facts. Thus, Mr. Simikian's particular exposures were not a focus so much as the notion that the *any exposure* theory could support causation regardless of the extent and nature of an individual plaintiff's claimed exposures. Plaintiffs asserted that under the *any exposure* theory, Mr. Simikian and anyone else who had even casual contacts with asbestos-containing products could claim that each such exposure was responsible for their disease.[4]

In response, the defendants filed motions challenging the admissibility of the *any exposure* theory under Pennsylvania's *Frye* standard on the grounds that it did not meet the standard of general acceptance in the relevant scientific community.[5] Judge Robert Colville of the Pennsylvania Superior Court for Allegheny County held a three-day hearing, after which he excluded this testimony.[6] Other courts have cited to and relied on Judge Colville's opinion as one of the best-articulated exposés of the logical holes and scientific flaws in the *any exposure* theory. In 2010, however, a majority of the intermediate court of appeals reversed Judge Colville's order.[7] The intermediate court held that Judge Colville had abused his discretion by analyzing the flaws in the theory himself, without citing to expert or briefing position articulating those same findings, and by rejecting the underpinnings of the theory as set forth by plaintiffs' expert.[8] The Pennsylvania Supreme Court accepted review and reversed the intermediate court, restoring Judge Colville's original decision.[9]

III. The Pennsylvania Supreme Court's Analysis

The Pennsylvania Supreme Court agreed with virtually all of the criticisms asserted by Judge Colville. The court agreed that Judge Colville was correct to challenge how the plaintiffs' expert could reason that even the smallest of occupational exposures could cause disease, yet the same type of fibers in the ambient air are not causative, regardless of overall lifetime dose.[10] The court noted that Dr. Maddox's reliance on case reports, animal studies, and regulatory pronouncements provided an unreliable basis for a causation opinion.[11] Further inconsistencies in the *any exposure* theory included Dr. Maddox's admission that individual exposures differ in the potency of fiber type, the concentration, or intensity of exposure, and the duration of the exposure. The *any exposure* theory fails to consider the different nature of these exposures, even though Dr. Maddox agreed that these factors "need to

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Texas Supreme Court Rules in Favor of Private-Property Owners in Case on Public Access to Beaches

by Brittany La Couture & Tim Sandefur

In a case of first impression, the Texas Supreme Court recently ruled in *Severance v. Paterson*[1] that the rights of private-property owners trump the public's right to access beaches on private property. The court held 5-3 that when an act of nature "suddenly and dramatically" pushes back the vegetation line on a beach, the public easement that state law creates on beaches does not move along with it.[2] In other words, while easements may change gradually, an avulsion[3] does not entitle the state to a drastic expansion of its claim over existing private property.[4] This article will describe the background and decision in *Severance* and examine how this case fits in with coastal-property jurisprudence.

I. Background

Texas's Open Beaches Act ("OBA") was passed in 1959 to help enforce the public's right to use the state's coastal beaches.[5] The OBA applies to state-owned beaches as well as to those where a public easement has been established over privately owned land.[6] Hurricane Rita, which hit the Texas coast in September 2005, washed away much of the public and private property burdened by these easements, and moved the line of vegetation landward over the property lines of owners whose Galveston Island lands were previously unencumbered.[7] The state sought to enforce the OBA easements against them and condemn homes that were now located on the beach.[8] The property owners sued in federal district court,[9] which held that the public easement automatically "rolls" from one parcel of land to the next according to natural changes in topography.[10] The case was appealed to the Fifth Circuit, which by certification asked the Texas Supreme Court in October 2011 to resolve whether easements under the OBA "rolled" with such sudden changes to the landscape.[11]

II. The Decision

The case was first brought before the federal district court, then appealed to the U.S Court of Appeals for the Fifth Circuit, which asked the Texas Supreme Court to determine whether Texas

recognizes a rolling easement on beachfront real property.[12] Emphasizing the "fundamental, natural, and inherent" nature of rights associated with land ownership,[13] the Texas Supreme Court ruled that state law did not automatically transform private beaches into public ones after such a storm event. The right to exclude others from one's property is one of the most important rights of property owners, and the state may only take it away through eminent domain with just compensation, an appropriate use of state police power, legally established easements, or other pre-existing limitations on rights of real-property owners that have existed "since time immemorial."[14]

The court found that none of these were present.[15] It rejected the state's argument that when there is avulsion old easements "roll" with the vegetation line onto adjacent property where no easement had ever been established.[16] The court quoted Justice Holmes: "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[17] "[I]t does not follow," the court added, "that the public interest in the use of privately owned dry beach is greater than a private property owner's right to exclude others from her land when no easement exists on that land."[18]

The court held that although real-property owners were warned that the state may use the OBA to try to enforce an easement on their property as the line of vegetation fluctuated, this did not displace the owners' right to exclude, which was one of the rights the owners purchased with the land.[19] This point was reinforced by the Texas Legislature's 1969 Interim Beach Study

