

NO. 10-0775

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IN THE SUPREME COURT OF TEXAS

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SUSAN ELAINE BOSTIC, INDIVIDUALLY AND AS PERSONAL  
REPRESENTATIVE OF THE HEIRS AND ESTATE OF TIMOTHY  
SHAWN BOSTIC, DECEASED; HELENE DONNAHOE, AND  
KYLE ANTHONY BOSTIC,

*Petitioners,*

v.

GEORGIA PACIFIC CORPORATION,

*Respondent.*

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FROM THE FIFTH COURT OF APPEALS, DALLAS, TEXAS

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**BRIEF OF *AMICI CURIAE* AMERICAN COATINGS ASSOCIATION,  
INC., AMERICAN CHEMISTRY COUNCIL, AND INTERNATIONAL  
ASSOCIATION OF DEFENSE COUNSEL**

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## INTEREST OF AMICUS

The American Coatings Association ("ACA") is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors. Collectively, ACA represents companies with greater than 95% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. The business of chemistry is a \$770 billion enterprise and a key element of the nation's economy.

A number of ACA's and ACC's members acquired companies that at one time sold products containing asbestos. ACA and ACC member companies have a vital

interest in assuring that defendants in asbestos cases are held liable only for injuries for which they are actually responsible and not merely because of limited, non-causative contact between the products that they once sold and plaintiffs.

The International Association of Defense Counsel ("IADC") is an organization of corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits. Since 1920, the IADC has been dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC regularly files briefs in pending cases throughout the United States to support a wide variety of civil justice issues. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries and responsible defendants are held liable only for appropriate damages.

Amici all contend that affirmance of the decision below - which properly held the plaintiff to his burden

of establishing a level of exposure to chrysotile asbestos in the defendant's product scientifically shown to cause mesothelioma - is essential to the continued vitality of the substantial contributing factor causation test in asbestos litigation in Texas and throughout the country.<sup>1</sup>

### ARGUMENT

#### **I. The Asbestos Crisis Continues Unabated and, Without Proper Controls, Threatens the Bankruptcies of Many Companies Whose Products Were Only Minimally Involved.**

The "asbestos-litigation crisis" aptly recognized by the United States Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 597 (1997), has not abated. It has been described as an "elephantine mass of asbestos cases," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999), or an "avalanche," *In re Combustion*

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<sup>1</sup> Pursuant to Tex. R. App. P. 11(c), amici curiae state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from amici curiae, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

*Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005).<sup>2</sup> Now entering its fourth decade, asbestos litigation is the nation's "longest running mass tort,"<sup>3</sup> and there is no end in sight. Most recent actuarial studies project that asbestos claims will continue for the next 35 to 50 years, suggesting that we may not yet be even halfway through this litigation.<sup>4</sup>

While mesothelioma claim filings have fluctuated somewhat in recent years (with a modest dip in 2006-2007 and a subsequent rebound in 2008-2012), overall annual filings have remained near peak levels since

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<sup>2</sup> Through 2002, roughly 730,000 people brought asbestos claims against 8,400 businesses. Stephen J. Carroll et al., *Asbestos Litigation*, Rand Institute for Civil Justice, xxiv-xxv (2005), [http://www.rand.org/pubs/monographs/2005/RAND\\_MG162.pdf](http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf)

<sup>3</sup> Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008).

<sup>4</sup> *A Synthesis of Asbestos Disclosures from Form 10-Ks - Updated*, Towers Watson, Insights, 5 (June 2013) ("Asbestos Disclosures"), <http://www.towerswatson.com/en/Insights/IC-Types/Ad-hoc-Point-of-View/Insights/2013/A-Synthesis-of-Asbestos-Disclosures-From-Form-10-Ks-Updated>; see also Joseph W. Belluck et al., *The Asbestos Litigation*

2000.<sup>5</sup> By one estimate, approximately 28,000 additional mesothelioma claims will be filed in 2013 and subsequent years.<sup>6</sup> A recent analysis of the insurance industry - which has already paid out about \$51 billion in claims tied to asbestos over the past quarter century - concluded that the \$23 billion that had been set aside for future expenses was far too low, and that future expenses were likely to reach \$34 billion, bringing the ultimate cost of such insured claims to \$85 billion.<sup>7</sup>

This figure, of course, does not include the tens of billions of additional dollars in costs incurred by

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*Tsunami-Will It Ever End?*, 9 J.L. Econ. & Pol'y 489, 492 (2013).

<sup>5</sup> Asbestos Disclosures, at 1.

