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TOXIC TORT—CAUSATION IN ASBESTOS CLAIMS—THE TEXAS SUPREME COURT CREATES NEW CAUSATION REQUIREMENT AND LEAVES NUMEROUS VICTIMS WITHOUT A REMEDY

Thomas L. Arnold*

THE Texas Supreme Court recently released an opinion that severely thwarts a plaintiff's ability to satisfy a prima facie case for causation of asbestos-related injuries. In general, a plaintiff meets his burden of proof where circumstantial evidence supports a reasonable inference of substantial causation.¹ Historically, circumstantial evidence was sufficient to support a reasonable inference of substantial causation when the frequency-regularity-proximity test was met.² To meet the test, there must be evidence of exposure to asbestos fibers originating from the defendant's product: (1) over some extended period of time; (2) on a regular basis; and (3) in proximity to the plaintiff.³ In *Borg-Warner Corp. v. Flores*, the Texas Supreme Court held that in addition to proof of exposure satisfying the frequency-regularity-proximity test, the plaintiff must also produce evidence of exposure to an approximate dose that is sufficient to be a substantial factor in causing the asbestos-related disease.⁴ This holding misapplies precedent. Additionally, the holding is overly broad and should not apply to mesothelioma cases for three reasons: (1) all levels of exposure to asbestos increase the risk of contracting mesothelioma; (2) science has not identified a threshold level of exposure below which mesothelioma will not occur; and (3) the necessary level of exposure varies with individual idiosyncrasy.

Arturo Flores, a retired brake mechanic, worked for thirty-five years in

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1. *Slaughter v. S. Talc Co.*, 949 F.2d 167, 171 (5th Cir. 1991); *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986); *Celotex Corp. v. Tate*, 797 S.W.2d 197, 205 (Tex. App.—Corpus Christi 1990, writ dismissed).

2. *Slaughter*, 949 F.2d at 171; *Lohrmann*, 782 F.2d at 1162-63.

3. *Slaughter*, 949 F.2d at 171; *Lohrmann*, 782 F.2d at 1162-63.

4. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007).

the Sears Automotive Department and now suffers from asbestosis.⁵ From 1972 to 1975, Flores worked on Borg-Warner disk brake pads.⁶ These brake pads contained chrysotile asbestos fibers.⁷ Depending on the type of pad, the chrysotile asbestos fibers comprised seven to twenty-eight percent of the pad's entire weight.⁸ In a given week, Flores performed roughly twenty brake jobs, five to seven of which involved work on Borg-Warner pads.⁹ Before installing the new brake pads, Flores ground the pads in an eight-by-ten foot room.¹⁰ While grinding was necessary to minimize brake squealing, it also produced visible clouds of dust that Flores inhaled.¹¹

At trial, Flores produced expert testimony to prove that asbestos exposure from Borg-Warner brake pads caused his asbestosis.¹² Dr. Dinah Bukowski, a board-certified pulmonologist, testified that she diagnosed Flores with asbestosis in 1998.¹³ Dr. Bukowski based her diagnosis on two facts: an examination revealing interstitial lung disease with a latency period characteristic of asbestosis and Flores' work as a brake mechanic.¹⁴ She testified that "every asbestos exposure contributes to asbestosis," "brake dust has been shown to . . . have asbestos fibers," and "that brake dust can cause asbestosis."¹⁵ However, Dr. Bukowski acknowledged that "everyone is exposed to asbestos in the ambient air"¹⁶ In addition, Dr. Castleman, an expert on asbestos disease in brake repair workers, testified that "levels of exposure to asbestos fiber in the air from brake servicing jobs . . . could be significant."¹⁷ He testified that brake mechanics can be exposed to asbestos "by grinding brake parts" because the process produces respirable asbestos fibers.¹⁸ Specifically, Dr. Castleman testified that "[r]espirable asbestos fibers still remain" in the brake dust produced after grinding the brake pads.¹⁹ He also described literature pertaining to the auto mechanic's trade to emphasize the "hazardous" nature of grinding brake pads given the "high levels of asbestos exposure."²⁰ On cross-examination, Dr. Castleman did concede he only knew Borg-Warner manufactured brake pads and did not specifically research Borg-Warner products.²¹

5. *Id.* at 766.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 766-67.

13. *Id.* at 766. "Asbestosis is a 'form of interstitial lung disease'" that causes scarring resulting from the inhalation of actual asbestos bodies or asbestos fibers. *Id.*

14. *Id.*

15. *Id.* at 769, 771.

