with your rod holder?  
 11 A. No.  
 12 Q. Or your welding rods?  
 13 A. No.  
 14 Q. Those -- the tools that might  
 15 get something on them that had to be cleaned  
 16 later were the fitter's tools.  
 17 A. Right.  
 18 Q. And the fitter would then take  
 19 care of his tools at the end of the day; is  
 20 that correct?  
 21 A. Sure.  
 22 MR. BURKE: Objection,  
 23 misstates.  
 24 BY MR. WARE:

1 you were welding for about a month at  
 2 Goodyear.  
 3 A. Uh-huh.  
 4 Q. Is that correct?  
 5 A. Yes, sir.  
 6 Q. And where in the plant were  
 7 you welding?  
 8 A. Oh, heavens. They had --  
 9 there was two different spots that they were  
 10 welding at. And at the -- I was about in the  
 11 middle of it. I can't remember or recall  
 12 what the name of the unit was or anything.  
 13 But it was a little place they had set up  
 14 there in the middle where they had some  
 15 welding machines at, and that's where we're  
 16 at.  
 17 Q. When you say it was in the  
 18 middle --  
 19 A. Yes, sir. And I don't really  
 20 recall. You know, they all have a unit  
 21 number and a name and stuff, but I can't  
 22 recall. It was a -- They had a lot of  
 23 jacks, it was like a wide open space where  
 24 they could work and get stuff in there.

Page 278

1 right?  
 2 A. Tested it? How would you test  
 3 it?  
 4 Q. So you never did that?  
 5 A. No.  
 6 Q. And you never saw any  
 7 documents saying whatever material they were  
 8 using to clean the pipes actually contained  
 9 benzene --  
 10 A. No.  
 11 Q. -- did you?  
 12 A. No. Nobody knew.  
 13 Q. And you don't know where the  
 14 fitters and their helpers obtained this  
 15 substance that you believe was benzene; do  
 16 you?  
 17 A. No.  
 18 Q. Did Don Love ever warn you  
 19 about the hazards of benzene?  
 20 A. No.  
 21 Q. Did Don Love ever do any air  
 22 monitoring to determine whether you were  
 23 being overexposed to benzene?  
 24 A. Not to my knowledge.

Page 279

1 Q. Did any of your employers ever  
 2 do any air monitoring to determine whether  
 3 you were overexposed to benzene?  
 4 A. Not to my knowledge.  
 5 Q. And none of your employers  
 6 ever provided you with any respiratory  
 7 protection to protect you from exposure to  
 8 benzene; did they?  
 9 A. No.  
 10 Q. If you had any questions about  
 11 your job out at Amoco, you would have asked  
 12 your foreman; correct?  
 13 A. If I had any questions? About  
 14 --  
 15 Q. About what you were supposed  
 16 to do.  
 17 A. Right.  
 18 Q. You would ask your foreman;  
 19 right?  
 20 A. Right.  
 21 Q. You never asked anyone from  
 22 Amoco how to do your job; did you?  
 23 A. No. I wasn't doing --  
 24 Q. And no one from Amoco ever

Page 280

1 told you how to do your job as a welder; did  
 2 they?  
 3 A. No.  
 4 Q. Is that a no?  
 5 A. Yes, no. No.  
 6 Q. And the reason companies like  
 7 Amoco hired Don Love and Brown & Root and  
 8 some of your other employers is because of  
 9 their expertise in pipe fitting and welding;  
 10 correct?  
 11 MR. BURKE: Objection,  
 12 speculation.  
 13 THE WITNESS: Sure.  
 14 BY MR. BLIZZARD:  
 15 Q. Now, you have mentioned that  
 16 you were exposed to benzene at Charter Oil;  
 17 correct?  
 18 A. Uh-huh.  
 19 Q. Is that a yes?  
 20 A. Yes, sir.  
 21 Q. All right. And you had the  
 22 same type of exposures to benzene at Charter  
 23 Oil as you did at all the other plants;  
 24 correct?

Page 281

1 A. Mostly. Yes, sir.  
 2 Q. Okay.  
 3 A. Now, not all the other plants.  
 4 Q. Exactly, exactly. The plants  
 5 we've talked about today, where you said --  
 6 A. There you go.  
 7 Q. -- you were exposed to  
 8 benzene, you had the same type of exposures  
 9 at Charter Oil; correct?  
 10 A. Yep.  
 11 Q. And you talked about a  
 12 Southland Lumber Yard. Was that Southland  
 13 Paper Mill?  
 14 A. Yes, sir. Yes, sir. I'm  
 15 sorry.  
 16 Q. And Brown & Root did a lot of  
 17 work at paper mills, didn't they?  
 18 A. Yes, sir. There's two of them,  
 19 in North Houston and one here.  
 20 Q. And did you -- what -- What  
 21 did the fitters and their helpers use to  
 22 clean the pipes at Southland?  
 23 A. No one was cleaning the pipe  
 24 on that. There was a -- It was a kiln, a