<sup>6</sup> *Id.*

<sup>7</sup> Erik Holm, *Insurers May Face \$11 Billion More in Asbestos Claims*, WALL ST. J., Dec. 17, 2012, <http://online.wsj.com/article/SB10001424127887324907204578185224076122106.html>; see also *Fitch: Asbestos Reserve Deficiency Continues for U.S. Insurance Industry*, BusinessWire, Nov. 28, 2012, <http://www.businesswire.com/news/home/20121128006206/en/Fitch-Asbestos-Reserve-Deficiency-Continues-U.S.-Insurance>.

companies with exhausted or nonexistent insurance. The financial impact of the asbestos litigation crisis to these companies - and the consequential changing nature of the defendant pool - is well documented. In the early 1980s, companies named as defendants in asbestos litigation typically distributed asbestos or manufactured highly-friable asbestos-containing products, such as pipe insulation. As these defendants' liabilities skyrocketed, however, many were forced to file for Chapter 11 bankruptcy protection. As a result, plaintiffs began to target other, still-solvent companies with less significant ties to asbestos, driving many of those companies into bankruptcy as well.<sup>8</sup>

As of July 2010, 96 companies with asbestos liabilities had filed for bankruptcy, with three such

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<sup>8</sup> See *Asbestos Disclosures*, at 1; see also Freedman, *supra* note 3, at 512 (noting increase in the number of asbestos defendants from 300 in 1982 to over 8,500 in the mid-2000s).

bankruptcies in the first half of 2010 alone.<sup>9</sup> A list of these companies as reported by the Rand Institute for Civil Justice is attached hereto as Exhibit A. These bankruptcies have affected a range of companies well beyond the traditional asbestos industry, and they have had devastating impacts on the companies' employees, retirees, shareholders, and communities, with ripple effects that extend throughout the U.S. economy.<sup>10</sup>

A majority of plaintiffs now sue defendants with whose products they have had minimal contact.<sup>11</sup> Indeed,

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<sup>9</sup> Lloyd Dixon et al., *Asbestos Bankruptcy Trusts*, Rand Institute for Civil Justice, xii, 25, 47-52 (2010), [http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2010/RAND\\_TR872.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf).

<sup>10</sup> Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51, 52 (2003); see also *In re GlobalSantaFe Corp.*, 275 S.W.3d 477, 482 (Tex. 2008) (asbestos litigation has resulted in the bankruptcies of many companies, the loss of thousands of jobs, enormous litigation expenses, and crowded dockets).

<sup>11</sup> Ted Frank, *Making the FAIR Act Fair*, American Enterprise Institute for Public Policy Research (2006) ("AEI Report"), <http://www.aei.org/article/health/making-the-fair-act-fair> (citing Lester Brickman, *On the Theory Class's*

a "hallmark of the [asbestos] litigation has been the mass filing of ... claims made by plaintiffs without reliable proof of causation, ... forc[ing] scores of defendant companies into bankruptcy."<sup>12</sup> "[M]ost plaintiffs sue every known manufacturer of asbestos products,' notwithstanding the plaintiff's marginal contact, if any, with a particular defendant's product." *Id.* at 631 (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986)). By one estimate, more than 10,000 corporate defendants have been sued in asbestos litigation.<sup>13</sup> As one plaintiffs' attorney is reported to have explained, asbestos litigation has become "the endless search for a solvent bystander."<sup>14</sup>

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*Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp. L. Rev. 33 (2003)).

<sup>12</sup> David C. Landin et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 J.L. & Pol'y 589, 592 (2008).

<sup>13</sup> Asbestos Disclosures, at 1

<sup>14</sup> Freedman, *supra* note 3, at 512



## II. The Policy Behind Flores Extends to All Toxic Tort Cases, Including Those Involving Mesothelioma and Other Forms of Cancer.

With this history in mind, the Texas Supreme Court decided *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007), noting that asbestos claims had been in the court system for decades but that “courts have continued to struggle with the appropriate parameters for lawsuits alleging asbestos-related injuries.” *Id.* at 765. It resoundingly answered “no” to the question “whether a person’s exposure to ‘some’ respirable fibers is sufficient to show that a product containing asbestos was a substantial factor” in causing that person’s asbestos-related disease. *Id.* at 766. Thus, the Texas Supreme Court in *Flores* agreed with many other courts across the country in “taking a more thorough look at [plaintiffs’] unsound causation claims.”<sup>15</sup>

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<sup>15</sup> Landin, *supra* note 12, at 605. See also, e.g., *Ford Motor Co. v. Boomer*, 736 S.E.2d 724 (Va. 2013) (reversing jury verdict for plaintiff where plaintiff failed to establish exposures to asbestos in defendant’s product alone at a level sufficient to cause mesothelioma); *Betz ex rel. Simikian v. Pneumo*

In prior years, courts had relaxed traditional rules of causation to allow more and more tenuous asbestos cases to get to sympathetic juries. But the relaxation of traditional rules has meant that companies not truly responsible for plaintiffs' illnesses have been forced nonetheless to compensate them. *Flores* made it clear that asbestos cases should be governed by the traditional rules that have always worked well in non-asbestos contexts. In light of *Flores*, asbestos cases are to be treated like other toxic tort cases, *i.e.*, before a case can be sent to the jury there must be real proof of specific causation

