NO. 05-08-01390-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

GEORGIA-PACIFIC CORPORATION,

Appellants,

vs.

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

Appellees.

ON APPEAL FROM THE COUNTY COURT AT LAW NO. 1
OF DALLAS COUNTY, TEXAS

APPELLEES' BRIEF

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STATEMENT OF THE CASE

Timothy Bostic was diagnosed with mesothelioma, an asbestos cancer, on October 31, 2002, at the age of 40. 7 RR 154; 7 RR 166. He died on September 5, 2003. 8 RR 66. He was survived by his wife of eighteen years, Susan, his eighteen year-old son, Kyle, his father, Harold Bostic, and his mother, Helen Donnahoe (the "Plaintiffs"). 7 RR 167-8.

Timothy Bostic's primary exposures to asbestos were from ten years working with Georgia-Pacific asbestos joint compound from 1967 to 1977; three months working in the "hot section" at a glass plant ("Knox Glass") in the early 1980's; six months as a welder's helper at Palestine Contractors in 1977-78; household exposure to his father when he was a child; and limited use of brake products. 7 RR 176-77; 8 RR 21-22; 7 RR 186-88; 12 RR 28-29; 7 RR 18-19; DX-33.

The Plaintiffs first went to trial against Georgia-Pacific Corporation ("Georgia-Pacific") in February 2005, having settled with or dismissed the other defendants in the case prior to trial. On March 14, 2005, the jury returned a verdict $9,327,000 ($3,127,000 in compensatory damages, and $6,200,000 in punitive damages), allocating 100% responsibility to Georgia-Pacific. CR 110. Because the verdict form placed the allocation for future lost wages under Timothy Bostic's estate as opposed to under his wife, Susan Bostic, the trial court, Judge Sally Montgomery presiding, ordered that Plaintiffs be required to elect a new trial on all issues; or eliminate the $600,000 award for future lost wages and the $6,200,000.00 in punitive damages. CR 147.

Plaintiffs elected for a new trial on all issues, and trial commenced for the second time against Georgia-Pacific on May 15, 2006. 2 RR 4. On May 25, 2006, Harold Bostic, Timothy Bostic's father, testified as a witness for Plaintiffs. 9 RR 117. Georgia-Pacific chose not to cross-examine Harold Bostic at that time, but instead to reserve its cross-examination for Georgia-Pacific's case-in-chief. 9 RR 159. Later that same day, Harold Bostic fell ill outside the courtroom. 9 RR 160. One of the jurors, Cortney Jackson, an EMT by training, rendered aid to Harold Bostic when he fell. 9 RR 160. Harold Bostic died the next day. Judge Montgomery later dismissed Cortney Jackson from jury service in the case prior to the commencement of juror deliberations. 15 RR 243.

Judge Montgomery ordered the jury to disregard Harold Bostic's testimony, and allowed Plaintiffs and Georgia-Pacific to read in the direct and cross-examination of Harold Bostic from the first trial. 12 RR 12-13. Georgia-Pacific moved for a mistrial, and when Judge Montgomery delayed ruling on the mistrial, filed a petition for writ of mandamus with this Court. This Court denied Georgia-Pacific's petition for writ of mandamus on June 2, 2006. *See In re Georgia-Pacific Corp.*, No. 05-06-00758-CV, 2006 WL 1753079, at *1

(Tex. App. - Dallas June 2, 2006, orig. proceeding) (mem. opp).

On June 8, 2006, the jury rendered a verdict of $13,593,917 ($7,554,907 in compensatory, $6,038,910 in punitives), allocating 75% responsibility to Georgia-Pacific, and 25% responsibility to Knox Glass. Upon questioning from counsel for Georgia-Pacific after the verdict was rendered, each of the jurors testified that the fact that Harold Bostic became ill and did not return to trial had no influence on their verdict. 16 RR 121-51.

Georgia-Pacific filed a Motion to Recuse Judge Montgomery, based on allegations made by Judge Montgomery's court reporter that Judge Montgomery had failed to timely communicate a question from former juror Cortney Jackson as to why Plaintiff's counsel was wearing black. CR 218-229. On July 26, 2006, Georgia-Pacific's Motion to Recuse was granted, and this case was transferred to Judge Russell H. Roden, County Court at Law No. 1, Dallas County. CR 334-35. On August 28, 2006, Georgia-Pacific filed a Supplemental Motion for Mistrial, claiming that the "bizarre sequence of events" that occurred during the second trial in this case warranted a new trial. CR 336. In December 2006, Judge Roden granted Georgia-Pacific's motion for mistrial and ordered a new trial. CR 439 (Tab C).

In February 2008, Plaintiffs filed a motion for vacatur of Judge Roden's order granting new trial and for entry of judgment, on the basis that there was no injury in the form of an improper verdict arising from any alleged misconduct in connection with Harold Bostic's death. CR 440-647. On July 18, 2008, Judge D'Metria Benson, presiding judge for the County Court at Law No. 1, Dallas County, granted Plaintiffs' motion to vacate. CR 1222-23. On July 23, 2008, Judge Benson signed a final judgment in this case. CR 1224-29. On October 22, 2008, in response to Georgia-Pacific's August 21, 2008 Motion to Modify, Correct, or Reform the Judgment, for New Trial, or for Remittur, Judge Benson entered a First Amended Judgment that reduced the final judgment in accordance with Georgia-Pacific's request for reduction due to allocation of settlement credits and calculation of punitive damages. CR 1230-1308; SCR 5-10. Georgia-Pacific agreed as to the form of the First Amended Final Judgment. SCR 10. Georgia-Pacific then filed this appeal.

ISSUES PRESENTED

1. Whether Plaintiffs' evidence of Timothy Bostic's ten years of frequent, proximate, and regular exposure to Georgia-Pacific asbestos joint compound, as well as Plaintiffs' quantification of the asbestos fibers released from Georgia-Pacific asbestos joint compound when performing the same tasks as Timothy Bostic, meets the substantial factor causation standard as set forth by the Texas Supreme Court in *Borg-Warner v. Flores*, 232 S.W.3d 765 (Tex. 2007).

2. Whether Plaintiffs presented sufficient evidence to support gross negligence by showing that Georgia-Pacific knew that exposure to asbestos joint compound is "very harmful," yet nonetheless acted with conscious indifference by failing to warn, falsely assuring customers that there was no cause of harm from its asbestos products, and continuing to market asbestos joint compound for greater competitive advantage.

3. Whether the trial court abused its discretion by refusing to grant a new trial, when Georgia-Pacific is not able to show any injury from any alleged misconduct in the form of the rendition of an improper verdict, and the trial court followed established law from the Fifth Circuit, Ninth Circuit, Seventh Circuit, and Second Circuit in instructing the jury to disregard Harold Bostic's testimony.

I. INTRODUCTION

In pursuit of a third trial in this case, Georgia-Pacific makes serious but baseless allegations of judicial, juror, and bailiff misconduct, and misstates the law and evidence applicable to this case. Stripped of hyperbole, none of the alleged conduct of the judge, jurors, or bailiff surrounding the death of Harold Bostic rose to the level of misconduct. More importantly, Georgia-Pacific offers no evidence of the requisite legal element necessary for a new trial based on alleged judicial, juror, or bailiff misconduct. Specifically, Georgia-Pacific does not show how any of the alleged misconduct resulted in a probable injury to Georgia-Pacific, by virtue of any juror voting differently than he would have otherwise done on "one or more issues vital to the judgment." *See Rosell v. Central West Motor Stages, Inc.*, 89 S.W.3d 643, 660 (Tex. App. - Dallas 2002, pet. denied). Indeed, every juror in this case testified that none of the events surrounding Harold Bostic's illness and death influenced them in any way. 16 RR 121-153. Finally, the absurd argument that Georgia-Pacific was denied right of cross-examination is in direct contradiction with the law of the Fifth Circuit, Ninth Circuit, Seventh Circuit, and Second Circuit, which uniformly hold that when a witness dies or pleads the fifth after direct examination but prior to cross-examination, the proper remedy is an instruction to disregard that witness's testimony. Therefore, the trial court did not abuse her discretion in refusing Georgia-Pacific's Motion for Mistrial.

With respect to Georgia-Pacific's claims that Plaintiffs failed to provide a scintilla of causation evidence in satisfaction of the substantial factor causation standard set forth in

Borg-Warner v. Flores, 232 S.W.3d 765 (Tex. 2007), Georgia-Pacific misstates the applicable law and the record in this case. Contrary to Georgia-Pacific's assertions, *Borg-Warner* does not require that Plaintiffs show that Timothy Bostic exposure to Georgia-Pacific asbestos joint compound was the cause of Timothy Bostic's mesothelioma, nor does *Borg-Warner* require that Plaintiffs produce evidence of Defendant-specific epidemiological studies in order to prove specific causation. In accord with *Borg-Warner's* substantial factor causation standard, Plaintiffs presented substantial evidence of (i) Timothy Bostic's ten years frequent, regular, and proximate exposure to Georgia-Pacific asbestos joint compound, and (ii) quantification of the amount of asbestos fibers released from Georgia-Pacific joint compound when used in the same manner as Timothy Bostic. Dr. Samuel Hammar testified that Timothy Bostic's exposure to Georgia-Pacific's asbestos joint compound would have been enough in and of itself to cause his mesothelioma. Accordingly, Georgia-Pacific's argument that Plaintiffs presented no evidence of specific causation is without merit.

Finally, Georgia-Pacific's claim that Plaintiffs presented no evidence of gross negligence is based on the misrepresentation that Plaintiffs rely only upon "general knowledge" from the literature in proving gross negligence. *See* Georgia-Pacific Brief at 32-33. In fact, Georgia-Pacific's internal documents and the testimony of Georgia-Pacific employees show that Georgia-Pacific knew that exposure to asbestos from its asbestos joint compound products was "very harmful," yet acted with conscious indifference by failing to apply OSHA-mandated warnings and by pushing this product onto the market to make more

profit and gain an advantage over its competitors. Therefore, Georgia-Pacific's argument must fail.

Accordingly, Plaintiffs respectfully request that Court deny Georgia-Pacific's appeal, and affirm the judgment in this case.

II. STATEMENT OF FACTS

A. Georgia-Pacific sold asbestos joint compound in both dry and "Ready-Mix" formulas from 1965 to 1977.

Georgia-Pacific sold bags of asbestos Triple-Duty dry joint compound, and one and five-gallon containers of asbestos pre-mixed Ready-Mix joint compound from 1965 until it was banned by the United States Government in 1977. 8 RR 158-59, 176. Georgia-Pacific asbestos joint compound contained from two to seven percent asbestos. 8 RR 169; PX-33; PX-9. The bags of Georgia-Pacific Triple Duty Joint Compound manufactured for use in Texas contained seven percent asbestos.[1] PX-12.

Georgia-Pacific Ready-Mix joint compound contained asbestos until 1977. 8 RR 54. In 1976, Georgia-Pacific stated that it would not market an asbestos-free Ready-Mix until OSHA "start[s] a vigorous enforcement program . . . ." PX-40. A March 3, 1977 Georgia-Pacific intracompany memorandum stated: "My feeling on asbestos remains the same: I want to continue to provide an asbestos Ready-Mix as long as possible." PX-20.