16. *Id.* at 767.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

Flores brought suit for damages arising from his use of the Borg-Warner brake pads.²² The district court found Borg-Warner liable under theories of negligence and strict liability, and Flores was awarded \$153,200 in damages.²³ The court of appeals affirmed the district court's decision holding that Flores had produced more than a scintilla of evidence on causation.²⁴ The appellate court noted that "[i]n the context of asbestos-related claims, if there is sufficient evidence that the defendant supplied any of the asbestos to which the plaintiff was exposed, then the plaintiff has met the burden of proof."²⁵

The Texas Supreme Court reversed and rendered judgment for Borg-Warner.²⁶ The court found the evidence legally insufficient to support a finding that Borg-Warner brake pads were a substantial factor in causing Flores' asbestosis.²⁷

As a result of this decision, proof of frequency, regularity, and proximity is necessary, but no longer sufficient, for exposure to be a substantial factor in causing an asbestos-related disease. Specifically, the Texas Supreme Court held that a plaintiff must produce "[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."²⁸ In adopting this new requirement, the court reasoned that the dose received by the plaintiff is the "single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect."²⁹ Even if a plaintiff meets the frequency-regularity-proximity test, without evidence of dose, a jury cannot evaluate the quantity of respirable asbestos to which plaintiff may have been exposed and whether those amounts were sufficient to cause asbestosis.³⁰

In developing this new requirement, the Texas Supreme Court relied on a combination of Section 431 of the *Restatement (Second) of Torts* and *Lohrmann v. Pittsburgh Corning Corp.*, a Fourth Circuit Court of Appeals opinion discussing the frequency-regularity-proximity test.³¹ Agreeing with *Lohrmann*, the Texas Supreme Court stated that satisfaction of the frequency-regularity-proximity test is required to prove that exposure was a substantial factor in causing harm.³² However, the court also noted that it is implicit in the *Lohrmann* decision that mere satisfac-

22. *Borg-Warner Corp. v. Flores*, 153 S.W.3d 209 (Tex. App.—Corpus Christi 2004), *rev'd*, 232 S.W.3d 765 (Tex. 2007).

23. *Id.* at 213.

24. *Id.* at 215.

25. *Id.* at 213.

26. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 774 (Tex. 2007).

27. *Id.* at 765–66.

28. *Id.* at 773.

29. *Id.* at 770 (quoting David L. Eaton, *Scientific Judgment and Toxic Torts—A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & POL'Y 5, 11 (2003)).

30. *Id.* at 771–72.

31. *Id.* at 770.

32. *Id.*

tion of the frequency-regularity-proximity test is insufficient to satisfy causation because the test does not fully encompass the substantial factor requirement.³³ Section 431 of the *Restatement (Second) of Torts* requires that the exposure be a “substantial factor” in causing the disease.³⁴ Therefore, to fully encompass the substantial factor requirement, in addition to proving frequency, regularity, and proximity, there must also be a requirement that plaintiff produce evidence that he was exposed to asbestos fibers in an amount sufficient to cause the asbestos-related disease.³⁵ Allowing a plaintiff to meet his burden of proof by merely showing frequency, regularity, and proximity of exposure to a *de minimis* level of asbestos ignores the requirement that exposure be a substantial factor in causing the asbestos-related disease.³⁶

In creating this new dosage requirement, the court relied on the *Lohrmann* court’s unremarkable declaration that a plaintiff does not meet his burden of proof on causation solely by presenting any evidence that a company’s asbestos-containing product was at the workplace while the plaintiff was also at the workplace.³⁷ In addition, the court cited two toxicology reference books for the proposition that the actual dosage of an element makes it dangerous, rather than the sole character of the element itself.³⁸ Another text was cited for the proposition that asbestosis appears to be dose-related.³⁹ Accordingly, the court concluded that to meet the burden of proof on causation, there must be evidence that the plaintiff’s dose exceeded a threshold level of dosage that produces adverse health effects.⁴⁰

Applying this standard to the facts of the case, the Texas Supreme Court concluded that Flores failed to produce legally sufficient evidence that Borg-Warner products were a substantial factor in causing his asbestosis.⁴¹ Although there was evidence that Flores was exposed to Borg-Warner’s asbestos-containing product on a regular basis, over an extended period of time, and in proximity to where he worked, there was no

33. *Id.*

34. *Id.* (“The word ‘substantial’ is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause” (quoting RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965))).

35. *Id.* at 772.

36. *Id.*

37. *Id.* at 773.