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*Abex LLC*, 44 A.3d 27, 56-57 (Pa. 2012) ("[W]e do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every 'direct-evidence' case. The result, in our view, is to subject defendants to full joint-and-several liability for injuries and fatalities in the absence of any reasonably developed scientific reasoning that would support the conclusion that the product sold by the defendant was a substantial factor in causing the harm.")

tying the particular defendant's product to the particular plaintiff's illness.<sup>16</sup>

In *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304 (Tex. App.-Houston [1st Dist.] 2007, pet. denied), this fundamental proposition of law was applied in due course to a mesothelioma case. The *Stephens* ruling shows that *Flores's* return to bedrock causation principles for asbestos cases applies equally well when the disease at issue is cancer as opposed to asbestosis. Likewise in *Smith v. Kelly-Moore Paint Co.*, 307 S.W.3d 829 (Tex. App.-Forth Worth 2010, pet. denied), the court explained that the causation standard announced in *Flores* cannot be read "so narrowly as to apply only to asbestosis or asbestos-exposure cases other than mesothelioma." *Id.* at 834.

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<sup>16</sup> As such, *Flores* manifests the continuing intent of the Texas Supreme Court to apply, in asbestos cases, the "fundamental principle of traditional products liability law ... that the plaintiff must prove that the defendants supplied the product which caused the injury." *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989).

Indeed, nothing about the fact that this case involves cancer compels a different result than this Court reached in *Flores*. Cancer may arise in a single cell, but that does not allow courts to ignore the requirement of quantifying the dose.

In benzene cases, for example, that the cancer starts in a single cell has not caused Texas courts to negate the requirement of quantifying the dose. See *City of San Antonio v. Pollock*, 284 S.W.3d 809, 819 (Tex. 2009) (reversing jury verdict in favor of plaintiff in leukemia case where “[n]o study was offered showing a relationship between chromosomal anomalies like [the plaintiff’s] and exposure to benzene at the lower levels . . . claimed”); *Austin v. Kerr-McGee Ref. Corp.*, 25 S.W.3d 280, 292-93 (Tex. App.—Texarkana 2000, no pet.) (plaintiffs must show an injurious level of exposure to benzene in chronic

myelogenous leukemia case) (citing *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997)).<sup>17</sup>

In radiation cases, Texas courts have not found that the fact that cancer starts in a single cell negates the requirement of quantifying the dose. *Cano v. Everest Minerals Corp.*, 362 F. Supp. 2d 814, 824 (W.D. Tex. 2005) (as part of specific causation plaintiffs must prove "that the exposure or dose levels were comparable to or greater than those in the studies" upon which they relied; plaintiffs must "prove the levels of exposure that are hazardous to human beings generally as well as the plaintiff's actual level of exposure to the defendant's toxic substance") (emphasis added; quotation omitted); see also *Burleson v. Texas Dept. of Crim. Justice*, 393 F.3d 577, 587 (5th

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<sup>17</sup> Other jurisdictions agree. See also *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 679 (6th Cir. 2011) (same); *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 49 (2d Cir. 2004) (same); *Baker v. Chevron USA, Inc.*, 680 F. Supp. 2d 865, 885 (S.D. Ohio 2010) (same), *aff'd*, Nos. 11-4369, 12-3995, 2013 WL 3968783 (6th Cir. Aug. 2, 2013); *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1165-66 (E.D. Wash. 2009) (same); *Sutera v. Perrier*

Cir. 2004) (criticizing expert's failure to determine plaintiff's radiation dose from thoriated tungsten rods in throat and lung cancer case).

Likewise, in ethylene oxide cases and creosote cases in Texas, that cancer starts in a single cell does not negate the requirement of quantifying the dose. See *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 195-96 (5th Cir. 1996) (ethylene oxide); *Abraham v. Union Pacific RR Co.*, 233 S.W.3d 13 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (creosote).

These cases all reflect the time-tested principle that liability must be founded upon proof that the agent at issue is a substantial contributing factor in causing the alleged harm.<sup>18</sup> The phrase "substantial factor" expresses an important concept of relativity, contrasting meaningful contributions to a plaintiff's

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*Grp. of Am. Inc.*, 986 F. Supp. 655, 666 (D. Mass. 1997) (same).

<sup>18</sup> *Marathon Corp. v. Pitzner ex rel. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003) ("The test for cause in fact ... is whether the act or omission was a substantial factor in causing the injury 'without which the harm would not have occurred.'")

injury, deserving of liability, from trivial contributions having no appreciable effect.<sup>19</sup> It is a principle premised upon "basic notions of sound public policy and overall fairness."<sup>20</sup>

### **III. The Fifth Court of Appeals Faithfully Applied the Causation Standard Set Forth in Flores.**

This Court instructed in *Flores* that a plaintiff in an asbestos personal injury lawsuit must present "[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 asbestos-related disease." 232 S.W.3d at 773. To constitute a substantial factor, "there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of 'causation' can be inferred."

