TADC ENVIRONMENTAL/TOXIC TORT NEWSLETTER

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INTRODUCTION

This edition of the ENVIRONMENTAL/TOXIC TORT NEWSLETTER contains decisions from the Texas Courts of Appeals.

We have attempted to analyze and/or provide pertinent excerpts from cases which either originated from an environmental/toxic tort realm, or address some issue that is relevant to same. Due to space limitations, we obviously cannot include every issue, fact or argument and so we tried to pull out some of the most precedential, defining and/or reinterpreted issues currently at hand. Obviously, many of the decisions may be subject to rehearing or *en banc* consideration and should therefore be used "with caution" in the future. The following are excerpts from opinions which have addressed issues relevant to this topic. Quotation marks have been omitted but the following consists of quotes from the opinions in the form of a summary.

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BORG-WARNER CORPORATION v. FLORES

Cause No. 05-0189, Texas Supreme Court
June 8, 2007

Whether a person's exposure to "some" respirable fibers is sufficient to show that a product containing asbestos was a substantial factor in causing asbestosis

FACTS: This is an asbestos case where the plaintiff sued the defendant, Borg-Warner, for damages arising out of the plaintiff's use of brake pads manufactured by the defendant that contained asbestos. The case was tried to a jury, which found that the defendant was liable under theories of negligence and strict liability, and also found that the defendant acted with malice. The jury awarded both compensatory and punitive/exemplary damages. The appellate court affirmed the judgment of the trial Court. Plaintiff was a mechanic who used the defendant's products for a period of time in the seventies, and inhaled dust created by the grinding down of the defendant's products, an act that was necessary to their use. The products all contained various percentages of asbestos fibers, which were released into the air by the grinding of the products.

At the trial the Plaintiff presented the testimony of only two experts, Dr. Dinah Bukowski, a board-certified pulmonologist and Dr. Barry Castleman, Ph.D., an independent consultant in the field of toxic substance control. Dr. Bukowski diagnosed Plaintiff with interstitial lung disease based on her review of x-rays and a single office visit. She also related her asbestosis finding to the Plaintiff's work as a brake mechanic coupled with an adequate latency period. Dr. Castleman testified that brake mechanics can be exposed to asbestos either by grinding brake parts or by blowing out brake housing doing brake service work.

There was also testimony that the Plaintiff had been a 50 pack per year smoker for approximately 35 years.

HOLDING: The court of appeal's judgment was reversed, and judgment was rendered for the manufacturer.

The Texas Supreme Court addressed the issue of causation. They held that in asbestos cases, a court must determine whether the asbestos in a defendant's product was a ***substantial factor*** in bringing about the plaintiff's alleged harm. The Supreme Court also stated that to support a reasonable inference of substantial causation from circumstantial evidence, a plaintiff must prove more than a casual or minimum contact with the product. Instead, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked. The Court reiterated that substantial factor causation need not be reduced to mathematical precision. Rather, the Court held that Defendant-specific evidence relating to the approximate does to which the plaintiff was exposed, coupled with evidence the does was a substantial factor in causing the asbestos-related disease would suffice.

However, in the instant case, the Supreme Court found that the Plaintiff did not meet his burden in establishing causation. In regard to toxicology, one of the central tenants is that "the does makes the poison." The Court found that in regard to asbestosis, the plaintiff must show that the exposure or does levels he was exposed to were comparable to or greater than epidemiological studies on which he relied. The Supreme Court apparently agreed that the evidence showed the frequency-regularity-proximity prong of the *Lohrmann* test was met (i.e. the Plaintiff worked in a small room, grinding brake pads composed partially of embedded asbestos fibers, five to seven times per week over a four year period). Regardless, the Court found that since the Plaintiff did not produce sufficient evidence concerning the amount of asbestos that he had inhaled, he could not meet the "*de minimus*" prong. Therefore, the evidence was not sufficient to meet the requirements of substantial factor causation.

GEORGIA-PACIFIC CORP. v. STEPHENS

Cause No. 01-05-00132-CV
Court of Appeals of Texas, First District, Houston
July 26, 20007

Whether evidence sufficient to show that a painter worked "in close proximity" to asbestos-containing joint compound, generally, was legally sufficient to show causation in an asbestos claim

FACTS: This is an asbestos case wherein Plaintiff was employed in occupations for over thirty years that exposed him to asbestos and asbestos-containing products. The plaintiff began working as a commercial painter in 1954 wherein he was responsible for painting various commercial buildings including the exterior and interior walls, the boiler room and pipes, and any equipment located within the buildings wherein he was exposed to asbestos and asbestos containing products. At least some of the buildings he painted were new or were under renovation wherein sheetrockers and tapes applied joint compound to connect adjoining pices of sheetrock. Once the compound dried it was sanded down causing a great deal of dust and the Plaintiff was often in the room while the sheetrockers performed their tasks. Once they were finished, the Plaintiff would sweep the dust from the walls and floors and would proceed to pain. Occasionally, the Plaintiff would also mix and sand the joint compound himself. In January 2003, the Plaintiff was diagnosed with a right pleural biphasic mesothelioma. Plaintiff, as well as his coworkers, recalled seeing the Georgia-Pacific brand of joint compound, amount other brands, at some of their job sites.

A jury found in favor of the Plaintiff resulting in a final judgment Georgia Pacific for $1,903,878.00. The Plaintiff died shortly after the trial.

HOLDING: The judgment was reversed, and judgment was rendered for the manufacturer.

