NO. 10-0775

In the Supreme Court of Texas

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

v.

GEORGIA-PACIFIC CORPORATION,
Respondent

Petition for Review Arising From the Court of Appeals
For the Fifth Judicial District
Dallas, TX
No. 05-08-01390-CV
(Hon. Robert M. Fillmore)

PETITIONERS' REPLY TO RESPONSE TO PETITION FOR REVIEW

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER AUTHORITIES

[Unbriefed] Issues Presented (Restated)[1]

1. To warrant a new trial based on alleged improper conduct of a judge, bailiff, or juror, there must be a showing of injury in the rendition of an improper verdict. *See* *Tex. Employers Ins. Assoc. v. Draper*, 658 S.W.2d 202, 209 (Tex. App.—Houston [1st Dist.] 1983, no writ); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985); *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 660 (Tex. App.—Dallas, pet. denied).

Did the trial court abuse its discretion in refusing to grant a new trial, when there was no misconduct by any judge, bailiff, or juror, and Georgia-Pacific is not able to show any injury from any alleged misconduct in the form of the rendition of an improper verdict? [Unbriefed].

2. The Fifth, Ninth, Seventh, and Second Circuits 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.

Did the trial court abuse its discretion in striking Harold Bostic's direct examination testimony, and allowing Plaintiffs and Georgia-Pacific to instead read in his direct and cross-examination from the first trial, for which Georgia-Pacific does not dispute it had an opportunity and similar motive to develop his testimony? [Unbriefed].

[1] Georgia-Pacific states that Plaintiff has waived preservation of issue of punitive damages claim. Resp. Br. at xiv, footnote 1. Plaintiff did not waive this issue. The court of appeals disposed of the punitive damages without reaching Georgia-Pacific's claim that there was no evidence of gross negligence, because it said that the "first issue" – causation – negated punitive damages (in other words, in the absence of a negligence finding, one cannot have punitive damages). Plaintiffs have made clear that they are appealing the "first issue," and thus the court of appeals' derivative decision on punitive damages. *See* Tex. R. App. P. 52.3(f) ("The statement of an issue or point will be treated as covering every subsidiary issue that is fairly included.").

I. INTRODUCTION

In *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007), this Court held that the appropriate test to apply in asbestos causation cases is the substantial factor test. *Id.* at 770. The court of appeals in *Georgia-Pacific Corp. v. Bostic*, 320 S.W.3d 588 (Tex. App.—Dallas 2010) erred in holding that (i) the substantial factor test necessitates proving "but for" causation, and (ii) therefore Plaintiffs' causation evidence did not meet the substantial factor test. *Id.* at 597.

In its brief, Georgia-Pacific Corporation ("Georgia-Pacific") cites to no instance where this Court held that the substantial factor test includes the "but for" test. Instead, it claims that, because this Court adopted the substantial factor test set forth in Section 431 of the RESTATEMENT (SECOND) OF TORTS, it incorporated "but for" causation as a part of the "substantial factor test." This argument has no support in either the RESTATEMENT (SECOND) OF TORTS or in this Courts' definition of the substantial factor test as set forth in *Borg-Warner* and *Union Pump Co. v. Allbritton*, 898 S.W.2d 773 (Tex. 1995). Second, Georgia-Pacific's claim that the court of appeals followed the proper evidentiary standard in holding that evidence of exposure to its asbestos joint compound "many, many times" over a decade cannot establish substantial factor causation is contradicted by the case law it cites.[2] *See Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1308 (8th Cir. 1993) (holding that evidence of use of a product "many times" satisfies substantial factor

[2] Georgia-Pacific wholly fails to address the fact that the court of appeals ignored this Court's caution that the analysis of proof required to show causation in an asbestos case may vary based on the type of disease and type of product at issue, which is especially relevant in this case, where even Georgia-Pacific's experts conceded that because of Timothy Bostic's age at the time of exposure, he would have required far lower levels of asbestos to cause his mesothelioma, because children are more susceptible to the impact of toxins. 4 RR 149-50; 5 RR 101; 14 RR 29-30; 13 RR 216.

causation). Finally, Georgia-Pacific ignores this Court's precedent in *Borg-Warner* that "substantial-factor causation, which separates the speculative from the probable, need not be reduced to mathematical precision,"[3] and claims that the court of appeals was correct to require Plaintiffs to do the impossible – prove the precise dose of asbestos that Timothy Bostic inhaled.