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<sup>19</sup> See *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471-72 (Tex. 1991); *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 401 & n.3 (Tex. 1993).

<sup>20</sup> *Brown v. U.S. Stove Co.*, 484 A.2d 1234 (N.J. 1984); accord *White v. ABCO Eng'g Co.*, 992 F. Supp. 630, 633 (S.D.N.Y. 1998), *aff'd in part and vacated and remanded in part on other grounds*, 221 F.3d 293 (2d Cir. 2000).

Id. (citation omitted); see also id. at 772 (noting "requirement that asbestos fibers were released in an amount sufficient to cause" plaintiff's disease. Id. at 772. "[A] plaintiff must prove that the defendant's product was a substantial factor in causing the alleged harm." Id. at 773.

The Fifth Court of Appeals faithfully applied this causation standard in its ruling in this case. The Court of Appeals found that each of Petitioners' causation experts - Drs. Hammar, Brody, and Lemon - expressly relied upon the same "each and every fiber" theory of causation that this Court rejected in *Flores*. *Georgia-Pacific Corp. v. Bostic*, 320 S.W.3d 588 (Tex. App.-Dallas 2010, pet. filed). The Court of Appeals then considered whether Petitioners had presented evidence, as required by *Flores*, of asbestos exposure from Georgia Pacific's product sufficient to cause Mr. Bostic's disease and concluded that they had not:

On this record, appellees' evidence is insufficient to provide quantitative evidence of Timothy's exposure to asbestos



fibers from Georgia-Pacific's asbestos-containing joint compound or to establish Timothy's exposure was in amounts sufficient to increase his risk of mesothelioma. Therefore, appellees' evidence is legally insufficient to establish substantial-factor causation mandated by *Flores*.

*Id.* at 601.

In their Motion for Rehearing, Petitioners disregard these dispositive holdings and take aim at another part of the Court of Appeals' opinion in which the court explained Petitioners' burden to demonstrate cause-in-fact. Again, this cause-in-fact burden is expressly stated in *Flores*: "We have recognized that '[c]ommon to both proximate cause and producing cause is causation in fact, including the requirement that the defendant's conduct or product be a substantial factor in bringing about the plaintiff's injuries.'" *Flores*, 232 S.W.3d at 770 (quoting *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995)).

Petitioners seek to make hay from the fact that the Court of Appeals included the additional phrase "and without which the harm would not have occurred."

*Bostic*, 320 S.W.3d at 596. This phrase too, however, was quoted directly from this Court, *id.* (quoting *Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 835 (Tex. 2009)), and is a well-established part of the cause-in-fact requirement under Texas law.<sup>21</sup> As this Court explained in *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007), “[d]efining producing cause as being a substantial factor in bringing about an injury, and without which the injury would not have occurred, is easily understood and conveys the essential components of producing cause that (1) the cause must be a substantial cause of the event in issue and (2) it must be a but-for cause, namely one without which the event would not have occurred.” See *Transcontinental Ins. Co. v. Crump*, 330 S.W.3d 211, 225 (Tex. 2010) (holding that a jury instruction on

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<sup>21</sup> See also Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. Tex. L. Rev. 945, 963 (2003) (discussing cause-in-fact requirement under Texas law).

causation that lacks the but-for component is reversible error).<sup>22</sup>

That *Flores* quoted a sentence from *Union Pump* that does not include this phrase in no way suggests that this Court intended to create a lesser standard of causation in asbestos cases than applies in all other areas of Texas tort law. To the contrary, *Union Pump* likewise explained that "cause in fact means that the defendant's act or omission was a substantial factor in bringing about the injury which would not otherwise have occurred," 898 S.W.2d at 775, so this Court's citation to *Union Pump* in *Flores* is most naturally read as incorporating the same but-for causation

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<sup>22</sup> See also, e.g., *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001) ("The test for cause-in-fact is whether the act or omission was a substantial factor in causing the injury 'without which the harm would not have occurred.'") (citation omitted); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991) ("Negligent conduct is a cause of harm to another if ... it produces an event, and without the negligent conduct such event would not have occurred"); *McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901, 903 (Tex. 1980) ("Cause in fact means that the act or omission was a substantial factor in bringing about the injury and without which no harm would have occurred.").

requirement. Moreover, the fundamental premise of *Flores* is that there is no asbestos-only causation standard under Texas law.

Likewise unavailing is Petitioners' suggestion that the Court of Appeals' holding would absolve a defendant of liability unless the plaintiff can trace precisely which fibers caused the mesothelioma. By requiring Petitioners to establish cause in fact, the Court of Appeals did not require them to "distinguish all possible inferences" but only to "show that the greater probability was that the [exposure to the defendant's product] probably caused the injury." *McClure*, 608 S.W.2d at 904; see also, e.g., *Gray v. Woodville Health Care Ctr.*, 225 S.W.3d 613, 617 (Tex App.—El Paso 2006, pet. denied) ("Regarding cause-in-fact, a plaintiff must be able to establish a causal connection based upon a 'reasonable medical probability,' not mere conjecture, speculation, or possibility."). Petitioners acknowledged below that their sole

causation expert was unable to offer such an opinion.