38. *Id.* at 770 (citing Bernard D. Goldstein & Mary Sue Heneifin, *Reference Guide on Toxicology*, in FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 401, 403 (2d ed. 2000); CURTIS D. KLAASSEN, CASARETTE AND DOULL’S TOXICOLOGY: THE BASIC SCIENCE OF POISONS chs. 1, 4 (6th ed. 2001)). *See also id.* (“[A]ll substances are poisonous—there is none which is not; the dose differentiates a poison from a remedy.” (quoting Eaton, *supra* note 29, at 5)).

39. *Id.* at 771 (“[T]he more one is exposed [to asbestos], the more likely the disease is to occur, and the higher the exposure the more severe the disease is likely to be” (quoting 3 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY, § 28:22 (2007))).

40. *Id.* at 765, 773.

41. *Id.* at 774.

evidence of dose.⁴² Dr. Castleman testified that brake mechanics can be exposed to respirable asbestos fibers when grinding brake pads, and Dr. Bukowski testified that every asbestos exposure contributes to asbestosis.⁴³ However, neither expert provided evidence of Flores' approximate dose. Absent any evidence of dose, the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts were sufficient to cause asbestosis.⁴⁴ Flores failed to meet his burden of proof on causation because there was no defendant-specific evidence of the amount of his exposure or evidence that the exposure amount was of sufficient magnitude to exceed the threshold level known to cause chemically-induced adverse health effects.⁴⁵

The additional dosage requirement for establishing causation in an asbestos-related injury is based on a misapplication of precedent. The Texas Supreme Court improperly cited *Lohrmann* for the proposition that substantial factor causation in an asbestos case entails more than a finding of exposure that merely meets the frequency-regularity-proximity test.⁴⁶ In *Lohrmann*, the court held that evidence regarding two defendants' products was insufficient where there was *no* evidence of exposure and *no* evidence showing when the product was used.⁴⁷ *Lohrmann* simply stands for the proposition that mere proof that a plaintiff and a certain asbestos product were at a large shipyard at the same time, without testimony of exposure, is insufficient to satisfy the proximity prong of exposure.⁴⁸ To be sure, applying *Lohrmann*, the Fifth Circuit in *Slaughter* held that the proximity prong was met where evidence demonstrates that defendants' products are likely to be present at a specific location near plaintiff's workplace.⁴⁹ The Fifth Circuit reasoned that plaintiffs are likely to have been exposed to the products if they worked *near* those specific locations.⁵⁰ This is a far cry from requiring proof that the actual amount of exposure exceeded a certain "threshold level." While *Lohrmann* clearly stands for the proposition that substantial factor causation is only satisfied where exposure is frequent, on a regular basis, and in proximity to the plaintiff,⁵¹ the opinion never endorses the idea that anything more is required. Interpreting the opinion to implicitly require something more and assuming the "something more" is a dosage exceeding a certain threshold is misapplication of the case. Out of this erroneous interpretation, the Texas Supreme Court crafted an unprecedented and overly stringent exposure requirement.

42. *Id.* at 771.

43. *Id.*

44. *Id.* at 771-72.

45. *Id.* at 773.

46. *Id.* at 770.

47. *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-64 (4th Cir. 1986).

48. *Id.* at 1162.

49. *Slaughter v. S. Talc Co.*, 949 F.2d 167, 172-73 (5th Cir. 1991).

50. *Id.*

51. *Lohrmann*, 782 F.2d at 1164.

Even if we assume a general threshold dosage requirement is appropriate to prove causation of asbestosis, the *Borg-Warner* holding is overly broad and should not apply to mesothelioma cases. Although it may be true that exposures to certain elements are only toxic at sufficient doses, creating a general threshold dosage requirement is inappropriate in mesothelioma cases. In contrast to asbestosis, mesothelioma is a form of cancer that may be caused by brief, low-level or indirect exposures to asbestos.⁵² In mesothelioma cases courts have specifically acknowledged that “each exposure to asbestos over a period of time, regardless of the degree or concentration, increases the probability that a person will get an asbestos-related disease.”⁵³ The injurious effect of inhalation is cumulative.⁵⁴ If *all* levels of exposure to asbestos increase the probability of contracting mesothelioma, then asbestos elements are always at a “sufficient dose” to cause a harmful increase in risk to some degree.⁵⁵ Since any asbestos exposure can increase the risk of contracting mesothelioma, requiring plaintiffs to satisfy a dosage requirement is illogical. Considering these facts, plaintiffs’ evidence should be sufficient to support causation where the amount of asbestos exposure satisfies the frequency-regularity-proximity test.

