

IADC Committee Newsletter

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

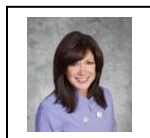
August 2014

IN THIS ISSUE

*Michele Smith and Paul Heyburn report on the July 11, 2014 Texas Supreme Court case of **Bostic v. Georgia-Pacific**, which rejects "but for" and "any exposure" causation but endorses substantial factor causation in mesothelioma cases.*

The Evolution of Substantial Factor Causation in Texas Toxic Exposure Cases

ABOUT THE AUTHORS



Michele Smith has 20 years of diverse jury trial experience representing clients in general civil litigation, concentrating in complex mass tort litigation and products liability. Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization, Michele is an advocate member of the American Board of Trial Advocates, Houston Chapter and serves as Executive Vice President for the Texas Association of Defense Counsel. Michele has been recognized by Texas Super Lawyers® (Top 100 Attorneys in Texas and one of the Top 50 Women Attorneys in Texas) and is also listed in Best Lawyers in America® (Personal Injury Litigation and Product Litigation.) She can be reached at michelesmith@mehaffyweber.com.



Paul Heyburn specializes in complex litigation matters with an emphasis in products, premises, environmental, commercial, and personal injury cases. Paul has coordinated multi-state litigation for national clients and has successfully tried to verdict cases with damages alleged in the tens of millions of dollars. Paul is a Fellow of the Litigation Counsel of America and a Founder of the International Institute for Natural Resources, Energy, and Environmental Law (IINREEL). Paul has been recognized as both a "Rising Star" and "SuperLawyer" by Texas Monthly magazine and named as a Top Lawyer in Houston by HTexas magazine. He can be reached at PaulHeyburn@mehaffyweber.com.

ABOUT THE COMMITTEE

Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Michael L. Fox
Vice-Chair of Newsletters
Sedgwick LLP
michael.fox@sedgwicklaw.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

w: www.iadclaw.org p: 312.368.1494 f: 312.368.1854 e: mmaisel@iadclaw.org

In *Bostic v. Georgia-Pacific*,¹ an eagerly anticipated opinion, the Texas Supreme Court revisits its “substantial factor” causation standard adopted in *Borg-Warner Corp. v. Flores*² and applies it to mesothelioma cases. In doing so, the Court refuses to require plaintiffs to prove “but for” causation. Of note, the International Association of Defense Counsel filed an amicus brief in the proceeding.

I. BORG WARNER v. FLORES

In 2007, the Texas Supreme Court issued the sea-changing opinion of *Borg-Warner Corp. v. Flores*.³ Flores was a brake mechanic who developed asbestosis.⁴ On appeal, the Court reversed the verdict in favor of *Borg-Warner* finding the evidence legally insufficient enunciating a “new” standard for causation in Texas. The Court held that “proof of mere frequency, regularity, and proximity is necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law.”⁵ While the plaintiff was not required to establish causation with “mathematical precision,” the Court required “[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease.”⁶

II. BOSTIC: TRIAL AND INTERMEDIATE APPEAL

In 2002, Timothy Bostic was diagnosed with mesothelioma and died from the disease in 2003.⁷ Bostic’s family sued Georgia-Pacific and 39 other asbestos defendants for negligence and products liability as a result of his death.⁸ The plaintiffs claimed that Bostic was exposed to asbestos-containing Georgia-Pacific products when, as a child and teenager, he assisted his father in remodeling homes for friends and family.⁹ Bostic mixed and sanded drywall compound from the age of five until he was 15 years old.¹⁰ He also claimed exposure to asbestos from his father’s clothing, from working on automobiles, while working for a piping contractor, and while at a glass plant.¹¹

At the trial in 2005, and before the Texas Supreme Court opinion in *Flores*, the plaintiffs presented the testimony of experts: Dr. Richard Lemen, an epidemiologist, Dr. William Longo, a material scientist, Dr. Arnold Brody, a pathologist, and Dr. Samuel Hammar, a pathologist.¹² Dr. Longo conceded that his studies did not attempt to “mimic any one person’s actual exposure to asbestos,” so he made no attempt to measure Bostic’s actual aggregate dose assignable to Georgia-Pacific or any other source.¹³ Drs. Hammar, Brody, and Lemen maintained that “each and every exposure”

¹ *Bostic v. Georgia-Pacific Corp.*, ---S.W.3d ---, No. 10-0775, 2013 WL 8808088, at *1 (Tex. 2014).

² *Flores*, 232 S.W. 3d 765 (Tex. 2007).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 772.

⁶ *Id.* at 773.

⁷ *Bostic* at *14-15.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at *15-19.