See *Bostic*, 320 S.W.3d at 596.

**IV. Petitioners' *Summers v. Tice* Argument is Directly Contrary to This Court's Ruling in *Gaulding v. Celotex Corp.***

Petitioners seek to bring the Court back to the first year of law school with citations to "alternative liability" cases like *Summers v. Tice*, 199 P.2d 1 (Cal. 1948). Mot. for Reh'g at 11. But these cases, even if applicable, would not salvage Petitioners' claims.

*Summers* and the other cases cited by Petitioners each rest on the necessary predicate that the actions of each defendant alone would have been sufficient to cause injury. See *Summers*, 199 P.2d at 5 ("If defendants are independent tort feasors and thus each liable for *the damage caused by him alone*, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress.") (emphasis added).<sup>23</sup>

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<sup>23</sup> See also *Corey v. Havener*, 65 N.E. 69, 69 (Mass. 1902) ("If each contributed to the injury, that is enough to bind both.") (emphasis added); *Anderson v. Minneapolis, St. P. & S.S.M. Ry. Co.*, 179 N.W. 45 (Minn. 1920) (jury

As the Court of Appeals correctly found below, Petitioners failed to show that Mr. Bostic's exposure to Georgia Pacific's products alone was sufficient to cause or contribute to his injury.

Moreover, Petitioners fail to mention that this Court has squarely rejected application of the *Summers* "alternative liability" rule in asbestos personal injury cases. See *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68-69 (Tex. 1989). In *Gaulding*, as here, plaintiffs sought to hold defendants liable in a mesothelioma personal injury case notwithstanding their inability to establish that any one of the defendants was the cause in fact of the decedent's injury.<sup>24</sup> And again as here, the *Gaulding* plaintiffs relied on *Summers*, as well as this Court's ruling in *Landers v.*

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instructed that defendant could not be liable unless fires caused defendant's rail cars reached plaintiff's land), *overruled in part by Borsheim v. Great N. Ry. Co.*, 183 N.W. 519 (Minn. 1921).

<sup>24</sup> Plaintiffs' inability to establish causation in *Gaulding* was due to lack of evidence as to who had manufactured the product at issue rather than lack of evidence of sufficient exposure.

*East Texas Salt Water Disposal Co.*, 248 S.W.2d 731 (Tex. 1952), as purported support for their claim. See *Gaulding*, 772 S.W.2d at 68-69. This Court rejected the *Gaulding* plaintiffs' attempt to escape their causation burden, and the Court should do so here as well.

First, *Gaulding* explained that the issue in *Landers* was not causation, *i.e.*, whether each of the defendants' actions were "but for" causes of injury to the plaintiff. The *Landers* Court was reviewing a dismissal on the pleadings, and it "was unequivocally alleged" that each of the two defendants were responsible for the release of large volumes of salt water that had contaminated the plaintiffs' land and "contributed to the overall injury." *Gaulding*, 772 S.W.2d at 68; see *Landers*, 248 S.W.2d at 731-32. The issue instead was proof of damages, *i.e.*, whether the defendants could escape liability because the plaintiff could not establish the share of the damage that should be attributed to each defendant. See *Landers*, 248 S.W.2d at 734.

Second, *Gaulding* rejected application of *Summers* because “[a] crucial element to alternative liability is that all possible wrongdoers must be brought before the court.” *Id.* at 69. “When a plaintiff fails to join all possible defendants, alternative liability does not apply.” *Id.* Here, there are numerous possible defendants not before the court, see *Bostic*, 320 S.W.3d at 594-95, and Petitioners also cannot negate the possibility that Mr. Bostic’s mesothelioma was the result of idiopathic causes unrelated to any workplace or bystander asbestos exposures.<sup>25</sup> *Summers* is thus completely inapposite.

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<sup>25</sup> See, e.g., Christine Rake et al., *Occupational, Domestic and Environmental Mesothelioma Risks in the British Population: A Case Control Study*, 100 *Brit. J. Cancer* 1175, 1181 (2009) (unexplained cases accounted for 14% of male and 62% of female mesotheliomas in Britain); Mary Jane Teta et al., *US Mesothelioma Patterns 1973-2002: Indicators of Change and Insights into Background Rates*, 17 *Eur. J. Cancer Prevention* 525, 534 (2008) (upwards of 300 cases of mesothelioma every year “may be unrelated to asbestos exposure” and may “reflect spontaneous causes”); Brooke T. Mossman et al., *Asbestos: Scientific Developments and Implications for Public Policy*, 247 *Science* 294, 295 (1990) (“approximately 20 to 30% of mesotheliomas occur in the



Petitioners' contention that the "but for" causation requirement would preclude liability in cases involving concurrent causes is also spurious. This Court has repeatedly held that there can be multiple "but for" causes of an injury. *See Lee Lewis Const.*, 70 S.W.3d at 784; *Lear Siegler*, 819 S.W.2d at 471; *McClure*, 608 S.W.2d at 903. What is required, however, is that plaintiff establish that each of the alleged tortious actors is a cause in fact of injury to the plaintiff (either as an indivisible whole or in some concrete part). Petitioners did not make any such showing below. Therefore, the Court of Appeals ruling dismissing their claim should be affirmed.