Georgia-Pacific temporarily introduced an asbestos-free bag of joint compound in

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[1] The cost of shipping played a major role for Georgia-Pacific in Georgia-Pacific's ability to sell the product. 8 RR 179. Therefore, the seven percent asbestos joint compound manufactured in Acme, Texas was what was sold to consumers of joint compound in Texas. 8 RR 179, PX-12.

1973, but then shortly thereafter reverted back to bags of asbestos-containing joint compound. PX-54. By 1974, Georgia-Pacific was only "market testing, in limited markets, a dry asbestos free powder product." PX-41. Over 74 percent of the joint compound shipped by Georgia-Pacific in 1977 contained asbestos. 9 RR 65.

Georgia-Pacific issued no warnings as to the hazards of asbestos from 1965 to 1973. 9 RR 77.

B. Timothy Bostic's primary exposure to asbestos was from Georgia-Pacific asbestos joint compound.

Timothy Bostic was born in 1962, and was diagnosed with mesothelioma in 2002, at the age of 40. 7 RR 166. Mesothelioma has a general latency period of thirty to forty years. 5 RR 107. His aggregate lifetime exposure to asbestos was from ten years working with Georgia-Pacific asbestos joint compound from 1967 to 1977; three months working in the "hot section" Knox Glass in the early 1980's; six months as a welder's helper at Palestine Contractors in 1977-78; household exposure to his father when he was a child; and limited use of brake products. 7 RR 176-77; 8 RR 21-22; 7 RR 186-88; 12 RR 28-29; 7 RR 18-19; DX-33. After getting his Bachelor's Degree in 1984, Timothy worked as a correctional officer at the Texas Department of Criminal Justice. 7 RR 190. He retired as Captain of the Correctional Officers when he was diagnosed with mesothelioma. 7 RR 190. There is no evidence that he was exposed to asbestos while working at the Texas Department of Criminal Justice.

Timothy was exposed to Georgia-Pacific asbestos joint compound from 1967 to 1977

while learning residential construction work from his father. 7 RR 178. Timothy testified that he was around joint compound work his "whole life," and that his father taught him to work with joint compound when he was "real young." 7 RR 178. He recalled "as a little guy helping him mud the holes . . ." 7 RR 178. He recalled observing joint compound work prior to the age of ten, and performing it himself ever since. 7 RR 178.

Harold Bostic, Timothy Bostic's father, testified that Timothy started helping out in his father's workshop from around the age of five, or since around the year 1967. 12 RR 25-27; 12 RR 78. Harold worked with his son just about every day from when he was a toddler until the age of ten, and then every weekend after that.[2] 12 RR 136. Harold testified that Timothy used Georgia-Pacific asbestos joint compound "many, many times." 12 RR 137. Harold testified that "between the time Timmy was five years old until about 15 or 16 years old, he could "see him sand . . . that joint compound and breathing in that dust." 12 RR 141.

When Timothy was five to seven years old, Harold testified that Timothy would help mix the asbestos joint compound: "[I]f I was doing sheetrock work, he'd mix the mud,[3] every kid likes mud. And he'd mix it for me as best he could. And then I'd have to follow him up and get the lumps out. And then he would spackle as far up as he could reach. I wouldn't let him get up on the ladder because they're so dangerous, when he was that small." 12 RR

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[2] When Harold and his wife divorced, Timothy was ten years old. 12 RR 26. From that point on, Harold got Timothy every weekend and during the summer. 12 RR 26.

[3] Harold Bostic referred to joint compound as "mud." 12 RR 28-29.

28. From the time he was very little, Timothy would help sand asbestos joint compound "as far up as he could reach." 12 RR 32.

Harold Bostic used Georgia-Pacific asbestos joint compound when working with Timothy for 98 percent of the time, "or more." 12 RR 39. Harold Bostic testified that when he was working with Timothy, Georgia-Pacific joint compound was "the No. 1 product." 12 RR 33. During the ten year period from 1967 to 1977, Timothy worked with Harold Bostic "on numerous occasions" using both dry and Ready-Mix Georgia-Pacific joint compound. 12 RR 34-36. Harold testified that use of the Georgia-Pacific joint compound created dust, especially when sanding the product, and that Timothy breathed the dust. 12 RR 35-36. Harold did not know that Georgia-Pacific asbestos joint compound could be hazardous to Timothy's health, nor did he see any warnings on the Georgia-Pacific joint compound. 12 RR 36-37. Harold stated that if he had known that the Georgia-Pacific asbestos joint compound that Timothy was using was dangerous and could have caused harm, he "wouldn't even have let him in the same building." 12 RR 60.

Timothy Bostic worked at Knox Glass for three summers in 1980, 1981, and 1982. 7 RR 171; 8 RR 27. Timothy had two different responsibilities at Knox Glass: in the "cold end" of the plant he made boxes, packed glass, and performed janitor work; and in the "hot end" he was exposed to asbestos while he performed mechanic work and clean-up 7 RR 172. Of the three summers he worked at Knox Glass, Timothy estimated that he spent an aggregate of only three months in the hot end. 8 RR 42. Dr. Richard Kronenberg, a

pulmonary physician who performed a study of workers at Knox Glass, testified that Timothy Bostic's work at the plant "would be really the extreme low end of the exposure for the folks out at the glass plant." 15 RR 218.

Additionally, Timothy worked with "three or four gaskets" a week and some pipe insulation for six months at Palestine Contractors from 1977-78. 8 RR 18-19. He also estimated that he did about four brake jobs a year helping his father. 7 RR 186. He performed "less than ten" clutch jobs in his lifetime. 8 RR 24.

C. Plaintiffs quantified the asbestos fibers to which Timothy Bostic was exposed while working with Georgia-Pacific joint compound.

Dr. William Longo tested the amount of asbestos fibers released from Georgia-Pacific dry and pre-mixed joint compound while doing the same tasks as performed by Timothy Bostic - mixing, sanding, and sweeping of Georgia-Pacific asbestos joint compound. 10 RR 73 Dr. Longo has a PhD in material science and engineering. 10 RR 37, PX-66. He has studied asbestos products for over twenty-five years. He developed a protocol for the Environmental Protection Agency on how to analyze the amount of asbestos in dust. 10 RR 42. He also wrote the American Society for Testing Material's dust method. 10 RR 42. He is the former chairman of the Transmission Electron Microscopy Analytical Committee for the National Asbestos Council for developing measurement methods to analyze asbestos. 10 RR 42. He has published peer-reviewed papers on the ability of asbestos products to release asbestos. 10 RR 42; PX-66.

In order to test the amount of asbestos released from asbestos products, Dr. Longo

follows OSHA and NIOSH protocols for measuring airborne asbestos. 10 RR 59-60. Dr. Longo's tests of the Georgia-Pacific asbestos joint compounds demonstrated that persons who mixed, sanded, and cleaned-up Georgia-Pacific asbestos joint compound were exposed to levels of asbestos many times greater than the current OSHA permissible exposure limit of .1 fiber cc,[4] and thousands of time higher than average background of asbestos in the air of .0005 fibers per cc.[5] 10 RR 136; 95. Dr. Longo measured a range of 2.7 to 6.6 fibers per cc when sanding and 4.7 fibers per cc when cleaning-up the Georgia-Pacific Ready-Mix joint compound. 10 RR 84. For the study on the dry bag of asbestos, Dr. Longo measured 1.6 fibers per cc when mixing, 1.5 fibers per cc when sanding, and 1.4 fibers per cc when cleaning-up.[6] 10 RR 87. In addition, Dr. Longo testified that dumping a half a bag of joint compound released asbestos levels of 25 to 50 fibers per cc.

Dr. Longo calculated that in a twenty-five pound bag of Georgia-Pacific joint compound that contained five percent asbestos, there would be 567,500,000 micrograms of chrysotile per bag, which equals 11.4 quadrillion chrysotile fibers. 10 RR 108-10. In the Ready-Mix study, Dr. Longo measured 16 billion asbestos structures on the clothing of the

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[4] In 1972, the OSHA permissible exposure level to asbestos was 5 fibers per cubic centimeter for an eight hour time-weighted average. 10 RR 136. OSHA lowered the asbestos permissible exposure level to 2 fibers per cc in 1976. 10 RR 138. The current OSHA asbestos permissible exposure level is .1 fiber per cc. 10 RR 136.

[5] The EPA determined that the average background content of asbestos in the air is .0005 fibers per cc. 10 RR 95.

[6] The measurements of the dry bag of asbestos were lower than the Ready-Mix, because Dr. Longo only measured nine linear feet of product from the dry bag. 10 RR 87. In other words, the less product that is used, the less asbestos dust will be released into the air.

worker who sanded Georgia-Pacific asbestos Ready-Mix joint compound. 10 RR 239-40.

Dr. Longo's quantification of the asbestos fibers released from Georgia-Pacific asbestos joint compound is supported by the measurements taken by the Texas State Department of Health, the Gypsum Association, and the peer-reviewed, published literature. A Texas State Department of Health Survey of the Georgia-Pacific Acme, Texas plant showed that stacking bags of asbestos joint compound released 13.7 fibers per cubic foot of asbestos. PX-12. The Gypsum Association, of which Georgia-Pacific was a member, measured exposure levels from dry mixing, sanding, and sweeping asbestos joint compounds that exceeded the 1972 OSHA permissible excursion limits of 10 fibers per cc. 6 RR 25-26. For example, in one instance, sanding joint compound for thirty minutes released asbestos fiber levels of almost 40 fibers per cc. 6 RR 26.

The peer-reviewed, published literature[7] shows that exposures to asbestos from joint compound work is comparable to the asbestos exposures of asbestos insulators, with a mean exposure to asbestos of 10 fibers per cc.[8] 5 RR 129, 139-40.

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[7] Georgia-Pacific misstates the law by asserting that the actually studies themselves must be "admitted into evidence." Georgia-Pacific Brief at 26, note 14. To use a learned treatise on direct examination, an expert may only read the relevant statement from the learned treatise to the jury. See Tex. R. Evid. 803(18). The treatise itself cannot be introduced into evidence as an exhibit or taken by the jury to the jury room. See Tex. R. Evid. 803(18); *see also Kahanek v. Rogers*, 12 S.W.3d 501, 504 (Tex. App. - San Antonio 1999, pet. denied) (because physician's desk reference was learned treatise, it could not be taken to the jury room).

[8] *See* Rohl et al, Exposure to Asbestos in the Use of Consumer Spackling, Patching and Taping Compounds, SCIENCE, vol. 189, no. 4204 (Aug. 15, 1975) (measuring "significant" exposure to asbestos up to 45 fibers per cc for joint compounds containing 5 to 12 percent asbestos by weight). 7 RR 31, 62-64. *See also* Stern, et al., Mortality Among Unionized Construction Plasterers and Cement Masons, AM. J. IND. MED., vol. 39, no. 4 (April 2001) (finding that asbestos fiber concentrations generated by sanding asbestos joint compound were similar to those measured in the work environment of asbestos insulation workers who had a seven fold increase in risk of cancer of the lung and the pleura); Fischbein, et al., Drywall Construction and Asbestos Exposure, AM. INDUS. HYG. ASSOC. J.,

D. The scientific and epidemiological evidence shows that low levels of exposure to asbestos joint compound greatly increase the risk of mesothelioma, particularly in children.