The appellate court held that under the principles set forth in the Borg-Warner decision, the expert testimony presented was legally insufficient to support the jury's causation finding. The Court stated that causation in toxic tort cases is often discussed in terms of general and specific causation. General causation was not challenged here. However, under Texas law, a fundamental principle of traditional products liability law is that the plaintiff must prove that the defendants supplied the product which caused the injury. The appellate court began its analysis by emphasizing that the Texas Supreme court in Borg-Warner, had rejected the earlier "any exposure" test for specific causation and adopted a *Lohrmann/Havner* "substantial-factor" causation standard.

Using the principles set forth in Borg-Warner, the Court analyzed the lay and expert testimony that was presented at trial regarding the Georgia Pacific compound as a cause of the Plaintiff's mesothelioma. The Plaintiff as well as several co-workers specifically recalled the Plaintiff working with and around the Georgia Pacific joint compound in question and being

exposed to dust from the sheetrocking/sanding process. In addition, the Plaintiffs' called three experts including an industrial hygienist, a pathologist, and a board certified specialist in pulmonary disease, internal medicine, and critical care to testify concerning causation. However, while the industrial hygienist testified that he believed the Plaintiff's exposures to the Georgia Pacific compound were at a level and of the type known to contribute the development of asbestos-related diseases, he could not come up with a range of likely does that the Plaintiff would have had to the joint compound nor could he estimate the amount of time the Plaintiff was actually exposed to joint compound generated asbestos dust in excess of OSHA permissible levels. The expert did not testify as to the minimum level of exposure to asbestos dust from joint compound that could lead to an increased risk of mesothelioma. Rather, he observed that every exposure contributes to the potential development of the disease. The pathologist testified that the type of asbestos found in the Georgia Pacific compound causes dose-related asbestos disease that would differ by individual. He testified that any exposure greater than "Backgournd" exposure causes their mesothelioma. He also testified that mesothelioma is a does-responsive disease, and that a threshold exists "above which you may be at risk, below which you may not be at risk" for developing the disease. The final expert testified that the Plaintiff's mestothelioma developed as a result of asbestos exposure, but had no information about the particular asbestos containing products in question. However, she, like the other experts, testified that all exposures to a carcinogen contribute to the development of a malignancy. All the experts relied on certain epedimiological studies to support causation under an "any exposure" theory.

The Court found that the Plaintiff's experts were unable to estimate the Plaitniff's exposure to the Georgia Pacific joint compounds. The Court also recognized that there was no evidence concerning the percentage of Georgia-Pacific joint compound used in comparison to the quantity of other products used on the Plaintiff's job sites (while there was some evidence that at least three other products were used more frequently). Therefore, the Court held that while there was evidence the Plaintiff was exposed to the compound generally, there was no quantitative evidence presented upon which the Plaintiff's experts could rely to determine that the was exposed to the product in sufficient quantities to have increased his risk of developing mesothelioma. The Court reiterated that Borg-Warner requires that, for a plaintiff to prove specific causation by relying on epidemiological studies showing an increased risk of developing mesothelioma, he must show that the frequency and regularity of his exposure to the asbestos-containing product is comparable to or greater than that of the individuals in the studies upon which he relies. Here, the Plaintiffs' experts relied on the "any exposure" principle which had been expressly rejected by the Texas Supreme Court. Therefore, the Court held that the evidence was legally insufficient proof of substantial-factor causation.

GAUDETTE v. CONN APPLIANCES, INC.

Cause No. 09-06-444 CV
Court of Appeals of Texas, Ninth District, Beaumont
September 6, 2007

Whether the trial court abused its discretion in disallowing an expert's testimony pertaining to the causal connection between indoor exposure to mycotoxins and neurological illnesses.

FACTS: Plaintiff parents on behalf of themselves and their children sued the company for allegedly negligently installing a refrigerator which caused mold which allegedly resulted in certain illnesses. The trial court excluded the testimony of the Plaintiff's expert under Tex. R. Evid. 702 and granted summary judgment in favor of the company as there was no evidence of specific causation. The Court found that toxic tort cases require proof of both general and specific causation about the effects of the toxic substance. General causation is whether a substance is capable of causing a particular injury or condition in the general population, whereas specific causation is whether a substance is capable of causing a particular injury or by attempting show that exposure to a substance increases the risk of the injury.

HOLDING: The exclusion of the Plaintiffs' expert was upheld; and the trial court's final summary judgment order was affirmed.

The Plaintiffs expert, Dr. Campbell, testified that he began treating the family members in 2001 for complaints of headaches, memory loss, sleep disturbance, fatigue and infections. He eventually diagnosed two family members with chronic inflammatory demyelinating polyneuropathy (CIDP) and stated that while he had no specific diagnoses for the remaining family members, their immune systems were "off". He concluded that the symptoms resulted from molds in their home. More specifically, his diagnoses were premised on the theory that their illnesses resulted from indoor exposure to mycotoxins. The Defendant filed a motion to exclude Campbell's testimony asserting that his diagnoses of mold-related autoimmune and/or neuropathic problems were "junk science" and that there is no scientific or medical evidence to support the theory. The trial court agreed finding that Dr. Campbell's theories, opinions, and analysis have not been sufficiently tested; his diagnosis of causation and conclusions have not been sufficiently tested; his diagnoses of causation and conclusions as to the Plaintiffs was subjective; his diagnoses and/or his causation conclusion are not supported by sufficient peer reviews; and the evidence does not demonstrate a theory of causation that is generally accepted in the scientific and medical communities. The appellate court found that the trial Court properly excluded Campbell's testimony finding that in regard to Plaintiff's argument that research was still ongoing, while the Court should not foreclose the possibility that advances in science may require reevaluation of what "good science" is in future cases, the Court is required to look at what is generally accepted in the current scientific community.

After the certain evidence, including the expert's testimony was determined to have been properly excluded, the Court found that there was no evidence of an essential element o the appellants' claim and affirmed the summary judgment.