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general population in adults not exposed occupationally to asbestos").

**CONCLUSION**

For the foregoing reasons, *amici* urge that the Court of Appeals ruling be affirmed.

August 22, 2013

Respectfully submitted

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**CERTIFICATE OF COMPLIANCE**

Relying on the word count function of the computer software used to prepare this document, the undersigned certifies that Brief of Amici American Coatings Association, American Chemistry Council and International Association of Defense Counsel contains 4,231 words (excluding the sections excepted under Tex. R. App. P. 9.4(i)(1)).

/s/ Richard O. Faulk \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of this brief was served by electronic service upon the following counsel of record on this 22nd day of August, 2013:

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# Exhibit

# A

REPORT

# Asbestos Bankruptcy Trusts

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An Overview of Trust Structure and Activity  
with Detailed Reports on the Largest Trusts

*Lloyd Dixon • Geoffrey McGovern • Amy Coombe*



INSTITUTE FOR CIVIL JUSTICE

## List of Bankruptcies with at Least Some Asbestos Liability

Table A.1 lists 96 companies that have declared bankruptcy with some asbestos liability, by filing date. Asbestos liability was the main cause of bankruptcy in some cases but only a peripheral cause in others. The table reports the date bankruptcy was filed and the date the reorganization plan was confirmed. Also listed is the name of the asbestos bankruptcy trust that was established, if any. The status of the trust is listed in the last column.

**Table A.1**  
**Chronological List of Bankruptcies with Some Asbestos Liability**

Company Name	Date Bankruptcy Filed	Date Reorganization Confirmed	Trust Established	Trust Status
UNR Industries	July 29, 1982	June 2, 1989	UNR Asbestos-Disease Claims Trust	Active
Unarco	July 29, 1982	June 2, 1989	UNR Asbestos-Disease Claims Trust	Active
Johns-Manville Corp.	August 1, 1982	July 15, 1987	Manville Personal Injury Settlement Trust	Active
Amatex Corp.	November 1, 1982	April 25, 1990	Amatex Asbestos Disease Trust Fund	Inactive
Waterman Steamship Corp.	December 1, 1983	June 19, 1986	—	—
Forty-Eight Insulations	April 19, 1985	May 16, 1995	Forty-Eight Insulations Qualified Settlement Trust	Inactive
Wallace and Gale Co.	November 16, 1985	June 27, 1998	Wallace and Gale Company Asbestos Settlement Trust	Inactive
Philadelphia Asbestos Corp. (Pacor)	July 1, 1986	November 30, 1989	Manville Personal Injury Settlement Trust	Active
Standard Insulations, Inc.	August 1, 1986	October 26, 1992	—	—
Prudential Lines, Inc.	November 4, 1986	December 15, 1989	PLI Disbursement Trust	Inactive

Table A.1—Continued

Company Name	Date Bankruptcy Filed	Date Reorganization Confirmed	Trust Established	Trust Status
McLean Industries	November 24, 1986	May 16, 1989	United States Lines, Inc. and United States Lines (S.A.) Inc. Reorganization Trust	Inactive
United States Lines	November 24, 1986	May 16, 1989	United States Lines, Inc. and United States Lines (S.A.) Inc. Reorganization Trust	Inactive
Gatke Corp.	March 2, 1987	August 9, 1991	—	—
Nicolet, Inc.	July 17, 1987	September 21, 1989	—	—
Todd Shipyards	August 17, 1987	Unknown	—	—
Raymark Corp./ Raytech Corp.	March 10, 1989	August 31, 2000	Raytech Corporation Asbestos Personal Injury Settlement Trust	Active
Delaware Insulations	May 22, 1989	September 9, 1992	—	—
Hillsborough Holding Co.	December 27, 1989	March 2, 1995	—	—
Celotex Corp.	October 12, 1990	December 6, 1996	Celotex Asbestos Settlement Trust	Active
Carey Canada, Inc.	October 12, 1990	October 6, 1996	Celotex Asbestos Settlement Trust	Active
National Gypsum	October 28, 1990	March 9, 1993	NGC Bodily Injury Trust	Active
Eagle-Picher Industries	January 7, 1991	November 18, 1996	Eagle-Picher Industries Inc. Personal Injury Settlement Trust	Active
H. K. Porter Co.	February 15, 1991	June 25, 1998	H. K. Porter Asbestos Trust	Active
Kentile Floors	November 20, 1992	December 10, 1998	—	—
American Shipbuilding, Inc.	November 4, 1993	October 11, 1994	—	—
Keene Corp.	December 3, 1993	June 13, 1996	Keene Creditors Trust	Active
Lykes Bros. Steamship	October 11, 1995	April 15, 1997	Lykes Tort Claims Trust	Active
Rock Wool Manufacturing	November 18, 1996	December 3, 1999	Rock Wool Mfg Company Asbestos Trust	Inactive
Brunswick Fabricators	November 30, 1997	Unknown	—	—