1. *The epidemiological evidence shows that exposure to chrysotile asbestos more than doubles the risk of developing mesothelioma.*

Dr. Richard Lemen, an epidemiologist, is the former assistant Surgeon General of the United States and the former Deputy Director of the National Institute for Occupational Safety and Health ("NIOSH"). 5 RR 5-6; PX-3. He has been invited by Congress to testify on numerous occasions as to the hazards of asbestos.[9] 5 RR 14, 17. He has received the Distinguished Service Medal from the United States Public Health Service, which is the highest award that a public health officer can receive. *Id.* Dr. Lemen did much of the research on asbestos while at NIOSH in collecting the exposure data as to what workers were exposed to and the types of diseases the workers would get, which provided the basis for the OSHA asbestos regulations. 5 RR 21-22. Dr. Lemen has published over sixty articles in the peer-reviewed literature, including multiple articles on the subject of the hazards of asbestos. 5 RR 29; PX-4.

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vol. 40, no. 5, at 402-07 (1979) (finding that asbestos joint compound workers have a significant risk of exposure to asbestos, and "asbestos disease is an important hazard in this trade."); Nicholson, Occupational and Community Asbestos Exposure from Wallboard Finishing Compounds, BULL. N.Y. ACAD. MED., vol 51, no. 10, at 1180 (1975) (showing x-ray abnormalities in 37 of the 63 joint compound workers who had ten or more years exposure to asbestos joint compound); Verma & Middleton, Occupational Exposure to Asbestos in the Drywall Taping Process, AM. INDUS. HYG. ASSOC. J., vol. 41, no. 4, at 264-69 (1980) (finding that joint compound workers are "occupationally exposed to potentially hazardous asbestos dust concentration in their work . . .[A] person engaged in mixing, sanding and sweeping of asbestos-containing compound should wear an approved respiratory device.") 5 RR 129-39.

[9] Dr. Lemen was asked by Congress to testify as to whether the United States should ban the use of asbestos in the United States. 5 RR 14. At the time of the trial in this case, thirty countries had banned the use of asbestos. 5 RR 14. The United States has not yet banned the use of asbestos. *See id.*

The asbestos in joint compound was chrysotile asbestos. While amphibole asbestos is more potent than chrysotile asbestos, the overwhelming scientific consensus is that all fiber types, including chrysotile asbestos, cause mesothelioma.[10] 5 RR 98-99. Dr. Lemen testified that the World Health Organization, the International Program for Chemical Safety, OSHA, NIOSH, the Environmental Protection Agency, the Public Health Service, the Center for Disease Control, and the thirty countries around the world who banned the use of any type of asbestos have all concluded that chrysotile asbestos causes mesothelioma. 5 RR 99.

In concluding that chrysotile asbestos causes mesothelioma, Dr. Lemen studied the biological plausibility that chrysotile invades the pleura surrounding the lung; he examined strength of association by reviewing epidemiological studies of persons exposed to chrysotile asbestos; and he considered animal studies that demonstrated that chrysotile, when administered to animals, caused more mesothelioma than amphibole fibers when given to animals under controlled condition. 5 RR 125-27. Dr. Lemen also relied upon epidemiological evidence showing more than a doubling of the risk in developing mesothelioma as a result of exposure to chrysotile asbestos.[11]

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[10] Because chrysotile fibers are serpentine(curly), they tend to break into smaller fibers. This allows them to be picked up by macrophages and deposited in the pleura of the lung. 5 RR 110. Unlike amphibole fibers, which are long and straight and tend to reside in the lung tissue, chrysotile fibers have a "preferential deposition" into areas outside the lung, such as the pleura. 5 RR 111.

[11] See Lemen, "Chrysotile Asbestos as a Cause of Mesothelioma: Application of the Hill Causation Model," INT. J. OCCUP. ENVIRON. HEALTH, 10:233-239 (2004); Pialotto et al, "An Update of cancer mortality among chrysotile asbestos worker in Balangero, Northern Italy," BR. J. IND. MED., 47:810-4 (1980) (showing ten times increased risk of developing mesothelioma after exposure to chrysotile asbestos); Cullen, M. et al, "Chrysotile asbestos and health in Zimbabwe: I. Analysis of miners and millers compensated for asbestos-related disease since independence," AM. J. IND. MED., 19:161-9 (1991) (showing a five-fold increase in risk in developing mesothelioma from exposure to chrysotile asbestos); Camus, et al, "Nonoccupational exposure to mesothelioma and the risk of

Georgia-Pacific's expert in pulmonology, Dr. Alan Feingold agreed that chrysotile asbestos causes mesothelioma. 13 RR 173. Dr. Feingold testified that he is not aware of one scientific or regulatory body that is of the opinion that chrysotile cannot cause mesothelioma. 13 RR 203, 225.

2. *Mesothelioma differs from other asbestos-related diseases such as asbestosis and lung cancer, in that extremely low levels of exposure greatly increase the risk for mesothelioma.*

Dr. Arnold Brody is professor of cell biology at medical school Tulane University, and vice chairman of the pathology department at Tulane University medical school. 4 RR 75; PX-1. Dr. Brody testified: "[T]here's no safe level for mesothelioma. In other words, no one's ever been able to show a level that will prevent everyone from getting mesothelioma. Now, you can do that for asbestosis, and you can get pretty close probably for most lung cancer cases, but for mesothelioma, no one's ever shown a safe level." 4 RR 92.

The 1997 Helsinki consensus report, which was peer-reviewed, published article by a multidisciplinary group of pathologists, radiologists, physicians, epidemiologists, toxicologists, and industrial hygienists who had well over a thousand publications in the area of asbestos and asbestos-related diseases, stated that "an occupational history of brief or low level exposure should be considered sufficient for mesothelioma to be occupationally

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cancer," N. ENGL. J. MED., 338:1565071 (1998) (showing a seven-fold increase in risk of mesothelioma for women with bystander exposure to chrysotile asbestos miners). 5 RR 112-127.

related."[12] 5 RR 105.

3. Every expert in this case, including Georgia-Pacific's experts, agreed that children are more susceptible to the hazards of asbestos than adults.

Dr. Brody testified that children are more susceptible to carcinogens, including the carcinogen chrysotile asbestos, than adults: "[C]hildren can be very susceptible because their cells are still growing." 4 RR 149-50. Dr. Lemen explained that children are much more susceptible than adults to the risks of asbestos exposure: "Because the children are rapidly growing, their cells are expanding and growing at a much more rapid rate . . . So children, for almost all of our environmental exposures, are much more susceptible than are the adults to the disease." 5 RR 101.

Dr. William Dyson, Georgia Pacific's expert in industrial hygiene, stated: "Well, certainly there's a higher susceptibility among young people than older people to the effects of asbestos," and that "most scientists believe" that "early year exposures can contribute maybe more importantly than later year exposures. . . ." 14 RR 29-30.

Dr. Feingold, Georgia-Pacific's expert in pulmonology, agreed that "[c]hildren have physiologic and behavioral characteristics that make them vulnerable to damage from environmental chemicals." 13 RR 216.

4. The United States Government determined by use of risk-analyses and epidemiological studies that small amounts of exposure to asbestos joint compound more than double the risk of death.

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[12] See "Asbestos, Asbestosis, and Cancer: The Helsinki Criteria for Diagnosis and Attribution," 23 SCAND. J. WORK ENV'T & HEALTH 311, 313 (1997).

The Consumer Products Safety Commission ("CPSC") banned asbestos-joint compond in 1977 based on risk-analysis models and epidemiological studies showing that use of asbestos joint compound for four days per year is an "unacceptable risk." 5 RR 145; 6 RR 11; PX-26.

The CPSC stated that exposure studies of asbestos joint compounds showed airborne asbestos fiber concentrations above the OSHA allowable interim excursion level. PX-26 at 38786. The CPSC also recognized that children were particularly at risk for exposure to asbestos joint compound: "Asbestos in the household presents a great risk due to the presence in the household of persons, such as children, who may be particularly vulnerable to carcinogens." PX-26 at 38786.

The CPSC based its risk calculations on peer reviewed, published joint compound exposure data; mathematical models; and on epidemiological studies.[13] Based on this review of the measured exposure levels and the relevant epidemiological data, the CPSC determined that the use of asbestos joint compound for six hours a day, four times in one year was an "unacceptable risk." PX-26 at 38787. According to the CPSC calculations, the increased risk of death induced by use of asbestos joint compound for only six hours a day, four times in one year is between 10 and 2,000 per million. *See id.* Given that the expected

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[13] "In addition, on the basis of data by Rohl et al, the Commission's Health Sciences staff has calculated an assessment of the risk of consumer exposure . . . . The calculations are based on the application of a theoretical model (modification of that by Enterline and Henderson, 1976, to epidemiological data cited in the literature (Selikoff, Hammond, and Seidman, 1973)." PX-26 at 38787.

mesothelioma rate is one case per million persons,[14] that is an increased risk of ten to 2,000 times over the expected.

5. *Taking into account the frequency, proximity, and regularity of exposure of Timothy Bostic's exposure to Georgia-Pacific's joint compound, Dr. Hammar testified that Timothy Bostic's exposure to Georgia-Pacific asbestos joint compound would have been sufficient in and of itself to cause his mesothelioma.*

Dr. Samuel Hammar is a board certified pathologist who has specialized in anatomic, clinical, and experimental pathology for over thirty-one years. 11 RR 9. He is the co-editor of a textbook entitled PULMONARY PATHOLOGY, which is in every medical library in the United States.[15] 11 RR 18. He is the author of approximately forty peer-reviewed, published articles on the subject of asbestos and mesothelioma. 11 RR 21. He is also the co-author of the book ASBESTOS: RISK ASSESSMENT, EPIDEMIOLOGY, AND HEALTH EFFECTS, which addresses the diseases that asbestos can cause, as well as technical aspects of asbestos related medicine."[16] 11 RR 22. He has been a member for seventeen years of the U.S.-Canadian Mesothelioma Panel, which is a panel of twelve experts in mesothelioma who review and confirm diagnoses of mesothelioma made by other pathologists. Georgia-Pacific's expert, Dr. Feingold, testified that Dr. Hammer is a "world renowned pathologist." 13 RR 162.

Georgia-Pacific misstates the record in this case by asserting that "Dr. Hammer's

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[14] 11 RR 37.

[15] *See* PULMONARY PATHOLOGY (David Dail & Samuel P. Hammer, eds., 1994).

[16] *See* ASBESTOS: RISK ASSESSMENT, EPIDEMIOLOGY, AND HEALTH EFFECTS (Ronald F. Dodson and Samuel P. Hammer, eds. 2005).

'each and every' exposure theory is the only evidence supporting the jury's finding of causation . . . ." Georgia-Pacific Brief at 30. In fact, Dr. Hammer analyzed the mathematical threshold of asbestos exposure leading to a multiple increased rick of mesothelioma, and testified that Timothy Bostic's ten year exposure to Georgia-Pacific asbestos joint compound would have been enough in and of itself to cause his mesothelioma.

Dr. Hammar testified that 0.1 fiber/cc year of exposure would lead to an increased risk of mesothelioma of seven cases per 100,000. 11 RR 37. Given that the expected is one case per million persons, that is a 70 times increased rate of death at an exposure of 0.1 fiber per cc/year. 11 RR 37. Dr. Hammar testified Timothy Bostic's " primary occupational exposure was . . . in the construction industry." 11 RR 48. Dr. Hammar stated that if Timothy Bostic had ten years of asbestos exposure from Georgia-Pacific asbestos joint compound, and three summers of potential exposure at Knox Glass, it does not "make common sense to ignore the exposure to Georgia-Pacific products." 11 RR 140. Dr. Hammar testified that Timothy Bostic's exposure to drywall work alone was sufficient to cause his mesothelioma. 11 RR 49.