¹³ *Id.*

to asbestos was a cause of Bostic's disease.¹⁴

The jury found Georgia-Pacific liable under both theories and allocated blame of 75 percent to Georgia-Pacific.¹⁵ The total award was \$11.6 million in compensatory and punitive damages.¹⁶ The Dallas Court of Appeals reversed and rendered the judgment of the trial court, finding that there was legally insufficient evidence of causation. Specifically, the court of appeals held that in order to meet the substantial factor causation standard in an asbestos case, the plaintiffs must show that defendant's asbestos product at issue was a "but for" cause of the plaintiff's asbestos disease, and without which the injury would not have occurred.¹⁷

III. "BUT FOR" CAUSATION

In a 6-3 decision, the Texas Supreme Court affirmed the Dallas Court of Appeals. However, in so doing, the Court found that "substantial factor" rather than "but for" was the causation standard for asbestos cases in Texas.¹⁸ The Supreme Court expressly disagreed with language in the court of appeal's decision suggesting that the plaintiffs were required to prove "but for" Bostic's exposure to Georgia-Pacific's asbestos-containing joint compound Bostic would not have contracted mesothelioma.¹⁹ Nevertheless, the Court concluded that "substantial factor" causation requires some quantification of the dose of asbestos from Georgia-Pacific's products. At trial, the

plaintiffs did not establish an approximate dose.²⁰ Accordingly, the expert testimony amounted to "any exposure was sufficient to establish causation."²¹ This theory was rejected by the Court in *Flores*.²²

In its rejection of "but for" causation, the Texas Supreme Court noted that "but for" and "substantial factor" are concepts that overlap and whose application usually leads to the same result.²³ However, in products liability cases where the plaintiff was exposed to multiple sources, the Texas Supreme Court chose to follow *Flores* and apply "substantial factor" causation as the appropriate standard.²⁴ The Court reasoned that, due to the nature of the disease process, which can occur over decades and involve multiple sources of exposure, choosing which fibers came from which defendants is not possible.²⁵ Even if the exposure from a particular defendant was, by itself, sufficient to cause the disease, it still may not be possible for a plaintiff to show that he would not have become ill "but for" the exposure from that defendant.²⁶

In coming to its conclusion, the Texas Supreme Court relied upon the Second and Third Restatement of Torts. The Restatement (Second) of Torts recognizes liability when the actor's conduct is not strictly speaking a "but for" cause because the other force would have caused the harm anyway.²⁷ The Court also noted that the Restatement (Second and Third) of

¹⁴ *Id.*

¹⁵ *Bostic*, 2013 WL 8808088 at *14-15.

¹⁶ *Id.*

¹⁷ *Bostic*, 2013 WL 8808088 at *5-8.

¹⁸ *Id.* at *6.

¹⁹ *Id.* at *5.

²⁰ *Id.* at *16.

²¹ *Id.*

²² *Id.*

²³ *Bostic*, 2013 WL 8808088 at *5.

²⁴ *Id.* at *15.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Bostic*, 2013 WL 8808088 at *17; See Restatement (Second) of Torts §432 (2) (1965).

Torts recognized both “but for” causation as well as “substantial factor” causation in certain cases.²⁸ Section 27 of the Restatement (Third) of Torts specifically provides for multiple causation in that if “multiple acts occur, each of which under [Section] 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.”²⁹

IV. “ANY EXPOSURE” CAUSATION

The Court further explained that if any exposure were sufficient to cause mesothelioma, everyone would suffer from it or at least be at risk of contracting the disease.³⁰ The Court flatly rejected the “any exposure above background” theory as going beyond strict liability and imposing absolute liability against any company whose asbestos-containing product crossed paths with the plaintiff throughout his entire lifetime.³¹ The Court agreed with the Pennsylvania Supreme Court that an expert opinion embracing the any exposure theory while recognizing that the disease is dose-related “is in irreconcilable conflict with itself. Simply put, one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive.”³²

²⁸ *Id.* at *17; See also Restatement (Second) of Torts §432 (2) (1965); See Restatement (Third) of Torts: Products Liability § 16 (a) (1998).

²⁹ *Id.* at *17; See also Restatement (Third) of Torts §27 (1998).

³⁰ *Id.* at *3.

³¹ *Id.*

³² *Betz v. Pneumo Abex, LLC*, 44 A.3d 27, 56 (Pa. 2012).