1 Q. Is that yes?  
 2 A. Yes, sir.  
 3 Q. When you were working as a  
 4 pipe fitter, did you ever --  
 5 A. I was a pipe welder.  
 6 Q. Pipe welder, did you ever  
 7 attain the status, were you ever a foreman  
 8 on any of these jobs?  
 9 A. Was I ever a foreman?  
 10 Q. Yes, sir.  
 11 A. No.  
 12 Q. Did they have a journeyman  
 13 classification for a fitter welder?  
 14 A. Yes. We were certified.  
 15 Q. Okay. You use the term  
 16 certified and journeyman kind of  
 17 interchangeably.  
 18 A. Usually, and I'm not sure on  
 19 this, but we had to have papers going in.  
 20 You had to have certification papers to weld  
 21 on pipe.  
 22 Q. And where did you get those  
 23 certification papers from?  
 24 A. From testing laboratory. And

1 A. Yes.  
 2 Q. And was the purpose of that,  
 3 to try to make sure there was nothing  
 4 flammable in the air?  
 5 A. That there was nothing  
 6 flammable, especially in a live plant.  
 7 Q. Did you recall doing any hot  
 8 work out at that plant?  
 9 A. At Exxon, no.  
 10 Q. Do you remember the name of  
 11 your Brown & Root foreman at this job? For  
 12 when you were working at Brown & Root for  
 13 Exxon?  
 14 A. No, I should because he was a  
 15 welder, started there. And he was a foreman  
 16 for a bunch of testing. And they made him  
 17 foreman.  
 18 Q. You mentioned this guy Billy  
 19 Moran. Did you work with Billy Moran at any  
 20 other job site besides Exxon Baytown?  
 21 A. No. I don't. No. I knew his  
 22 sister and stuff and that's the reason I  
 23 remember him before I met him.  
 24 Q. Have you talked with Billy

1 some would do them on job site, some of them  
 2 would do them on a testing laboratory.  
 3 Q. This job for Brown & Root,  
 4 where you worked at Exxon Baytown, that was  
 5 not a union job, was it?  
 6 A. That was non-union.  
 7 Q. Do you recall getting job  
 8 permits to do the jobs that you did at Exxon  
 9 Baytown?  
 10 A. You get the permit to do the  
 11 job inside the plant. Sure.  
 12 Q. Was that pretty standard at  
 13 all the different job sites?  
 14 A. Yes, all of them.  
 15 Q. Prior to starting any of your  
 16 welding, was it normal for you to do some  
 17 type of air testing to determine if there  
 18 was any gases in the area?  
 19 A. Yes, and there would be like  
 20 Exxon or Shell, any of them you had a safety  
 21 man come around and you had a foreman come  
 22 around and you had -- some of them were more  
 23 than others, you know.  
 24 Q. Did they use an explosimeter?

1 Moran about this lawsuit?  
 2 A. He's dead.  
 3 Q. Do you remember, do you recall  
 4 the names of any of your coworkers from  
 5 Brown & Root while you were working at Exxon  
 6 Baytown who are still alive?  
 7 A. No.  
 8 Q. Do you ever recall being  
 9 monitored while you were working at Exxon?  
 10 Any type of industrial hygiene monitoring  
 11 where they try to determine sort of what  
 12 things you might have been exposed to?  
 13 A. No.  
 14 Q. Do you ever recall being  
 15 placed in a benzene monitoring program?  
 16 A. No.  
 17 Q. Where they were monitoring you  
 18 for potential exposure for benzene? Is that  
 19 no?  
 20 A. No, sir.  
 21 Q. Do you ever recall seeing any  
 22 warning signs around the plant that said  
 23 benzene was present?  
 24 A. No.



LOUIS GEST	§	IN THE DISTRICT COURT OF
	§	
V.	§	JEFFERSON COUNTY, TEXAS
	§	
CHEVRON U.S.A. INC., ET AL.	§	172 <sup>ND</sup> JUDICIAL DISTRICT

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**ORDER**

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On this day came on for consideration the Motion for Summary Judgment of Defendant The Goodyear Tire & Rubber Company and, upon consideration of the pleadings, motion, response and oral argument, if any, the Court determines that Defendant's Motion should be GRANTED. Therefore, it is

ORDERED, that the Motion for Summary Judgment of Defendant The Goodyear Tire & Rubber Company is GRANTED and that Plaintiff Louis Gest is hereby ordered to take nothing of or from The Goodyear Tire & Rubber Company which is hereby dismissed with prejudice. It is further

ORDERED that all costs will be assessed against the parties incurring same.

Signed this the \_\_\_\_ day of \_\_\_\_\_, 2019.

\_\_\_\_\_  
Honorable Mitchell Templeton