Dr. Kronenberg, called as a witness by Georgia-Pacific, testified that Timothy Bostic's exposure to drywall products containing asbestos as a young person played a significant contributing role in the development of his mesothelioma, and that taking into consideration that Timothy Bostic died at the age of 41, and the average latency is 30 years, his early exposures to asbestos drywall products were extremely important in the development of his

mesothelioma. 15 RR 222.

E. Georgia-Pacific had actual awareness of the extreme hazards arising from exposure to Georgia-Pacific asbestos joint compound, but nevertheless acted with conscious indifference to the safety of those using its asbestos joint compound.

1. Georgia-Pacific knew since 1965 that exposure to asbestos from its asbestos joint compound presented an extreme degree of risk.

By 1965, the year that Georgia-Pacific began selling asbestos joint compound, there were over a thousand publications in the literature discussing asbestos related disease. 6 RR 9. In 1966, the Gypsum Association, of which Georgia-Pacific was a member, informed its members that "[g]overnment investigations indicate the possibility of the use of asbestos as a cause of lung disease in industry. Payment of claims arising from this could cost our industry many dollars unless counter action is taken." 6 RR 27; PX-5. In 1967, Georgia-Pacific was present at a Gypsum Association meeting where it was noted that inhabitants of a neighborhood surrounding an asbestos plant were getting lung carcinomas. 6 RR 28-29; PX-6. In 1970, Matt Fink, the Georgia-Pacific Safety Supervisor, wrote an intra-office memorandum advising that the Mount Sinai Hospital had found a spot on the lung of a man who did joint sanding on the job, and warning that "the drywall industry might be on the next targets for their lung research." PX-8. In 1970, Mr. Fink wrote to the Gypsum Association that "[a]sbestos is very harmful." 6 RR 33-34; PX-9. 6 RR 34; PX-9. To avoid the cost of future product liability claims, Mr. Fink suggested placing blame on contractors such as Harold and Timothy Bostic: "We realize that someone will be the whipping boy. Also,

product liability will be stressed. It is our opinion that the entire blame can be placed on the contractor for not insisting on respirators and dust masks while sanding." 6 RR 34; PX-9. In 1971, the National Gypsum Company wrote to the President of Georgia-Pacific: "Our tests indicate that sanding of joint treatment products . . . offer some substantial potential hazards." 6 RR 36; PX-11. In 1972, the Texas State Department of Health wrote to the plant manager of the Georgia-Pacific plant in Acme, Texas that "asbestos has recently been recognized as one of the more dangerous pneumoconiosis producing substances," "with indisputable evidence connecting asbestos exposure to increased probability of lung cancers and mesotheliomas . . . ." 6 RR 37-38; PX-12.

A September 22, 1972 intra-company Georgia-Pacific memorandum reported: "[T]he use of asbestos is considered a health hazard and rigid controls are being enacted." PX-35. In 1972, Mr. Eugene Burch, the head of sales for Georgia-Pacific, attended an annual meeting of the Gypsum Association in Chicago, in which it was reported: "[NIOSH] has prepared a criteria document on all toxic and hazardous material in plants and . . . asbestos is listed as the No. 1 hazardous material . . . Any product containing more than one percent asbestos must be marked with a warning label." 9 RR 100-01.

On May 17, 1974, Eugene Burch reported to Mr. Wilson, the head of the Georgia-Pacific Gypsum Division, that there were 17 actual cases of fibrosis in the lungs of members of the New York local painters union who performed work with asbestos joint compound. 9 RR 95-96. Mr. Burch's report stated: "Taping and spackling compounds used in drywall

finishing may expose workers to dangerous levels of asbestos fibers, according to OSHA officials." 9 R 97.

On May 13, 1974, Mr. Burch wrote to all Georgia-Pacific Gypsum Sales Managers: "[W]e do know that the dust level in the mixing and sanding of joint compounds is sufficiently high that respirators should be worn . . . . Respirators should be worn while sanding." PX-41.

2. Georgia-Pacific acted with conscious indifference to the safety of the users of its asbestos joint compounds.

a. Georgia-Pacific violated federal law by failing to warn of the hazards of asbestos in its asbestos joint compounds.

As of 1972, federal law required that asbestos warning labels be placed on asbestos products. 5 RR 23; PX-4. On April 11, 1973, almost a year after OSHA promulgated these regulations, Georgia-Pacific stated "In view of the OSHA regulations, we believe it is in our best interest to begin marking our bags of joint compound which contain asbestos fiber." 7 RR 65; PX-13; 9 RR 93. However, Georgia-Pacific determined that there was no need to begin labeling its Ready-Mix joint compound in compliance with OSHA at that time. 7 RR 65-66; PX-13. In 1974, the Acme, Texas plant was issued an OSHA citation for not labeling one-gallon cans of asbestos Ready-Mix joint compound. 6 RR 48; PX-18.

In 1974, Georgia-Pacific produced a manual on asbestos joint compounds, with a picture of a father working while the son mixed the joint compound on the front cover. PX-17. The manual was "designed for the average homeowner who's involved in a home-

improvement project." 6 RR 44; PX-17. The manual recommended sanding the joint compound after application, a task that Georgia-Pacific knew would create unsafe levels of asbestos dust. 6 RR 40; PX-17. Georgia-Pacific placed no warnings in this manual as to the hazards of asbestos dust, nor did it advise that users of the asbestos joint compound use respirators. 6 RR 40; 44; PX-17.

b. Despite having seen "actual cases" of persons harmed from work with asbestos joint compound, Georgia-Pacific's head of sales advised its customers in 1977 that there were no dangers from the use of asbestos joint compound.

Despite having seen actual cases of asbestos-related disease in 1974, Mr. Burch, head of sales for Georgia-Pacific, advised a customer concerned with the welfare of his children in 1977 that there were no dangers from using asbestos joint compound. 9 RR 98-99; PX 22, 23. Mr. Burch told the customer that "there was no known case of harm" from asbestos. 9 RR 98.

c. Despite its knowledge as to the hazards of asbestos joint compound, Georgia-Pacific delayed marketing an asbestos free joint compound in order to gain an advantage over its competitors.

In 1975, Georgia-Pacific calculated that it could make more profits by selling asbestos joint compound than asbestos-free joint compound: "We are benefitting from various manufacturers attempting to get asbestos free ready mix into the market. Eventually the others will probably find a way to make it and make it acceptable but the damage will already been done and they'll have no business. Let's keep this in mind when we come to ours and not market an asbestos free type . . ." PX-19.

d. Despite its knowledge as to the hazards of asbestos and the fact that the CPSC had voted to ban asbestos, Georgia-Pacific urged its branches to sell as much asbestos joint compound as possible prior to the effective date of the ban.

On April 28, 1977, Georgia-Pacific received notice that the CPSC had voted unanimously to ban the use of asbestos joint compounds. 6 RR 45-46; PX-21. On August 3, 1977, the President of Georgia-Pacific urged the branches to expel their inventories of asbestos joint compounds: "You're probably aware, but in case you have not been advised, the [CPSC] has finally published in the federal register the proposed rule making for joint cement products containing asbestos . . . This means we have roughly 45 to 60 days to dispose of our inventories of joint cement containing asbestos. It would seem appropriate that the branches should be advised of the need to expel their inventories of asbestos joint compound as soon as possible." PX-43; 9 RR 114-15.

F. Plaintiff presented substantial evidence of extraordinary damages.

This case involves extraordinary damages. Because of his exposure to asbestos, Timothy Bostic died from asbestos cancer at age forty-one, leaving behind a wife, a teenage son, and his mother and father. Two separate juries assessed the Bostic family damages and awarded $9 million (100% liability apportioned to Georgia-Pacific and $6.2 million in punitives) and $13 million (75% liability apportioned to Georgia-Pacific and $6 million in punitives), respectively.

Timothy's physical and mental anguish were extreme. Timothy described the surgery he endured: "[The doctor] went in and made about a 14-inch incision in my back, removed

one of my ribs; removed my lung, my right lung; removed my right-side abdomen and replaced it with Gortex; removed my heart and scraped the outside lining off my heart and replaced it with some kind of biodegradable lining . . . and sewed me back up." 7 RR 194. Because mesothelioma involves a process of slow suffocation, there were many times that Timothy simply could not breathe. His mother testified: "[A]ll you had to do would be to look at him and tell the pain that was on his face. And he could not breathe." 7 RR 158. The net present value of his lost wages was $603,891.00. 8 RR 72 His medical bills were $251,679.10. 11 RR 61.

Helen Donnahoe, Timothy's mother, testified that it was only her faith that sustained her: "I do not know how anyone could get through the death of a child, and he wasn't a child exactly, but he was my child. He wasn't a baby, but he was my baby. I can't imagine how anybody could get through such a thing if they did not have the hope that lies within my faith." 7 RR 163.

Timothy had dated his wife Susan since they were in high school. Timothy's mother explained the depth of their love for each other: "Timmy was faithful to her in everything that he did. She was faithful to him in everything that she did. Everything that Timmy picked up to do, Susan was . . . right there with him. I used to laugh and tell him, I said, but, son, when you start to do something, you have someone to help you, because Susan's always there. They – both of them worked hard to, to take care of their bills and stuff like that, and it was a loving relationship, and where one went, the other one went." 7 RR 148.

Susan explained that her son Kyle's loss was particularly tragic, because Timothy died when Kyle was only a teenager: "Kyle will never have the relationship of a father-son as an adult. I think as children, to our parents, we clash with them, we don't get along with them for years . . . Kyle was, you know, young when his dad was diagnosed . . . He doesn't have that relationship now to actually be his dad's best friend or him to his, you know, the best friends. And to actually glean from his father the things his father could have shown him." 12 RR 150-51.

III. SUMMARY OF THE ARGUMENT

In accordance with the substantial factor causation standard as established by the Texas Supreme Court in *Borg-Warner v. Flores*, 232 S.W.3d 765 (Tex. 2007), Plaintiffs presented substantial evidence of Timothy Bostic's ten years of frequent, proximate, and regular exposure to Georgia-Pacific asbestos joint compound, and also quantified the asbestos fibers released from Georgia-Pacific asbestos joint compound when performing the same tasks as Timothy Bostic. Georgia-Pacific misstates the law in claiming that Plaintiffs are required to show defendant-specific epidemiological evidence in proving specific causation, and misstates the facts in asserting that Plaintiffs' experts relied on the "each and every exposure" theory.

In proving gross negligence, Plaintiffs rely on internal Georgia-Pacific documents and the testimony of Georgia-Pacific employees to show that Georgia-Pacific knew that exposure to asbestos joint compound is "very harmful," yet nonetheless acted with conscious

indifference by failing to warn, falsely assuring customers that there was no cause of harm from its asbestos joint compound, and continuing to manufacture asbestos joint compound for greater competitive advantage. Georgia-Pacific misstates the facts in claiming that Plaintiffs only rely on the "general literature" in proving their gross negligence claim.