Table A.1—Continued

Company Name	Date Bankruptcy Filed	Date Reorganization Confirmed	Trust Established	Trust Status
M. H. Detrick	January 13, 1998	August 21, 2002	M. H. Detrick Company Asbestos Trust	Inactive
Fuller-Austin	September 4, 1998	November 13, 1998	Fuller-Austin Asbestos Settlement Trust	Inactive
Harnischfeger Corp.	June 7, 1999	May 18, 2001	—	—
Rutland Fire Clay	October 13, 1999	November 17, 2000	Rutland Fire Clay Company Asbestos Trust	Inactive
Asbestos and Insulation Corporation (A&I Corporation)	November 5, 1999	June 17, 2005	A&I Corporation Asbestos Bodily Injury Trust	Active
Babcock and Wilcox Co.	February 22, 2000	January 17, 2006	Babcock and Wilcox Company Asbestos Personal Injury Settlement Trust	Active
Pittsburgh Corning	April 16, 2000	n.y.c.	Pittsburgh Corning Corporation Asbestos PI Trust	Proposed
Stone and Webster Engineering	June 2, 2000	January 16, 2004	Stone and Webster Asbestos Trust	Active
Owens Corning Corp.	October 5, 2000	October 31, 2006	Owens Corning Fibreboard Asbestos Personal Injury Trust—Owens Corning Subfund	Active
Owens Corning Fibreboard	October 5, 2000	October 31, 2006	Owens Corning Fibreboard Asbestos Personal Injury Trust, Fibreboard Subfund	Active
E. J. Bartells	October 20, 2000	February 14, 2001	Bartells Asbestos Settlement Trust	Active
Burns and Roe Enterprises, Inc.	December 4, 2000	February 20, 2009	Burns and Roe Asbestos Personal Injury Settlement Trust	Active
Armstrong World Industries	December 6, 2000	August 18, 2006	Armstrong World Industries Asbestos Personal Injury Settlement Trust	Active
G-1 Holdings, Inc.	January 5, 2001	November 12, 2009	G-1 Asbestos Personal Injury Settlement Trust	Active
Murphy Marine Services	March 21, 2001	July 25, 2002	—	—

Table A.1—Continued

Company Name	Date Bankruptcy Filed	Date Reorganization Confirmed	Trust Established	Trust Status
W. R. Grace	April 1, 2001	n.y.c.	W. R. Grace and Co. Asbestos Personal Injury Settlement Trust	Proposed
Skinner Engine Co.	April 16, 2001	n.y.c.	Skinner Engine Co. Asbestos Trust	Proposed
United States Mineral Products	June 23, 2001	November 30, 2005	United States Mineral Products Company Asbestos Personal Injury Settlement Trust	Active
USG Corp.	June 25, 2001	June 15, 2006	United States Gypsum Asbestos Personal Injury Settlement Trust	Active
Insul Co.	September 4, 2001	June 7, 2005	—	—
Federal Mogul (Turner & Newall, Flexitallic, Ferodo)	October 1, 2001	November 13, 2007	Federal Mogul U.S. Asbestos Personal Injury Trust, Turner & Newall Subfund	Active
Federal Mogul (Federal Mogul Products/Wagner)	October 1, 2001	November 13, 2007	Federal Mogul U.S. Asbestos Personal Injury Trust, FMP Subfund	Active
Federal Mogul (Federal Mogul Corporation/Vellumoid)	October 1, 2001	November 13, 2007	Federal Mogul U.S. Asbestos Personal Injury Trust, Vellumoid Subfund	Active
Federal Mogul (Felt Products Manufacturing)	October 1, 2001	November 13, 2007	Federal Mogul U.S. Asbestos Personal Injury Trust, Fel-Pro Subfund	Active
Swan Transportation Co.	December 20, 2001	July 21, 2003	Swan Asbestos and Silica Settlement Trust	Active
North American Refractories Corp. (NARCO)	January 4, 2002	July 25, 2008	North American Refractories Company Asbestos Personal Injury Settlement Trust	Proposed
Kaiser Aluminum	February 12, 2002	May 11, 2006	Kaiser Aluminum & Chemical Corporation Asbestos Personal Injury Trust	Active
J. T. Thorpe, Inc.	February 12, 2002	January 19, 2006	J. T. Thorpe Settlement Trust	Active
Global Industrial Technologies (Harbison-Walker)	February 14, 2002	November 13, 2007	DII Industries, LLC Asbestos PI Trust	Active
A. P. Green	February 14, 2002	December 16, 2003	APG Asbestos Trust	Proposed

