



TEXAS SUPREME COURT REJECTS “ANY EXPOSURE” CAUSATION IN ASBESTOS LITIGATION

by Eric G. Lasker and Richard O. Faulk

The Texas Supreme Court has firmly rejected the latest effort to reopen the floodgates for asbestos litigation in Texas. See *Bostic v. Georgia-Pacific*, ___ S.W.3d ___, No. 10-0775 (Tex., July 11, 2014).¹ The decision reflects the Court’s consistent requirement for quantification of exposures to a particular defendant’s products—as opposed to fictional presumptions purportedly justified by plaintiffs’ difficulties in proving such exposures.

In 2007, the Texas Supreme Court sharply limited plaintiffs’ ability to bring asbestosis claims against non-bankrupt secondary asbestos defendants by requiring plaintiffs to establish an “approximate quantum” of the exposure to a defendant’s product sufficient to cause that disease. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 774 (Tex. 2007). After failing to persuade the Texas legislature to replace the *Flores* standard with a more liberal causation test, plaintiffs’ counsel turned their focus to mesothelioma, contending that differences between mesothelioma and asbestosis render *Flores* inapplicable in mesothelioma cases. Plaintiffs’ counsel and their experts asserted that “any exposure” to asbestos could cause mesothelioma—and hence, they were not required to prove the details of exposure to each defendant’s product.

Plaintiffs’ counsel’s strategy initially proved successful when the *Bostic* plaintiffs obtained an \$11.6 million judgment against Georgia-Pacific. As is standard in asbestos litigation, Mr. Bostic’s work history reflected multiple sources of potential exposures to asbestos, including the most hazardous amphibole fibers historically found in insulation products. Plaintiffs alleged, however, that Mr. Bostic’s mesothelioma was caused by purported childhood exposure to asbestos in Georgia-Pacific joint compound. Plaintiffs did not present evidence of the level of Mr. Bostic’s alleged exposure via the joint compound. Instead, they claimed that Mr. Bostic’s cumulative exposures caused the disease and that “any exposure” to the defendants’ asbestos-containing products sufficed to sustain the verdict. The defendants disagreed. They argued that plaintiffs were required to prove “but for” causation—a showing that the decedent would not have developed mesothelioma in the absence of exposure to Georgia-Pacific joint compound, in particular. On appeal, the court of appeals agreed with defendants and reversed the judgment. Plaintiffs then appealed to the Texas Supreme Court—which initially denied review—but then did a surprising about-face and granted it.

The Supreme Court affirmed the court of appeals decision—but not all of its reasoning. The Court clearly rejected plaintiffs’ argument that “any exposure” to asbestos was sufficient to support a finding of causation, but it also clarified that plaintiffs were not required to prove that their decedent’s disease would not have occurred “but for” exposure to a particular defendant’s product. Instead, the Court held that plaintiffs were required to prove that that each defendant’s product was a “substantial factor” in causing the disease.

¹ The majority, concurring and dissenting opinions are available at <http://www.supreme.courts.state.tx.us/historical/071114.asp> (last visited July 18, 2014).

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Following the Texas Supreme Court's ruling, plaintiffs' counsel have attempted to spin the Court's ruling on "but for" causation as reopening the door to mesothelioma litigation in Texas, if only by a crack. But this argument ignores a more fundamental principle that informed the Court's opinion, namely, that an asbestos plaintiff is required to establish causation with respect to *each defendant's specific product*. In *Bostic*, the Texas Supreme Court merged two separate lines of legal authority in Texas, the first setting forth plaintiff's burden to present scientifically reliable evidence of causation, *see Flores; Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), and the second setting forth plaintiff's burden to prove that an individual defendant manufactured the product alleged to give rise to the harm. *Gaulding v. Celotex Corp.*, 772 S.W.2d 66 (Tex. 1989).

In *Gaulding*, a mesothelioma case, the Supreme Court squarely rejected methods of collective liability, such as alternative liability, enterprise liability, and market-share liability and embraced the "fundamental principle" that a plaintiff must prove that the defendants supplied the product that caused the injury. Although some advocates may have construed *Gaulding* merely to require product identification, the *Bostic* Court interwove it as an important thread in a tapestry of precedents to show that legally sufficient exposure to the *particular* defendant's product must cause the illness. Under *Bostic*, "cumulative" exposures to the products of many defendants is legally insufficient to establish that exposure to a specific defendant's product was a "substantial factor" in causing the disease. Given *Gaulding's* mandate to focus on the responsibility of individual defendants, the exposures must be allocated and demonstrated with particularity. Only those specific product exposures which are, in themselves, legally sufficient to cause mesothelioma will support a judgment.

Viewed in this perspective, *Gaulding* serves as the linchpin to the *Bostic* decision. Under *Bostic*, causation evidence can only be legally sufficient in the context of a particular defendant's relationship to the plaintiffs' injury. Sufficiency in that context—and in that context only—can justify imposing liability. *Bostic* is perhaps the first Texas Supreme Court case to consolidate the reasoning of those prior cases into a cohesive principle of law. In this sense, *Bostic* isn't new law in Texas, but it is a clarifying and refreshing restatement. Texas still refuses to indulge fictions that shift traditional burdens to justify awarding damages to plaintiffs who cannot supply adequate and particularized proof of causation.

With this rule of product-specific proof in place, the Court then turned to the quantum of causation proof that would be required to establish liability. To be a "substantial factor," there must be legally sufficient evidence that demonstrates that the plaintiff was exposed to a level of asbestos from each particular defendant's product sufficient to cause the disease. Under *Flores*, plaintiff must establish the quantum of asbestos exposure arising from use of the product. Under *Havner*, there must be epidemiological evidence that the level of exposure to the particular defendant's product was at least sufficient to "double the risk" of developing the disease. Moreover, in the context of multiple exposures from different products, the increased risk from exposure to the defendant's product must be substantial in light of the risks from other product exposures. Thus, even if there was epidemiologic evidence of a doubling of the risk from exposure to a defendant's product, that still would not constitute a substantial factor if the plaintiff had other exposures that increased his risk by a factor of 10,000.

These holdings should firmly close the door against the vast majority of asbestos claims currently being pursued in Texas against secondary and tertiary asbestos defendants, whose products largely contained less friable and less hazardous chrysotile fibers. In *Bostic*, for example, the Supreme Court held that plaintiffs had not presented any epidemiological evidence that the types of alleged exposures to Georgia-Pacific's product was sufficient to "double the risk" of developing mesothelioma. Therefore, Georgia-Pacific could not be held liable. Plaintiffs bringing claims against other similarly-situated defendants, such as brake manufacturers, will likewise be unable to meet this burden.

Thus, while the Texas Supreme Court rejected a formalistic adherence to "but for" causation in mesothelioma, the essence of "but for" still survives because, "but for" legally sufficient proof of exposure to the particular defendant's product, the defendant cannot be held liable. The requirement of legally sufficient proof applicable to exposure to each defendant's product remains, and the challenges associated with meeting that requirement remain the same. Perhaps the cohesiveness of this holding will influence other states to define "substantial factor" similarly, or perhaps they will cleave to regrettable "solutions" that rely on fictions, as opposed to evidence. In Texas, however, the asbestos litigation floodgates remain in the same position as they were before *Bostic* was decided—tightly closed.