Finally, Georgia-Pacific is not able to show any injury in the form of the rendition of an improper verdict from any alleged misconduct. With respect to Georgia-Pacific's claim that it was deprived of its constitutional right to cross-examine Harold Bostic, the trial court followed established law from the Fifth Circuit, Ninth Circuit, Seventh Circuit, and Second Circuit in instructing the jury to disregard Harold Bostic's testimony. Therefore, the trial court did not abuse her discretion in denying Georgia-Pacific's motion for mistrial.

IV. ARGUMENT

A. Plaintiffs met the asbestos causation requirements under *Borg-Warner v. Flores*, 232 S.W.3d 765 (Tex. 2007).

1. A no evidence point can only be sustained where there is a complete absence of a vital fact.

In determining whether there is no evidence of probative force to support a jury's finding, all the record evidence must be considered in the light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from that evidence is to be indulged in that party's favor. *Merrell Dow v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact; (b) the court is barred by the rules of law or of evidence

from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the vital fact. *Id.*

2. *Timothy Bostic was exposed to Georgia-Pacific Joint Compound between 1967 and 1977.*

As set forth at length above, Timothy Bostic worked with asbestos joint compound, 98% of which was Georgia-Pacific, continuously and "many, many times" from 1967 to 1977. *See supra* at section II.B.

Georgia-Pacific makes the spurious argument that because Georgia-Pacific made non-asbestos containing joint compounds, then Plaintiff cannot prove that Timothy Bostic was exposed to asbestos joint compound. *See* Georgia-Pacific Brief at 18. First, Georgia-Pacific did not market non-asbestos Ready-Mix asbestos joint compound prior to 1977, so Timothy's exposure to that product would necessarily have exposed him to asbestos. *See supra* at section I.A. Second, Georgia-Pacific did not offer non-asbestos bags of joint compound until 1973, and then only infrequently, so the majority if not all of the time that Timothy was exposed to bags of Georgia-Pacific joint compound he would have been exposed to asbestos. *See supra* at section I.A.

Second, Georgia-Pacific attempts to claim that because Harold Bostic could not remember with specificity the exact places that he worked forty years ago, it follows that "there is a complete lack of evidence" that Timothy ever used Georgia-Pacific joint compound prior to 1980. Georgia-Pacific Brief at 19. Harold explained at multiple points

in his testimony that he could not remember all of the properties on which he and Timothy had worked, or the details of specific work that was done on any particular property, because so many years had passed since the work was done. 12 RR 80, 131;136. However, Harold explained that there was no doubt in his mind that he and Timothy used Georgia-Pacific joint compound "[m]any, many, many times" between 1967 and 1977. 12 RR 136-137. The fact that Harold Bostic's memory as to the exact addresses of all the many sites he performed joint compound work with Timothy has now faded does not negate the fact that he and Timothy performed this work regularly and frequently.

3. *Plaintiffs satisfied the requirements of Borg-Warner v. Flores in quantifying the dose of Georgia-Pacific Joint Compound to which Timothy Bostic was exposed.*

Georgia-Pacific contends that Plaintiffs were required to present reliable and quantitative evidence of dose to show "whether that amount was sufficient to cause his mesothelioma . . ." Georgia-Pacific Brief at 21. At the outset, Georgia-Pacific misstates the law. Pursuant to *Borg-Warner v. Flores*, 232 SW3d 765 (Tex. 2007), Plaintiffs are required to show that the Timothy Bostic's exposure to Georgia-Pacific asbestos joint compound was a "substantial factor" in contributing to his risk of mesothelioma, not whether the amount of asbestos from Georgia-Pacific joint compound "caused" Timothy Bostic's mesothelioma. *See Borg-Warner*, 232 S.W.3d at 772. Further, contrary to Georgia-Pacific's argument, *Borg-Warner* does not require a precise calculation of dose: "[S]ubstantial factor causation, which separates the speculative from the probable, need not be reduced to mathematical

precision." *Id.* at 773.

Here, as set forth at length above, Plaintiffs quantified the frequency, regularity, and proximity of Timothy Bostic's exposure to Georgia-Pacific asbestos joint compound not only by quantifying the ratio of Timothy Bostic's exposure to Georgia-Pacific asbestos joint compound as compared to his other exposures (ten years of Georgia-Pacific asbestos joint compound versus three months of exposure at Knox-Glass, six months at Palestine Contractors, potential household exposure, and sporadic brake work), but also by actually testing the products at issue and measuring asbestos levels multiple times in excess of OSHA permissible exposure limits and thousands of times above background exposure to asbestos. *See supra* at section II.A. and II.C.

The facts presented by this case are inapposite from the exposure evidence that the Texas Supreme Court found insufficient in *Borg-Warner*. In *Borg-Warner*, the Plaintiff worked as a brake mechanic for thirty-five years, performing brake jobs with five different types of brands of brake pads. *Borg-Warner*, 232 S.W.3. at 765. He worked with Borg-Warner brake pads for only three of those years, from 1972-75. *See id.* In contrast, Timothy Bostic worked with Georgia-Pacific asbestos joint compound "98 percent of the time" if not more, for ten years. In *Borg-Warner*, Plaintiff's expert testified that "most of the asbestos in brake linings is destroyed by the heat of friction and therefore is not released to the public air as asbestos fiber." *Id.* at 767. In contrast, the evidence in this case is that the asbestos fibers were not destroyed by use or application, but rather were released many hundreds of

times above background. In *Borg-Warner*, no materials scientist nor an industrial hygienist provided testimony as to the properties of the asbestos products at issue, such as their ability to release respirable fibers. *Id.* Indeed, neither of the two experts in *Borg-Warner* had researched the Borg-Warner products or had any specific knowledge about them. *See id.* at 768. Here, Plaintiffs entered quantifiable evidence from a materials analytic scientist who had measured the release of respirable asbestos fibers from the very products at issue. In *Borg-Warner*, the asbestos at issue was "embedded in the brake pads." *Id.* at 774. Here, asbestos in the joint compound was not encapsulated, as in gaskets or brakes, but was in loose powder form or released through sanding.

The facts of *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304 (Tex. App. - Houston [1st Dist] 2007, pet. denied) are entirely different from the facts of this case. In *Stephens*, the plaintiff initially testified at deposition that he did not recall using Georgia-Pacific joint compound, and then clarified that on "small jobs" he did use Georgia-Pacific. *Stephens*, 239 S.W.3d at 312. Moreover, the plaintiff in *Stephens* was exposed to ten different joint compounds: Kaiser Gypsum, Bestwall, Flintkote, Gold Bond, Georgia-Pacific Ready Mix, Georgia-Pacific dry powder, Kelly Moore patching, Paco, Durabond, and USG. *Id.* at 318-19. There was no calculation of the percentage of Georgia-Pacific joint compound used in comparison to other joint-compound products at the worksite. *See id.*

In contrast to the multitude of undifferentiated asbestos exposures by the plaintiff in *Stephens*, the source and quantify of Timothy Bostic's asbestos exposure is clear: he had ten

years of exposure to asbestos joint compound, 98% of which was Georgia-Pacific joint compound, and only three months of exposure at Knox Glass, six months at Palestine Contractors, and an indeterminate amount of household exposure as a child. Further, while the industrial hygienist in *Stephens* only relied on historical literature relating to asbestos exposure, Dr. Longo actually tested the Georgia-Pacific dry and Ready-Mix joint compounds used by Timothy Bostic, and measured the respirable asbestos fibers.

The *Stephens* court recognized that where the plaintiff was able to state the percentage use of the product in comparison to his other exposures, and his exposure was not negligible or theoretical, then this would meet the frequency-regularity-proximity test. *Stephens,* 239 S.W.3d at 320.[17] Given that Plaintiffs have clearly set forth the frequency, proximity, and duration of Timothy Bostic's exposure to Georgia-Pacific's asbestos joint compound, as well as an "approximate quantum" of the asbestos fibers from Georgia-Pacific's asbestos joint compound, Plaintiffs have clearly met their evidentiary burden pursuant to the requirements of *Borg-Warner* and *Stephens*.

4. Borg-Warner does not require defendant-specific epidemiological studies in order to prove specific causation.

Georgia-Pacific's argument that *Merrill Dow Pharmaceuticals, Inc. v. Havner*, 953

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[17] *See Rotondo v. Keene Corp.*, 956 F.2d 436, 442 (3d Cir. 1992) (frequency-regularity-proximity test met where evidence showed that plaintiff worked in boiler room at least two days per week for at least three to four months, and pipecovers used defendants' asbestos-containing product in the boiler room fifty percent of the time); *Goss v. Am. Cyanamid, Co.*, 650 A.2d 1001, 1006 (1994) (frequency-regularity-proximity test met where plaintiff testified that "most" asbestos pipe covering he used was manufactured by defendant, and coworker testified that he used defendant's pipe covering approximately ninety percent of the time and installed it in the area where plaintiff regularly worked.)

S.W.2d 706 (Tex. 1997) governs the standards used in order to prove specific causation, and that *Borg-Warner* in turn requires that specific causation be proven by means of defendant-specific epidemiological studies, is without support in the law.

"[C]ausation in toxic tort cases is discussed in terms of general and specific causation. General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *Havner*, 953 S.W.2d at 714 (internal citations omitted). In *Havner*, the only issue before the court was whether there was sufficiently reliable evidence to show general causation; that is, does ingestion of Bendectin during pregnancy lead to an increased risk of limb reduction birth defects. *See Havner*, 953 S.W.2d at 711. Georgia-Pacific's attempt to transform *Havner* into a specific causation case is without support in the law, and can only be explained by the fact that Georgia-Pacific fails to recognize that the Texas Supreme Court cites to *Havner* in *Borg-Warner* only with reference to its analysis as to general causation.

a. *Borg-Warner* cites to *Havner* in analyzing whether the plaintiffs had met their ***general causation*** burden to show that the Mr. Flores' aggregate lifetime exposure to asbestos caused his asbestosis.

Georgia-Pacific's misstatement of the law stems from a misreading of *Borg-Warner*. The threshold issue for the Texas Supreme Court in *Borg-Warner* was general causation - i.e. whether there was sufficient evidence to show that Mr. Flores' entire lifetime exposure to asbestos was sufficient to have caused asbestosis in the first instance.

Georgia-Pacific, in arguing that in order to prove specific causation the Plaintiffs must provide epidemiological evidence that Timothy Bostic's exposure to asbestos joint compound doubled his risk pursuant to *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 715 (Tex. 1997), ignores the fact that the court in *Borg-Warner* cited *Havner* because it could not find any evidence that Mr. Flores' total aggregate lifetime dose of asbestos caused his alleged disease. Thus, the court in *Borg-Warner* suggested that epidemiological studies, while "not necessary," would have been helpful in "supporting causation" where there was a fundamental question as to whether the plaintiff's symptoms were caused by asbestos. *Borg-Warner*, 232 S.W.3d at 772.

b. *Borg-Warner* does not require "but for" causation in proving specific causation; *Borg-Warner* requires only that the Plaintiffs show that Timothy Bostic's exposure to Georgia-Pacific's asbestos joint compound was a substantial factor in contributing to his risk of mesothelioma.

With respect to specific causation, *Borg-Warner* does not require that the exposure to Georgia-Pacific joint compound be the cause in and of itself of Timothy Bostic's mesothelioma. The Texas Supreme Court was clear as to the specific causation requirement in an asbestos case: "In asbestos cases, then, we must determine whether the asbestos in the defendant's product was a substantial factor in bringing about the plaintiff's injuries." *Borg Warner*, 232 S.W.3d. at 770. The Texas Supreme Court stated: "[P]laintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or

ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate the fibers from the defendants's particular product were the ones, or among the ones, that actually produced the malignant growth." *Borg-Warner*, 232 S.W.3d at 772-73, *citing Rutherford v. Owens-Illinois*, 941 P.2d 1203, 1219 (Cal. 1997) (emphasis added).

c. Plaintiffs have met their burden under Borg-Warner by substantial evidence of both general causation and specific causation.