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Supreme Court Reaffirms Its Holding from *Citizens United*

by Edward Greim & Justin Whitworth

In denying a recent petition for certiorari and summarily reversing a decision of the Montana Supreme Court, the United States Supreme Court adhered to principles of stare decisis and reaffirmed its 2010 decision in *Citizens United v. Federal Election Commission* ("*Citizens United*"), which held that corporations and labor unions' independent spending for political campaigns enjoys First Amendment free-speech protection.[1] The Montana Supreme Court had upheld a state law that prohibited corporate political expenditures, reasoning that *Citizens United* did not apply in Montana because of the state's purportedly distinctive history of its "political system being corrupted by corporate interests."[2] The United States Supreme Court disagreed, summarily reversing without granting certiorari.[3]

In a brief per curiam decision opinion joined by five Justices, the Court framed the issue as "whether the holding of *Citizens United* applies to the Montana state law."[4] Without hesitation, the Court answered that "[t]here can be no serious doubt that it does."[5] The Court found Montana's arguments in support of upholding its law to be unoriginal and unconvincing.[6] As the Court held in *Citizens United*, there is little uncertainty that independent corporate political spending "does not give rise to corruption or the appearance of corruption."[7]

Justices Ginsburg, Sotomayor, and Kagan joined the dissenting opinion authored by Justice Breyer, which expressed a strong desire to grant certiorari and reevaluate *Citizens United*.[8] Moreover, Justice Breyer found that, even if he agreed with the holding in *Citizens United*, the Montana state law should not be struck down because of the state court's finding that "independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana."[9] Nevertheless, Justice Breyer ultimately decided that it was appropriate to deny the petition because it was apparent to him from the per curiam opinion that *Citizens United* would not be overturned.[10]

Critics of the Court's 2010 decision had hoped that the Justices would "reconcile their sweeping statement of free speech principles in *Citizens United* with the real-world facts" in Montana and throughout the country that allegedly show that corporate independent expenditures do create corruption.[11] Yet the *Citizens United* majority had clearly grappled with and disposed of a wide array of arguments and purported evidence of "corruption," making it clear in a lengthy and reasoned decision that its rationale did not rest merely on the fleeting nature of the evidence before it. It is clear that the Court did not believe that Montana's history presented either the quality or quantum of evidence that would have justified a close reexamination—let alone a complete reversal—of such a recent and exhaustively considered decision.

toxic-tort cases. Presumably, the Pennsylvania opinion will make it more difficult to expand the theory into other areas as well.

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Endnotes

1 Betz v. Pneumo Abex LLC, No. 38 WAP 2020, 2012 WL 1860853 (Pa. May 23, 2012).

2 *Id.* at *2.

3 *See infra* Section IV. For a more thorough review of the *any exposure* theory, see Mark A. Behrens & William L. Anderson, *The 'Any Exposure' Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 Sw. U. L. Rev. 479 (2008).

4 *In re* Toxic Substances Cases, No. A.D. 03-319, 2006 WL 2404008, at *1 (C.P. Allegheny, Aug 17, 2006).

5 *Id.* Pennsylvania has adopted the *Frye* standards for testing the validity of expert testimony. In short, Pennsylvania requires that an expert's methodology must be generally accepted within the relevant scientific field. *See* Grady v. Frito-Lay, Inc., 839 A.2d 1038 (Pa. 2003).

6 *Id.* at *2.

7 Betz v. Pneumo Abex LLC, 998 A.2d 962 (Pa. Super. 2010), *rev'd* No. 38 WAP 2020, 2012 WL 1860853 (Pa. May 23, 2012).

8 *Id.* at 976.

9 Betz v. Pneumo Abex LLC, No. 38 WAP 2020, 2012 WL 1860853 (Pa. May 23, 2012).

10 *Id.* at *22.

11 *Id.* at *23.

12 *Id.*

13 *Id.* at *25.

14 *Id.* at *23 (emphasis added).

15 *Id.* (citing Gregg v. V-J Auto Parts Co., 943 A.2d 216, 226-227 (Pa. 2007)).

16 *Id.* at *25.

17 *See, e.g.,* Moeller v. Garlock Sealing Techs., 660 F.3d 950 (6th Cir. 2011); Bartel v. John Crane, Inc., 316 F. Supp. 2d 603, 607-08 (N.D. Ohio 2004), *aff'd sub nom.* Lindstrom v. A-C Prod. Liab. Trust, 424 F.3d 488 (6th Cir. 2005); Borg-Warner Corp. v. Flores, 232 S.W.3d 765, 773 (Tex. 2007), *reh'g denied* (Oct. 12, 2007); Smith v. Kelly-Moore Paint Co., 307 S.W.3d 829 (Tex. App. 2010); Butler v. Union Carbide Corp., 712 S.E.2d 537 (Ga. Ct. App. 2011); Daly v. Arvinmeritor, Inc., No. 07-19211, 2009 WL 4662280 (Fla. Cir. Ct. Nov. 30, 2009); Free v. Ametek, No. 07-2-04091-9 SEA, 2008 WL 728387 (Wash. Super. Ct. Feb. 28, 2008).

