

Products Liability Law Daily Wrap Up, TOP STORY—ASBESTOS—Tex. Sup. Ct.: “Substantial factor” standard for asbestosis cases extended to mesothelioma cases, (Jul. 14, 2014)

By John W. Scanlan, J.D.

The “substantial factor” causation standard that Texas has applied to cases involving claims brought by plaintiffs with asbestosis has been extended to include plaintiffs with mesothelioma, the Texas Supreme Court held while upholding the reversal of a multimillion dollar verdict for insufficiency of the evidence for specific causation ([Bostic v. Georgia-Pacific Corp.](#), July 11, 2014, Willett, D.).

Background. Timothy Shawn Bostic was born in 1962. As a child and teenager, he helped his father Harold in remodeling projects. Harold testified that he used drywall compound manufactured by Georgia-Pacific Corp. “like 98 percent of the time,” although he could not recall with certainty whether Timothy was present when he did drywall projects. From 1965 to 1977, the company manufactured dry-mix joint compound that contained chrysotile asbestos. Harold also worked for Knox Glass Company, which used asbestos products extensively at their plant, from 1962 to 1984, and Timothy lived with him during much of this time. Timothy also worked at Knox Glass during the summers of 1980, 1981, and 1982, during which he cut asbestos cloth (without respiratory protection), cleaning up after asbestos insulation was repaired, removing and repairing asbestos from machines, and wearing asbestos gloves. Timothy was also exposed to asbestos while working for Palestine Contractors in 1977 and 1978, while working with his father on automobiles that contained asbestos parts, and while performing remodeling work as an adult using products not manufactured by Georgia-Pacific. From 1984 until 2002, when he stopped working due to illness, he worked at a Texas correctional officer (and did not claim asbestos exposure during this time).

Timothy was diagnosed with mesothelioma in 2002 and died the following year. His family brought claims for negligence and products liability against Georgia-Pacific Corp. and 39 other defendants, alleging that exposure to their products caused him to develop the disease. The jury found Georgia-Pacific liable and assessed 75 percent of the liability to it and 25 percent to Knox Glass Company, which had settled with the family. The judgment, as amended by the trial court, awarded \$6.8 million in compensatory damages and \$4.8 million in punitive damages. However, the appellate court reversed and issued a take-nothing judgment, finding that evidence of causation was legally insufficient. The family appealed.

Exposure standard. In all cases involving multiple sources of asbestos exposure, a plaintiff must establish that a defendant’s product was a substantial factor in causing the plaintiff’s asbestos-related disease, the Texas Supreme Court ruled. Proof of “any exposure” is insufficient; the plaintiff must establish the dose of asbestos fibers to which he was exposed by the defendant’s product. This dose must be quantified, although it does not need to be established with “mathematical precision.” The state high court had previously held in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007), that the substantial factor requirement applied to a claim involving a brake mechanic allegedly suffering from asbestosis. Proof of “mere frequency, regularity, and proximity” was necessary but insufficient without quantitative information relating to the approximate dose to which the plaintiff was exposed, the court continued. The family in the present case argued that these standards should not apply because their case involved mesothelioma, not asbestosis, and that relatively small amounts of asbestos can cause mesothelioma whereas asbestosis requires a heavy exposure to asbestos. However, the court found that the “*Flores* framework” for reviewing the legal sufficiency of the evidence lent itself to mesothelioma cases as well as asbestosis cases, and that the lower amount of asbestos exposure required did not require a different analysis. Applying a less demanding standard for mesothelioma cases would in effect impose not strict liability but absolute liability on any company that made an asbestos-containing product to which a plaintiff had ever been exposed, the court said. An “any exposure” theory for mesothelioma could apply to all carcinogens, negating a plaintiff’s burden to prove causation by a preponderance of the evidence. Liability cannot justly be imposed on any conceivable defendant, including those responsible for *de minimis* exposures, when other parties are responsible for far greater exposures.

The high court agreed with the family that the appellate court had erred in requiring them to prove “but for”

causation in addition to substantial factor causation. While the tests overlap, they are different concepts, the court said. The court noted that it had often recognized but for causation as the standard for establishing causation in fact; however, applying *Flores*, it said that substantial factor causation was the appropriate standard without also requiring a strict but for causation test. Due to the latency of asbestos-related diseases, it may be impossible to establish in multiple-exposure cases which fibers from which defendant actually caused the disease, the court reasoned. Finally, examining the Restatement (Second) of Torts and the Restatement (Third) of Torts, the court determined that they would not require the family to meet a strict but for causation test.

Sufficiency of the evidence. The state supreme court agreed with the appellate court that the family had not presented causation evidence that was legally sufficient to uphold the verdict. While proof of substantial causation required some quantification of the dose resulting from the individual's exposure to Georgia-Pacific products, the family did not attempt to do so. Instead, they proffered arguments and expert testimony that any exposure to asbestos was sufficient to establish causation; however, the court stated that it has previously rejected this idea in *Flores*, observing that the any exposure theory contradicted the experts' opinion that the disease was dose-responsive. In addition, the studies relied upon by the family's experts did not confirm the any exposure theory, and none of them found a statistically significant link between mesothelioma and the occasional exposure to Georgia-Pacific joint compounds the son experienced while helping his father. Noting that one of the family's experts testified that exposure while working at Knox Glass "substantially contributed" to the son's mesothelioma, the court said that without any attempt to quantify the exposures from Knox Glass and Georgia-Pacific products, there was no meaningful way for the jury to determine whether his exposure to Georgia-Pacific products was a substantial factor or to apportion liability between the two sources.

Concurrence/dissent. In a concurring opinion, Justice Guzman stated that while he agreed with the conclusion that evidence of causation was legally insufficient, he believed that both the majority opinion and the dissent did not properly interpret the preponderance of the evidence standard. He argued that the majority opinion was too demanding when it found the epidemiological studies cited by the family were insufficient, stating that the court had only required substantially similar studies, not identical ones, whereas the dissent neglected the preponderance of the evidence standard and eased the burden of proof to something lower.

In a dissenting opinion, Justice Lehrmann asserted that the majority opinion had ignored recent reliable scientific research that showed that even low exposure levels can cause mesothelioma and, as a result, had erred when requiring the verdict to be set aside because the family did not demonstrate an exposure threshold above which a person's risk of developing mesothelioma was doubled. Because the family showed that the son's mesothelioma was caused by asbestos exposure and that he was exposed to substantial quantities of Georgia-Pacific's asbestos-containing products, the evidence was legally sufficient.

The case number is 10-0775.

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Companies: Georgia-Pacific Corp.

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