First, with respect to general causation, Dr. Lemen testified as to the substantial epidemiological evidence showing that exposure to chrysotile asbestos more than doubles the risk for mesothelioma. *See supra* at section II.D.1.

Second, with respect to specific causation, Plaintiffs met their burden to prove that Timothy Bostic's exposure to Georgia-Pacific was a "substantial factor" in contributing to his risk of mesothelioma. In order to show substantial factor causation under *Borg-Warner*, a plaintiff must be able to "relate" defendant-specific dose to the "approximate dose to which the Plaintiff was exposed." *Id.* at 773. In other words, the quantum of defendant-specific asbestos fibers must not be an insignificant portion of the total dose required to cause the disease. Here, Timothy Bostic used Georgia-Pacific asbestos joint compound "many times" over ten years. His exposure to Georgia-Pacific asbestos joint compound was far greater than any other asbestos exposure. Further, Dr. Longo quantified the asbestos fibers released from Georgia-Pacific asbestos joint compound in the manner used by Timothy Bostic, and determined that use of these products in the same manner performed by Timothy Bostic would lead to exposures to asbestos thousands of times above background. *See supra* at

section II.C. Further, Plaintiffs entered evidence that only four days of exposure per year to asbestos joint compound presents a multi-fold increased risk of death from asbestos disease.[18] *See supra* at section II.D.4. Moreover, every expert agreed that as a child exposed to Georgia-Pacific asbestos joint compound, Timothy Bostic was uniquely susceptible, and thus required lower levels to contribute to his risk. *See supra* at section II.D.3.

5. Plaintiffs' experts did not rely on the "each and every exposure" argument in proving that Timothy Bostic's exposure to Georgia-Pacific's asbestos joint compound was a substantial factor in contributing to his risk for mesothelioma.

As set forth above, Plaintiff's expert in specific causation, Dr. Samuel Hammer, does not rely on "each and every exposure" in stating (i) what the threshold for causation is for mesothelioma; and (ii) whether Timothy Bostic's exposure to Georgia-Pacific joint compound contributed to his risk of developing mesothelioma.

Dr. Hammer considered (i) the threshold for a multiple increased risk of developing mesothelioma is 0.1 fibers per cc, (ii) the frequency, regularity, and fiber concentration of Timothy Bostic's ten years of exposure to Georgia-Pacific asbestos joint compound, and testified, within a reasonable degree of medical certainty, that these exposures were

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[18] The plaintiff in *Borg-Warner* alleged that he had asbestosis, which has a much higher causation exposure level than mesothelioma. The Texas Supreme Court recognized that the aggregate dose to cause mesothelioma is lower than that for asbestosis: "[I]t is generally accepted that one may develop mesothelioma from low levels of asbestos exposure." The Seventh Circuit recognized that the nature of the disease itself must be considered when applying the frequency, regularity, and proximity test, and that because minor exposures to asbestos can cause mesothelioma, the test "becomes less rigid for purposes of proving substantial factor when dealing with cases in which exposure to asbestos causes mesothelioma." *Tragarz v. Keene*, 980 F.2d 411, 421 (7th Cir. 1993) ("[T]he substantial factor test is not concerned with the *quantity* of the injury-producing agent or force but rather with its legal significance . . . Where there is competent evidence that one or a *de minimis* number of asbestos fibers can cause injury, a jury may conclude the fibers were a substantial factor in causing a plaintiff's injury." *Id* (internal citations omitted).

sufficient, in and of themselves, to have caused his mesothelioma. *See supra* at II.D.5.

Dr. Hammer's opinions concerning substantial factor causation were made in reference to the "minimum exposure level leading to an increased risk of development of mesothelioma . . . ." *Compare Stephens*, 239 S.W.3d at 321 (where plaintiffs' experts failed to identify the "minimum exposure level leading to an increased risk of development of mesothelioma," and therefore had no basis for claiming that the exposures at issue increased the plaintiff's risk of developing the disease.) Thus, here, the Plaintiffs' evidence provides the necessary "link" between defendant-specific exposure levels and the dose required to demonstrate a statistically increased risk of developing the disease. *Stephens*, 239 S.W.3d at 321.

B. There is overwhelming evidence that Georgia-Pacific knew that exposure to asbestos from Georgia-Pacific joint compound was extremely hazardous, yet in spite of this knowledge, acted with conscious indifference toward the health and safety of the users of its product.

Gross negligence involves two components: (i) viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree of risk, considering the probability and magnitude of the harm to others; and (ii) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994). The first element, "extreme risk," means a likelihood of serious injury to the plaintiff. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998). The second element, "actual awareness," means that the defendant knew

about the peril, but its acts or omissions demonstrated that it did not care. *Lee Lewis Construction, Inc.*, 70 S.W.3d 778, 785 (Tex. 2002). Evidence of gross negligence is legally sufficient if, considered as a whole in the light most favorable to the prevailing party, it rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 595 (Tex. 1999). Some evidence of care does not defeat a gross negligence finding. *Lee Lewis*, 70 S.W.3d at 785. Circumstantial evidence is sufficient to prove either element. *Ellender*, 968, S.W.2d at 921.

1. *Viewed objectively from Georgia-Pacific's standpoint, there was an extreme risk of serious injury to Timothy Bostic from working with Georgia-Pacific asbestos joint compound from 1967 to 1977.*

Georgia-Pacific wholly ignores the record in this case by stating that Plaintiffs' proof of Georgia-Pacific's knowledge was generalized medical and scientific literature that "at best . . . shows a 'general risk of harm.'" Georgia-Pacific Brief at 32. As set forth at length above, evidence of internal Georgia-Pacific documents and testimony from Georgia-Pacific employees showed that Georgia-Pacific repeatedly recognized from 1965 on that its asbestos joint compounds posed a substantial risk of severe injury to those who mixed, sanded, and cleaned-up these products without respiratory protection. *See supra* at II.E. Thus, Plaintiffs clearly satisfied the objective prong of the gross negligence standard.

2. *Georgia-Pacific had actual awareness of the risk of serious injury to users of Georgia-Pacific asbestos joint compound, yet nonetheless Georgia-Pacific demonstrated that it did not care.*

Regarding the subjective prong, Georgia-Pacific simply repeats its argument that there

is no evidence that Georgia-Pacific had actual knowledge of the extreme risk of harm from exposure to asbestos from its products. *See* Georgia-Pacific Brief at 35.

First, as discussed above, Georgia-Pacific internal documents and testimony from Georgia-Pacific employees demonstrated that Georgia-Pacific not only knew that use of its asbestos joint compounds was "very harmful," but also that Georgia-Pacific had seen actual cases of persons injured by their use of asbestos joint compound. *See supra* at II.E.1. Second, despite its knowledge of the extreme risk of harm, Georgia-Pacific delayed warning about the hazards of its product in violation of OSHA; falsely advised its customers that there no known cause of harm from asbestos; delayed selling asbestos-free joint compound in order to gain advantage over its competitors; and attempted to dump all its asbestos joint compound onto the market when the CPSC passed the ban on asbestos joint compound. *See supra* at II.E.2. Thus, there is substantial evidence satisfying the subjective prong of the gross negligence standard.

Georgia-Pacific's reliance on *Exxon Mobil Corporation v. Altimore*, 256 S.W.3d 415 (Tex. App. - Houston [14th Dist.] 2008, no pet) is misplaced. In *Altimore*, the issue before the Court was whether Exxon could have known prior to 1972 that spouses of refinery workers were at risk for developing mesothelioma by means of household exposure. The evidence in *Altimore* showed that Exxon was aware of the risk of serious injury to its own employees, but not to their spouses by means of secondary exposure. The Court concluded that "Exxon's general knowledge of a risk to employees is no evidence that Exxon had

knowledge of an extreme degree of risk to family members of employees." *Id.* at 424. In contrast, Georgia-Pacific knew that there was the risk of serious injury to users of its asbestos joint compounds such as Timothy Bostic.

3. *The First Amended Final Judgment enters the punitive damages exactly as Georgia-Pacific requested in its Motion to Modify the Judgment; therefore, Georgia-Pacific cannot now complain that there is any error in apportioning the punitive damages.*

Georgia-Pacific states that the trial court erred in reapportioning the $6,038,910 in punitive damages awarded by the jury. *See* Georgia-Pacific Brief at 37 n. 19. The First Amended Final Judgment, approved as to form by Georgia-Pacific, exactly conforms with the calculations of punitive damages as set forth in Georgia-Pacific's Motion to Modify, Correct or Reform the Judgment, for New Trial, or for Remittitur. CR 1249-50. Georgia-Pacific argued in its Motion to Modify the Judgment that Helen Donnahoe, as mother of the decedent, should receive no allocation for punitive damages. CR 1249. Further, Georgia-Pacific stated that Susan Bostic should receive $3,019,455.00 in punitive damages, and Kyle Bostic should receive $1,811,673 in punitive damages. CR 1249. This is the exact allocation awarded by the trial court in the First Amended Final Judgment. SCR 7. Accordingly, Georgia-Pacific cannot now on appeal argue that the punitive damages calculations are in error.

C. The trial court did not abuse its discretion in refusing to grant Georgia-Pacific a new trial, because there was no "injury" to Georgia-Pacific as a result of Harold Bostic's death.

Every complaint that Georgia-Pacific makes with respect to the "prejudice" it suffered

in this trial is as a result of the death of one witness, Harold Bostic, during trial. It is well-established, however, that the death of a witness or even a party to a case does not in and of itself rise to the level of prejudice necessitating a mistrial.[19]

Twice juries have returned substantial verdicts against Georgia-Pacific for the injuries