Texas Supreme Court Rules in Favor of Private-Property Owners in Case on Public Access to Beaches

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Committee report, which stated that "[a]n easement is a property interest; the State can no more impress private property with an easement without compensating the owner of the property than it can build a highway across such land without paying the owner."[20]

The court explained that historically the State of Texas, and before that the Republic of Texas and Mexico, all recognized the beachfront properties on Galveston Island to be without limitation.[21] No subsequent action had altered this longstanding recognition of the owners' rights, proving that the "rolling easement" theory had not existed "since time immemorial."[22] And without such a pre-existing restriction on private property rights, the state would have to pay for property if it wanted to take it for public use.

III. Implications

The *Severance* decision was greeted by loud complaints by government and environmental groups as an example of pro-business activism.[23] These critics pointed out that the decision differed sharply from similar cases in other states.[24] New Hampshire, New Jersey, Idaho, Hawaii, and Oregon state courts have all enforced public easements across privately owned beach property.[25] But the *Severance* majority pointed out that "[t]hese jurisdictions have long-standing restrictions inherent in titles to beach properties or historic customs that impress privately owned beach properties with public rights,"[26] which are not present in Texas.

The local effect of this ruling is that property owners must explicitly grant public-access easements before the state may operate publicly funded beach clean-up and renourishment programs on Galveston beaches.[27] While many homeowners' associations in the Galveston area have willingly granted easements in exchange for government aid in maintaining beaches, not all landowners are willing to trade away their right to exclude.[28] In fact, there is currently a debate about

whether property owners will use this decision to justify the construction of concrete protective bulkheads to prevent erosion.[29] These structures have previously been disallowed by the Texas General Land Office because they contribute to erosion on neighboring property, but given the decision in *Severance,* the GLO may have to allow their construction.[30]

The biggest question that remains undecided is where the line should be drawn between "gradual" and "dramatic" changes in the coast line: when does erosion that creates a rolling easement become protected avulsion?[31] Only future litigation can resolve this complicated question.

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Endnotes

1 No. 90-0381, 2012 WL 1059241(Tex. Mar. 30, 2012).

2 *Id.* at *3.

3 "Avulsion . . . is the sudden and perceptible change in land and is said not to divest an owner of title." *Id.* at *24.

4 *Id.* at *3.

5 *Id.* at *7.

6 *Id.*

7 *Id.* at *8-9.

8 The Texas legislature has defined public and private beaches along the Gulf of Mexico as land between the mean low-tide line and the line of vegetation. *Id.* at *12.

9 *Id.*

10 Severance v. Patterson, 485 F. Supp. 2d 793, 802-04 (S.D. Tex. 2007).

11 *Severance*, 2012 WL 1059241, at *10.

12 *Id.*

13 *Id.* at *5.

14 *Id.* at *6. Texas courts have interpreted "time immemorial" as referring to the time when Spanish or Mexican civil law governed. *Id.* at *41-42.

15 *Id.*

16 *Id.*

17 *Id.* at *34.

18 *Id.* at *35.

19 *Id.*

20 *Id.* at *22.

21 *Id.* at *16.

22 *Id.*

23 Nick Jimenez, *Render Ballot Justice to These Five Justices*, Caller, Apr. 22 2012, http://www.caller.com/news/2012/apr/22/render-ballot-justice-to-these-five-justices/.

24 *Id.*

25 *Id.* at *35-36.

26 *Id.* at *36.

27 Heber Taylor, *Clean Beaches and Public Access*, Daily News, May 14, 2012, http://galvestondailynews.com/story/314482.

28 *Id.*

29 Harvey Rice, *Galveston Beach Homeowners Prepare to Exert Rights: Battle May Be Looming After High Court Ruling*, Chron, May 9, 2012, http://www.chron.com/news/houston-texas/article/Galveston-beach-homeowners-prepare-to-exert-rights-3547164.php.

30 *Id.*

31 Matt Festa, *Decision on Open Beaches Act/Rolling Easement Case (Severance v. Patterson)*, Land Use Prof Blog, Jul. 18 2012, http://lawprofessors.typepad.com/land_use/2010/11/decision-on-open-beaches-act-rolling-easement-case-severance-v-patterson.html.

Iowa Supreme Court Deeply Divided on Whether Iowa Constitution Contains a Right to Education

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that the plaintiffs' equal protection and due process claims failed because there was a conceivable rational basis for not establishing greater statewide standards—namely, that "[t]he legislature may have decided that local school board autonomy is preferable in certain instances to state mandates." Moreover, the plaintiffs didn't claim that the state treats school districts differently from one another (i.e., unequally); they claimed only that the state should be more active in regulating those school districts. That, said the majority, does not amount to a violation of the equal protection clause.

The majority also questioned whether the state can ever violate *substantive* due process by failing to act. The plaintiffs alleged that the state was not doing enough to regulate schools, not that it was taking some wrongful affirmative action. As the majority noted, that is an unusual due process claim. The due process clause