The court’s reliance on scientific journals is misplaced as well. Scientific studies have not conclusively identified a threshold level of asbestos exposure below which mesothelioma will not occur in humans or animals.⁵⁶ There is no basis for courts to require plaintiffs to meet a threshold that is scientifically non-existent and that has not been definitively determined. Additionally, the necessary intensity of exposure to cause mesothelioma varies with individual idiosyncrasy⁵⁷ Even if a general

52. FAIGMAN, *supra* note 39, § 26.24.

53. *N. Am. Refractory Co. v. Easter*, 988 S.W.2d 904, 910 (Tex. App.—Corpus Christi 1999, pet. denied).

54. *Id.* at 911 (citing *Sheffield v. Owens-Corning Fiberglass Corp.*, 595 So. 2d 443, 456 (Ala. 1992)).

55. *See id.* at 910 (“[I]nhalation of asbestos dust, even with relatively light exposure, can produce asbestos-related diseases.”).

56. Victor L. Roggli & Anupama Sharma, *Analysis of Tissue Mineral Fiber Content*, in *PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES* 309, 323-24 (Victor L. Roggli et al. eds., 2004); Harvey I. Pass et al., *Malignant Pleural Mesothelioma*, 28 *CURRENT PROBLEMS IN CANCER* 93, 97 (2004); Alberto M. Marchevsky, MD & Mark R. Wick, MD, *Current Controversies Regarding the Role of Asbestos Exposure in the Causation of Malignant Mesothelioma: The Need for an Evidence-Based Approach to Develop Medicolegal Guidelines*, 7 *ANNALS OF DIAGNOSTIC PATHOLOGY* 321, 323 (2003); Ozkan Yetkin, Letter to the Editor, *Malignant Pleural Mesothelioma: Occupational and Environmental Exposure*, 100 *RESPIRATORY MEDICINE* 1121, 1121-22 (2006); KWOK Chiu Chang & Chi Chiu Leung, Letter to the Editor, *Malignant Mesothelioma: A Minor Issue About Gender Ratio and a Major Issue About Regulatory Policies*, 100 *Respiratory Medicine* 1123, 1123-24 (2006); FAIGMAN, *supra* note 39, § 26:24.

57. *Celotex Corp. v. Tate*, 797 S.W.2d 197, 203 (Tex. App.—Corpus Christi 1990, writ dismissed); *see also* FAIGMAN, *supra* note 39, § 26:28 (noting that families which have lost the heterozygosity of the Wilms’ tumor suppressor gene have an increased risk of developing mesothelioma); Monica Neri et al., *Pleural Malignant Mesothelioma, Genetic Susceptibility and Asbestos Exposure*, 592 *MUTATION RESEARCH* 36, 37 (2005) (confirming that individuals with a mEH low activity genotype and a NAT2 fast acetylator genotype both have an increased risk of developing mesothelioma). These genetic predispositions, evidenced by

threshold did exist, an overall threshold level is unsuitable since the requisite amount of exposure differs with each individual. Whether one believes that each exposure increases the risk of contracting mesothelioma or only accepts the truism that science has not yet identified a threshold level low enough to not cause mesothelioma, requiring plaintiffs to prove that their exposure exceeded a threshold level of dosage is irrational.

In *Borg-Warner v. Flores*, the Texas Supreme Court erroneously added the requirement that a plaintiff must produce evidence of approximate dosage of asbestos that exceeds a threshold level in order to satisfy a prima facie case for substantial factor causation.⁵⁸ This new requirement was derived from a misapplication of precedent, ignores that each exposure to asbestos increases risk of disease, and does not consider that requisite level of exposure varies with individual sensitivity. Additionally, scientific studies have not identified a threshold level of exposure below which mesothelioma will not occur. In creating the new dosage requirement, the court places an unprecedented burden on plaintiffs to meet an indefinite standard that has not been proven to exist. Plaintiffs suffering from asbestos-related diseases, who are otherwise able to meet the frequency-regularity-proximity test, will no longer have claims against the entities responsible for their diseases unless they can produce evidence of actual dosage. This is particularly troubling considering exposure may have occurred more than twenty years before the disease actually manifests itself. In an area of such scientific uncertainty, the Texas Supreme Court should have held the frequency-regularity-proximity test sufficient rather than developing a new requirement that is unsupported by precedent and based on unsettled and strained scientific theories.

hereditary susceptibility to mesothelioma, are clear proof that the necessary level of exposure varies between individuals.

58. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 772-73 (Tex. 2007).