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[19] The case law is unequivocal that the death of a party or witness does not necessitate a mistrial. *See Consolidated Underwriters v. Foster*, 383 S.W.3d 829 (Tex.Civ.App.—Tyler 1964, writ ref'd n.r.e.) (trial court properly denied mistrial where plaintiff became overwhelmed with emotion during testimony); *Tex. Employers Ins. Ass'n v. Schaffer*, 161 S.W.2d 328 (Tex.Civ.App.—Amarillo 1942, writ ref'd w.o.m.) (trial court properly denied mistrial where plaintiff suffered a vicious seizure on the witness stand, and in front of the jury, lasting between two and three minutes while his counsel tried to subdue him); *Dickinson v. Davis*, et al., 284 S.W. 815 (Mo. Ct. App. 1926) (trial court properly denied mistrial where plaintiff suffered an epileptic seizure in front of the jury); *Nami v. Harmes et ux.*, 286 S.W. 558 (Tex.Civ.App.—Galveston 1926, no writ) (trial court properly denied mistrial where plaintiff became hysterical and fainted into her daughter's arms during argument before the jury, and was then placed on a bench outside the courtroom directly in the path jurors were obligated to walk to return to the deliberation room); *Hudson v. Devlin*, 111 S.E. 693 (Ga. Ct. App. 1922) (trial court properly denied mistrial where plaintiff fainted, and was carried from the courtroom, in front of the jury); *Fonts v. S. Pac. Co.*, 159 P. 215 (Cal. Ct. App. 1916) (trial court properly denied mistrial where plaintiff fainted and fell from the witness stand after cross examination); *El Paso & S.W.R. Co. of Tex. v. Ankenbauer*, 175 S.W. 1090 (Tex.Civ.App.—El Paso 1915, writ ref'd) (trial court properly denied mistrial where plaintiff's counsel carried plaintiff into the courtroom on a stretcher so that plaintiff could testify); *United States v. Britt*, 27 Fed. Appx. 862 (9th Cir. 2001) (holding that a juror's death on the second day of trial did not necessitate a mistrial); *Bugosh v. Allen Refractories Co.*, 932 A.2d 901 (Pa. Super. Ct. 2007) (trial court properly denied mistrial where a plaintiff suffering from mesothelioma died during trial and the jury was informed of the death); *Owens-Corning Fiberglass Corp. v. Garrett*, 682 A.2d 1143 (Md. 1996) (trial court properly denied mistrial where, during trial, one plaintiff with mesothelioma died, a second plaintiff died of a heart attack, and a witness suffering chest pains was carried from the courtroom by ambulance); *State v. McCray*, 614 S.W.2d 90 (Tenn. Crim. App. 1981) (trial court properly denied mistrial where the child of a juror died during the trial and the juror continued to serve); *Chawkley v. Wabash Ry. Co.*, et al., 297 S.W. 20 (Mo. 1927) (trial court properly denied mistrial where plaintiff fainted in front of the jury during trial); *Hatton v. Stott*, 189 N.W. 850 (Mich. 1922) (trial court properly denied mistrial where plaintiff fainted during examination on the witness stand); *Hunt v. Van*, 202 P. 573 (Mont. 1921) (trial court properly denied mistrial where plaintiff collapsed in front of the jury); *Poe v. Arch*, 128 N.W. 166 (S.D. 1910) (trial court properly denied mistrial where plaintiff fainted in front of jury during argument, was carried out of court, and the jury then heard plaintiff screaming); *Chicago & E. R. Co., et al. v. Meech*, 45 N.E. 290 (Ill. 1896) (holding that "[t]he fact that a plaintiff or defendant or witness, or any other person, suddenly swoons or faints, or gives vent to hysterical exclamations, or breaks down with hysteria, does not call for the granting of a new trial."); *Maidman v. Stagg*, 82 A.D.2d 299 (N.Y. App. Div. 1981) (trial court properly denied mistrial where plaintiff died during trial after direct and cross examination); *Ill. Cent. R.R. Co. v. Rothschild*, 134 Ill. App. 504 (Ill. App. Ct. 1907) (trial court properly denied mistrial where plaintiff fainted in front of the jury and his family rushed to his aid); *McGloin v. Metro. St. Ry. Co.*, 75 N.Y.S. 593 (N.Y.A.D. 1902) (trial court properly denied mistrial where plaintiff became prostrate in front of the jury for a period of twenty minutes and was attended to by a physician in front of the jury); *Galveston H. & S. A. Ry. Co. v. Hitzfelder*, 66 S.W. 707 (Tex.Civ.App.—Galveston 1900, no writ) (trial court properly denied mistrial where plaintiff suffered epileptic seizures in front of the jury); *Ismall v. City of New York*, 18 Misc.2d 818 (N.Y. Sup. Ct. 1959) (trial court properly denied mistrial where plaintiff passed out in the courtroom, his wife began to panic, and the jury remained in court for two to three minutes before they were dismissed).

suffered by Plaintiffs, and Georgia-Pacific, in an attempt to avoid its obligations, makes the wholly erroneous statement that the death of Harold Bostic resulted in prejudicial misconduct, or was somehow a denial of Georgia-Pacific's constitutional right to cross-examination. Each of these allegations, when viewed against the facts, are without support in the record or the law. Most importantly, Georgia-Pacific presents no evidence that Georgia-Pacific suffered any injury in the form of the rendition of an improper verdict. Therefore, the trial court did not abuse her discretion in denying Georgia-Pacific's request for a new trial.

Moreover, when Georgia-Pacific was unable to cross-examine Harold Bostic, the trial court followed the proper evidentiary and constitutional procedure as set forth by the Texas Rules of Evidence and the law of the Fifth, Seventh, Ninth, and Second Circuit, by instructing the jury to disregard this testimony and substituting in its place testimony from the first trial, where Georgia-Pacific had a full opportunity to cross-examine Harold Bostic. Thus, Georgia-Pacific was not deprived of any constitutional rights by virtue of Harold Bostic's death.

1. There was no judicial misconduct by Judge Montgomery: she did not comment on the weight of the evidence; she correctly waited until the end of trial to investigate the any outside influence on the jury; and she promptly disclosed all juror communications to counsel for Georgia-Pacific and Plaintiffs.

a. Judge Montgomery never suggested to the jury her opinion on a matter that the jury must decide.

First, Georgia-Pacific states that Judge Montgomery's remarks to the jury were "in

violation of the rule commenting on the weight of the testimony," and were "reversible error." Georgia-Pacific Brief at 40.

To comprise error, a trial court's comment on the weight of the evidence must be direct; it must suggest to the jury the trial court's opinion concerning a matter upon which the jury must decide. *Barham v. Turner Construction Co.*, 803 S.W.2d 731, 737 (Tex. App. - Dallas 1990, writ denied); *Charter Builders v. Durham*, 683 S.W.2d 487, 491 (Tex. App. - Dallas 1984, writ ref'd n.r.e.). Reversal of a judgment should not be ordered unless there is a showing of impropriety, coupled with probable prejudice, and the rendition of an improper verdict. *Texas Employers Ins. Assoc. v. Draper*, 658 S.W.2d 202, 209 (Tex. App. - Houston [1st Dist.] 1983, no writ).

Judge Montgomery never commented to the jury concerning a matter upon which the jury must decide. Georgia-Pacific complains of two comments:

1. First, after Harold Bostic fell in the hallway in the presence of three of six the jurors, Judge Montgomery stated: "I talked to the EMT, and Mr. Bostic's vital signs are fine. And I'm hoping this is just a matter of – you all know he's on medication and light-headed from the stress of the testimony. And so hopefully we'll get a report to you on Tuesday morning. And I'll see you – remember your instructions. I'll see you back here Tuesday morning." 9 RR 161.

2. Next, Judge Montgomery instructed the jurors to disregard Harold Bostic's testimony: "Harold Bostic gave testimony in this case but is not available to be cross-examined by the Defendant. So because Mr. Bostic's testimony was not subject to cross-examination, it cannot be considered as evidence in this case and you must disregard it . . . I am instructing you to disregard the previous testimony you heard from Harold Bostic. If you recall, you have a right to cross-examine, and in this case, Mr. Bostic's not going to be available for cross-examination. So you've got to totally disregard what he stated

previously. We're starting over." 12 RR 12-13.

Neither of these comments were error, because neither expressed the trial court's opinion concerning a matter upon which the jury must decide.[20] In the first instance, the trial court acted to allay the juror's concerns after witnessing Harold Bostic fall in the hall. In the second instance, the trial court properly instructed the jury to disregard Harold Bostic's live testimony, because Georgia-Pacific did not cross-examine him at that time. The jury was not asked to award any damages to Harold Bostic, so nothing in the court's comments could be construed as commenting on the weight of the evidence. Further, Georgia-Pacific provides no evidence that either comment lead to an improper verdict. Indeed, every juror testified that these events had no influence whatsoever on their verdict. 16 RR 121-51.

b. Judge Montgomery did not abuse her discretion in waiting until trial concluded to rule on Georgia-Pacific's motion for mistrial.

Georgia-Pacific claims that it was error for the trial court to refuse to rule on Georgia-Pacific's motion for mistrial arising from Harold Bostic's death until after the jury returned its verdict. Georgia-Pacific Brief at 44. Georgia-Pacific made the same complaint in a Petition for Writ of Mandamus to this Court during the trial of this case, and this Court

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[20] The cases cited by Georgia-Pacific are entirely inapposite, because they involve situations in which the trial court directly commented on key evidentiary issues to be decided by the jury. *See City of Houston v. Pillot*, 105 S.W.2d 870, 871 (Tex. 1937) (the trial court stated that a change in an expert witnesses' testimony on a key measure of damages was warranted); *Murray v. Morris*, 17 S.W.2d 110, 112 (Tex. Civ. App. - Amarillo 1928, writ dism'd w.o.j.) (trial court commented on the credibility of a witness by testifying as to the market value of the land at issue); *Hargrove v. Fort Worth Elevator Co.*, 276 S.W.426 , 428 (Tex. Comm'n App. 1925, holding approved) (trial court attempted to discredit the testimony of a key witness as to the source of an environmental nuisance in an environmental nuisance case); *Am. Express Co. v. Chandler*, 231 S.W. 1085 (Tex. Comm'n App. 1921, holding approved) (trial court chastised defendant for requesting time to put their key medical witness on the stand, which the trial court himself admitted was error).

denied Georgia-Pacific's petition that the trial court failed to act within a reasonable amount of time. *See In re Georgia-Pacific Corp.*, No. 05-06-00758-CV, 2006 WL 1753079, at *1 (Tex. App. - Dallas June 2, 2006, orig. proceeding) (mem. opp).

c. Georgia-Pacific's allegations as to an unfair trial are without merit.

Georgia-Pacific also complains that the trial "was not conducted fairly," based upon the manner in which Judge Montgomery informed counsel that Courtney Jackson, the juror who was excused because he rendered aide to Harold Bostic, had asked the Bailiff why Plaintiff's counsel was wearing black. Georgia-Pacific Brief at 49-50. The heart of Georgia-Pacific's complaint is that the court reporter claims that the trial court learned about the juror's clothing question on Monday, June 5, 2006, and did not inform counsel for Georgia-Pacific and Plaintiff's counsel until Wednesday, June 7, 2006. The trial court disputes this, stating that "[W]hen I found out about it, I told you. I that's why I let you question [the Bailiff]." 16 RR 164-65.

Based solely on the testimony of Judge Montgomery's court reporter, who had engaged in *ex parte* conversations during the trial with counsel for Georgia-Pacific,[21] Georgia-Pacific makes the serious allegations that Judge Montgomery was "untruthful," and that she fired her court reporter because the court reporter "disputed the completeness and accuracy of her statements." Georgia-Pacific Brief at 50. Georgia-Pacific's attack on the judiciary based on the court reporter's self-interested and one-sided evidence is an affront

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[21] 17 RR 26.

to Judge Montgomery and to the judicial system itself.

Moreover, Georgia-Pacific offers no evidence that the dispute as to the timing over the trial court's disclosure of the juror clothing question in any way affected the result of the verdict or prejudiced Georgia-Pacific. Thus, there simply is no injury warranting a mistrial.

2. Georgia-Pacific does not meet its burden to show juror misconduct warranting a new trial, because every juror testified that Harold Bostic's death had no influence on their decision in this case.