The Court concluded that, without any attempt to quantify the exposures from the sources, the testimony was legally insufficient. There was no meaningful way for the jury to conclude that Bostic’s exposure to Georgia-Pacific’s products was a substantial factor in causing his disease, nor was there any basis for the jury to apportion liability between the sources of asbestos exposure.³³

V. PEER REVIEWED LITERATURE

The majority also found that the peer-reviewed literature relied upon by the plaintiffs’ experts did not support a statistically significant link between mesothelioma and the decedent’s asbestos exposure introduced at trial.³⁴ In *Havner*, the Court required a plaintiff to be similar to the studies including “proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies . . . and that the timing of the onset of injury was consistent with that experienced by those in the study.”³⁵ In the current case, the experts’ studies involved dry wall plant workers and union plasterers and were not like the exposure of the decedent; who performed drywall work outside his primary employment.³⁶

VI. DISSENT

The dissent deserves mention because the justices felt compelled to write separately to highlight the distinction between general and specific causation in toxic tort cases. It’s almost as if the dissent felt that

³³ *Bostic*, 2013 WL 8808088 at *15-19.

³⁴ *Id.* at *18.

³⁵ *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997).

³⁶ *Bostic*, 2013 WL 8808088 at *18.

the majority pulled a bait and switch on causation by reaffirming the *Havner* standard created for general causation but using it to take away the jury's verdict by arguing that plaintiff failed to follow that high standard for specific causation - an area traditionally reserved for the finder of fact.

The dissent, written by Justice Lehrmann and joined by Justices Boyd and Devin, would have found that the plaintiffs established "substantial factor" causation against Georgia-Pacific.³⁷ The dissenting Justices explained that the use of epidemiological studies to establish causation under *Havner* is not the exclusive measure of proof in a toxic tort case but was meant to be an alternative means of proving a case when direct evidence was not available.³⁸ In the current case, the plaintiffs established their case by direct, scientifically reliable proof.³⁹

Specifically, the plaintiffs produced testimony from a reliable expert witness who stated that Bostic's exposure to asbestos from Georgia-Pacific products exceeded the level over which that toxic substance can cause mesothelioma.⁴⁰ Noting that in *Flores* the Court found that the calculation of an asbestos dose "need not be reduced to mathematical precision," the dissenting Justices would conclude that the direct evidence of Bostic's exposure to Georgia-Pacific products was sufficient for a jury to determine that such exposure was a substantial factor in causing his illness.⁴¹ In a multi-exposure

case, the dissenting justices would also not require a plaintiff to show that a single defendant's product was, by itself, sufficient to cause the disease.⁴²

VII. CONCLUSION

Not surprisingly, *Bostic* affirms the Texas Supreme Court's analysis in *Flores* of the type of evidence necessary to establish causation in mesothelioma and again expressly rejects the "any exposure" argument. Somewhat surprisingly, the Court reversed and rendered, rather than remanded, the case, even though *Bostic* was tried before *Flores*, requiring dose evidence, was decided. Given the current conservative make up of the Court, many assumed "but for" causation would be adopted. Nevertheless, this decision is likely to make it more difficult for a plaintiff to maintain an asbestos injury case against peripheral defendants.

³⁷ *Id.* at *25-37 (dissenting opinion).

³⁸ *Id.* at *29.

³⁹ *Id.* at *25.

⁴⁰ *Id.* at *30.

⁴¹ *Id.* at *35-37.

⁴² *Id.* at *30-31.



PAST COMMITTEE NEWSLETTERS

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

JUNE 2014

Hydraulic Fracturing Survives First Jury Trial Test—Bombardiere v. SOS Staffing Services, Inc., et al. (N.D.W.Va. 2013)

Raymond G. Mullady, Jr. and Harrison Kang

MAY 2014

Toxic Tort Issues Related to Spray Polyurethane Foam

Robert F. Redmond Jr.

APRIL 2014

BP Fights Fifth Circuit Ruling on Deepwater Horizon Settlement

Jim Shelson

MARCH 2014

Recent Developments in Medical Monitoring Case Law (2013-2014)

Martin J. Healy and Kristie A. Tappan

NOVEMBER 2013

California Appellate Court Limits Application of Sophisticated User Doctrine

Michael L. Fox and Brian M. Davies

JULY 2013

Digging Deeper: Mass Toxic Tort Class Certification after Dukes, Comcast, and Amgen

Timothy Coughlin and Barbara A. Lum

JUNE 2013

Revisiting the Misuse of Public Nuisance Law to Address Climate Change and Chevron in Ecuador

Jim Shelson

APRIL 2013

Maryland's Highest Court Clarifies Toxic Tort Standards and Reverses a Punitive Damage Award in Excess of \$1 Billion

Michael L. Williams and Michael L. Fox

JANUARY 2013

"Substantial Factor" Causation in Asbestos Litigation

Jim Shelson