Table A.1—Continued

Company Name	Date Bankruptcy Filed	Date Reorganization Confirmed	Trust Established	Trust Status
Plibrico Co.	March 13, 2002	January 30, 2006	Plibrico 524(g) Trust	Active
Porter-Hayden Co.	March 15, 2002	July 5, 2006	Porter Hayden Bodily Injury Trust	Active
Special Metals Corp.	March 27, 2002	September 29, 2003	—	—
Shook and Fletcher	April 8, 2002	October 29, 2002	Shook and Fletcher Asbestos Settlement Trust	Active
ARTRA Group, Inc.	June 3, 2002	January 25, 2007	ARTRA 524(g) Asbestos Trust	Active
Asbestos Claims Management Corp. (ACMC)	August 19, 2002	June 5, 2003	NGC Bodily Injury Trust	Active
AC&S	September 16, 2002	May 6, 2008	ACandS Asbestos Settlement Trust	Active
A-Best Products	September 20, 2002	June 7, 2004	A-Best Asbestos Settlement Trust	Active
J. T. Thorpe Co.	October 1, 2002	March 3, 2004	J. T. Thorpe Company Successor Trust	Active
Western MacArthur/ Western Asbestos	November 22, 2002	January 27, 2004	Western Asbestos Trust	Active
Combustion Engineering	February 17, 2003	March 1, 2006	Combustion Engineering 524(g) Asbestos PI Trust	Active
Muralo Co.	May 20, 2003	December 21, 2007	Muralo Trust	Inactive
C. E. Thurston	August 18, 2003	March 30, 2006	C. E. Thurston and Sons Asbestos Trust	Active
Congoleum Corp.	December 1, 2003	June 8, 2010	Congoleum Plan Trust	Active
Mid-Valley, Inc. (Halliburton)	December 16, 2003	July 21, 2004	DII Industries, LLC Asbestos PI Trust	Active
Oglebay Norton Co. (ONCO)	February 23, 2004	November 7, 2004	—	—
Utex Industries	March 26, 2004	June 16, 2004	Utex Industries, Inc. Successor Trust	Active
Special Electric	April 15, 2004	December 21, 2006	—	—
Flintkote Co./ Flintkote Mines	May 1, 2004	n.y.c.	Flintkote Company and Flintkote Mines Limited Asbestos Personal Injury Trust	Proposed
Quigley Co. (Pfizer)	September 3, 2004	n.y.c.	Quigley Company, Inc. Asbestos PI Trust	Proposed
API, Inc.	January 6, 2005	May 25, 2006	API, Inc. Asbestos Settlement Trust	Active

Table A.1—Continued

Company Name	Date Bankruptcy Filed	Date Reorganization Confirmed	Trust Established	Trust Status
Lake Asbestos of Quebec, Ltd.	August 9, 2005	Unknown	ASARCO LLC Asbestos Personal Injury Settlement Trust	Active
ASARCO, LLC	August 9, 2005	November 13, 2009	ASARCO LLC Asbestos Personal Injury Settlement Trust	Active
Brauer Supply Co.	August 22, 2005	January 5, 2007	Brauer 524(g) Asbestos Trust	Active
Dana Corporation	March 3, 2006	December 26, 2007	—	—
ABB Lummus Global	April 21, 2006	July 21, 2006	Lummus 524(g) Asbestos PI Trust	Active
Lloyd E. Mitchell Co.	June 6, 2006	Unknown	—	—
Thorpe Insulation Co.	October 15, 2007	n.y.c.	Thorpe Insulation Company Asbestos Personal Injury Settlement Trust	Proposed
Pacific Insulation Co.	October 31, 2007	n.y.c.	Thorpe Insulation Company Asbestos Personal Injury Settlement Trust	Proposed
Hercules Chemical Co.	September 18, 2008	December 23, 2009	—	—
Christy Refractories Co. LLC	October 29, 2008	n.y.c.	—	—
T. H. Agriculture and Nutrition, LLC (THAN)	November 24, 2008	October 26, 2009	T. H. Agriculture and Nutrition, LLC Asbestos Personal Injury Trust	Active
Plant Insulation Co.	March 13, 2009	n.y.c.	—	—
General Motors Corp.	June 1, 2009	n.y.c.	Whether a trust will be established is uncertain	—
Durabla Manufacturing Co.	April 12, 2010	n.y.c.	Whether a trust will be established is uncertain	—
Bondex International Inc./ Specialty Products Holding Corp.	May 31, 2010	n.y.c.	Trust not yet named	—
Garlock Sealing Technologies, LLC	June 5, 2010	n.y.c.	Trust not yet named	—

SOURCES: Plevin, Davis, and Bloomberg (2009); bankruptcy documents.

NOTE: n.y.c. = not yet confirmed.