To warrant a new trial for jury misconduct, the movant must establish that (i) misconduct occurred; (ii) it was material; and (iii) probably caused injury. *Golden Eagle Archery v. Jackson*, 24 S.W.3d 362, 372. Misconduct is material when it is reasonably calculated to prejudice the rights of the complaining party. *See Sharpless v. Sim*, 209 S.W.3d 825, 829 (Tex. App. - Dallas 2007, pet. denied). To show probable injury, there must be some indication in the record that the alleged misconduct most likely caused a juror to vote differently than he otherwise would have done on one or more issues vital to the judgment. *Redinger v. Living*, 689 S.W.2d 415, 419 (Tex. 1985). Whether misconduct occurred is a question of fact for the trial court. *Id.* If there is conflicting evidence on the finding of jury misconduct, the trial court's finding must be upheld on appeal. *Pharo v. Chambers County, Texas*, 922 S.W.2d 945, 948. While a juror may not testify about any alleged misconduct involving a matter or statement raised during deliberations, a juror "may testify as to whether any outside influence was improperly brought to bear upon any juror."[22]

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[22] The Texas Supreme Court differentiates between misconduct that allegedly occurs during deliberations, versus juror misconduct that occurs outside of deliberations. Thus, while testimony may not be heard about any

Tex. R. Civ. P. 327b. *See Sharpless*, 209 S.W.3d at 828 (allowing testimony from a juror that her outside internet research "had no effect on her deliberations or her vote, and she did not communicate the information to the other jurors," in order to determine whether the movant suffered injury).

The juror "misconduct" complained of by Georgia-Pacific is that Juror Jackson . "contacted [a] co-worker at the hospital and learned that Mr. Bostic died after his collapse . . . [and] then informed other jurors that Mr. Bostic had died." Georgia-Pacific Brief at 43. First, the trial court dismissed Mr. Jackson from the jury prior to deliberations. 15 RR 243. Second, Mr. Jackson only told one of the jurors, Ms. Woitas, that Mr. Bostic had passed away. 16 RR 130. Ms. Woitas did not repeat this information to any other juror. 16 RR 132. Moreover, even in response to leading questions from counsel for Georgia-Pacific, Ms. Woitas testified that this information had no effect on her decision in this case:

> Q. And as you saw the family since this point, has that been something you've thought about? I guess it's hard to divorce – your feelings from what you observed, knowing what Mr. Jackson told you. Is that fair?
>
> A. I – I understand what you're saying, but I think I did. I didn't – I didn't hold that – I don't know how to say it. Even though I knew he passed away, I don't think that had any [effect] on my decision, what we came up with.

16 RR 131-32.

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outside influence arising during deliberations, such as for example the juror in Golden Eagle who brought up evidence of a prior settlement of the plaintiff, testimony is "still permitted on the issues of juror misconduct, communications to the jury, and erroneous answers on voir dire, provided such testimony does not require delving into deliberations. *Golden Eagle*, 24 S.W.2d at 372.

Additionally, Cortney Jackson told Juror Jones that Mr. Bostic "may have had a stroke," and Juror Barbosa that Mr. Bostic was in intensive care. 16 RR 123; 138. Both jurors testified that they completely erased this information from their minds immediately upon hearing it. Juror Jones stated: "You know, that information wasn't really relevant to anything. So as such, it came in one ear and it left." 16 RR 127. Juror Barbosa testified that the day that she heard this information, "When I left here, I completely forgot about it."[23] 16 RR 140.

Every juror testified that the fact that Mr. Bostic became ill outside the courtroom had no bearing on their decision in this case. 16 RR 121-151.

Applying the law to these facts, Georgia-Pacific cannot meet its burden to show misconduct, materiality, or injury. First, it is impossible to contemplate a circumstance under which the update on the health status of a witness rises to the level of being misconduct; it is not material information with respect to a fact to be decided by the jury, nor does it represent an attempt to discuss the issues presented by case.

Second, it is not "material," because updating a health status cannot be construed as reasonably calculated to prejudice the rights of Georgia-Pacific. *Sharpless*, 209 S.W.3d at 829. Third, Georgia-Pacific makes no showing whatsoever that anything about this information caused any juror to vote differently on an issue; thus Georgia-Pacific does not meet its requisite burden to show injury. In fact, the evidence from the jurors demonstrates the opposite; each juror testified that this information simply had no relevance to their

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[23] Juror Jackson did not communicate any further information to Jurors Mosely, Berryman, and Brown. 16 RR 142-151.

deliberations whatsoever.

Finally, Georgia-Pacific makes the incredible statement that the damages evidence presented in the second trial was "less compelling," suggesting that the jury's verdict of $7,554,907 in compensatory damages was not supported by the evidence.[24] As set forth above, the damages evidence in this case was devastating and extraordinary. *See supra* at section II.F. Georgia-Pacific's claim that a man who dies from asbestos cancer at the age of 41, leaving behind a wife and teenage son, is less than "compelling,"defies credulity.

3. The Bailiff did not engage in misconduct that caused injury to Georgia-Pacific.

To warrant a new trial for bailiff misconduct, Georgia-Pacific must prove that (i) there was misconduct; (ii) it was material; and (iii) it caused injury. *Rosell v. Central West Motor Stages, Inc.*, 89 S.W.3d 643, 660 (Tex. App. - Dallas 2002, pet. denied) (holding that statement by bailiff to jury that it must deliberate another day was neutral and therefore not misconduct). Neutral information that would not persuade a juror to decide the case in any particular manner is not misconduct. *Id.* at 661. To show probable injury, there must be some indication in the record that the alleged misconduct most likely caused a juror to vote differently than he would otherwise have done on "one or more issues vital to the judgment." *Id.* at 660.

Here, as set forth above, when asked why Plaintiff's counsel was wearing black, the

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[24] The verdict from the first trial was $9,327,000, which is approximately thirty percent less than the $13,593,817 verdict from the second trial. See CR 110; SCR 5.

Bailiff told Juror Jackson, who was later excused from jury service: "I told . . . him that maybe she liked black. And he asked me – he says what about, you know, Mr. Bostic? Anything wrong? I said, nothing that I know of. I can't tell you that. I told you earlier that I would let y'all know how he was doing after the trial was over with." 16 RR 158-59. First, as this statement is entirely neutral, it is not misconduct. Moreover, Georgia-Pacific presents no evidence that the Bailiff's statement that "nothing" was wrong caused a juror to vote differently than he would have otherwise done "on one or more issues vital to the judgment."

With respect to the timing of the disclosure of this statement to counsel for Plaintiff and Georgia-Pacific, Georgia-Pacific does not demonstrate that any alleged delay in giving notice to Georgia-Pacific resulted in an injury to Georgia-Pacific, namely that any juror voted differently because of the "delay."

The cases cited by Georgia-Pacific are not applicable to these facts, because they involve statements or conduct by a bailiff concerning issues to the decided by the jurors. *See Pharo v. Chambers County, Texas*, 922 S.W.2d 945, 950 (Tex. 1996) (holding that bailiff's comment about raising taxes in a suit against the County was improper, but did not result in probable injury to the plaintiffs); *Logan v. Grady*, 482 S.W.2d 313, 321-22 (Tex. App. - Ft. Worth 1972, no writ) (holding that bailiff's refusal to allow the jury to request the court to hear the testimony of a witness was prejudicial error).

4. *Georgia-Pacific was not denied its right to cross-examine Harold Bostic, because the trial court properly struck Harold Bostic's testimony, and entered into evidence the cross-examination from the first trial pursuant to Texas Rule of Evidence 804(b)(1).*

Mistrial is a "drastic" remedy that imposes a significant burden on the parties and the Court. *Texas Cities Gas Co. v. Ellis*, 63 S.W.2d 717, 722 (Tex. Civ. App. - Waco 1933, no writ). The trial court has broad discretion in considering a request for a mistrial. *Onstad v. Wright*, 54 S.W.3d 799, 808 (Tex. App. - Texarkana 2001, pet denied). In determining whether to grant a mistrial, the court must consider whether less drastic remedies would protect the defendant's right to a fair trial. *See Hill v. State*, 90 S.W.3d 308, 313 (Tex. Crim. App. 2002) ("The judge is required to consider and rule out 'less drastic alternatives' before granting a mistrial.")

In striking Harold Bostic's testimony and substituting the direct and cross-examination from the first trial in this matter, the trial court was granting the very remedy expressly condoned by the Texas case law, federal law, and Texas Rules of Civil Procedure. First, "[g]iven the strong curative power of an instruction to disregard, judicial economy demands that a party resort to such a remedy before he be allowed to move for a mistrial." *Hooten v. State*, 689 S.W.2d 328, 329 (Tex. App. - Fort Worth 1985, no writ). Second, it is presumed that an instruction to disregard will cure error. *See S. Pac. Transp. Co. v. Peralez*, 546 S.W.2d 88, 96 (Tex. Civ. App. - Corpus Christi 1977, writ ref'd n.r.e.). Third, the Texas Rules of Evidence allow testimony from a non party taken from another proceeding if (i) the witness is unavailable due to death; and (ii) the party against whom the testimony is offered had an opportunity and similar motive to develop the former testimony by cross-examination. See Tex. R. Evid. 804(b)(1).

The Fifth Circuit, the Ninth Circuit, the Seventh Circuit, and the Second Circuit all recognize that when a witness becomes unavailable after direct examination but before cross-examination because of death or invocation of privilege, the proper remedy is to strike the witness's testimony. In *Fountain v. United States,* 384 F.2d 624, 628 (5th Cir. 1967), the Fifth Circuit held: "Where the privilege is legitimately invoked by a witness during cross examination, all or part of that witness's direct testimony may be subject to a motion to strike. The ultimate inquiry is whether the defendant has been deprived of his right to test the truth of the direct testimony. If he has, so much of the direct testimony as cannot be subjected to sufficient inquiry must be struck." *Id. See also United States v. Malsom*, 779 F.2d 1228, 1239 (7th Cir. 1986) (holding that defendants were not denied a Sixth Amendment right to confront the witness when the witness died after direct testimony but before cross-examination where "the district court struck [the witness's'] testimony and took pains to instruct the jury to disregard it"); *United States v. Seifert*, 648 F.2d 557, 561 (9th Cir. 1980) ("Where a witness asserts a valid privilege against self-incrimination on cross-examination, all or part of that witness's testimony must be stricken if invocation of the privilege blocks inquiry into matters which are 'direct' and not merely 'collateral.'").

Not only did the trial court afford Georgia-Pacific the remedy of striking Harold Bostic's testimony; the trial court also entered into evidence the cross-examination of Harold Bostic from the first trial. Georgia-Pacific does not dispute that it had an opportunity and similar motive to develop Harold Bostic's former testimony by cross-examination in the first

trial in this case. Thus, the trial court's actions were directly in accord with the procedures afforded by the Rules of Evidence in the event of unavailability of the witness.

In support of its position, Georgia-Pacific cites to *Bruton v. United States*, 391 U.S. 123 (1968), which is entirely inapposite. *Bruton* holds that in a joint trial of two criminal defendants, the admission of the confession of one defendant inculpating the co-defendant is prejudicial error if the defendant who made the confession does not testify and thereby subject himself to examination by the co-defendant. *See id.* at 126. In this limited circumstance involving the uniquely prejudicial incriminating extra-judicial statements of a co-defendant, the Supreme Court held that the right to cross examination under the Sixth Amendment was violated, and could not be cured by instruction. As these are not the facts presented herein, *Bruton* does not apply.

V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court deny Georgia-Pacific's appeal in this case, affirm the judgment of the trial court, and for such other relief as to which Plaintiffs may be entitled.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Appellees' Brief was served on counsel of record for all parties to this appeal by certified mail, return receipt requested, on Sept. 28, 2009, 2009.

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