The court of appeals decision has eviscerated the asbestos causation standard as carefully set forth by this Court in *Borg-Warner* and continued the conflicting interpretations of this decision.[4] Plaintiffs pray that the Court grant this Petition for Review, order full briefing on the merits, and reverse the decision of the court of appeals.

II. STATEMENT OF FACTS

At the outset, in an apparent attempt to obfuscate the important causation issues before this Court, Georgia-Pacific materially misstates the facts in this case.

First, Georgia-Pacific claims repeatedly that Plaintiffs' causation proof relies on the "each and every exposure theory" of liability. Resp. Br. at 11-12. Georgia-Pacific, like the court of appeals, ignores the fact that Dr. Hammar testified that Timothy Bostic was exposed to enough Georgia-Pacific asbestos joint compound to, in and of itself, have caused his mesothelioma.[5] Georgia-Pacific's own expert, pulmonary physician Dr. Richard Kronenberg, testified that "Timothy Bostic's exposure to drywall products

[3] *Borg-Warner*, 232 S.W.3d at 773.

[4] *See e.g.*, *Georgia-Pacific v. Stephens*, 239 S.W.3d 304 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Smith v. Kelly-Moore Paint Co., Inc.*, 307 S.W.3d 829 (Tex. App.—Fort Worth 2010, no pet.).

[5] Q. Was Timothy Bostic exposed at high enough levels, to your knowledge, in doing this drywall work, in mixing, sanding, and cleaning up of drywall materials sufficient to cause the disease mesothelioma?

A. Yes.

11 RR 49.

containing asbestos as a young person played a significant contributing factor in the development of his mesothelioma." 15 RR 221. Instead, Georgia-Pacific and the court of appeals attempt to discredit Plaintiffs' experts for recognizing the axiomatic scientific principle that every breath of asbestos inhaled necessarily adds to a person's total dose (which is a separate inquiry from substantial factor causation).[6]

Second, Georgia-Pacific incorrectly claims that it had "no opportunity to cross-examine Harold Bostic." Resp. Br. at xiii, 6. On May 25, 2006, Harold Bostic, 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 its case-in-chief. 9 RR 159. Later that same day, Harold Bostic fell ill, and ultimately died. 9 RR 160. The trial court 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.[7] 12 RR 12-13. Georgia-Pacific did not dispute that it had an opportunity and similar motive to develop Harold Bostic's testimony by cross-examination in the first trial in this case.

Third, Georgia-Pacific states that it found evidence of "questionable conduct" by a juror, bailiff, and trial judge. Resp. Br. at xiv. All of this alleged "evidence" arises from the death of Harold Bostic. What Georgia-Pacific neglects to inform this Court is that, upon questioning from Georgia-Pacific's counsel after the verdict was rendered, each of

[6] Indeed, Georgia-Pacific's expert in industrial hygiene, Dr. William Dyson, testified that "by definition" each and every exposure increases one's lifetime total dose. 15 RR 90.

[7] *See 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").

the jurors testified Harold Bostic's absence from trial had no influence on their verdict.[8] 16 RR 121-51.

Finally, Georgia-Pacific misleads this Court in stating that Georgia-Pacific asbestos joint compound contains only a "small percentage" of asbestos fibers, and that Georgia-Pacific offered several asbestos-free products. Resp. Br. at 3-4. Dr. William Longo calculated that, in a twenty-five pound bag of Georgia-Pacific joint compound containing 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. The Consumer Products Safety Commission ("CPSC") banned asbestos-joint compound 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 also recognized that children like Timothy Bostic were particularly at risk for exposure to asbestos joint compound. PX-26 at 38786. Further, all Georgia-Pacific Ready-Mix joint compound contained asbestos until 1977, and over 74 percent of the joint compound shipped by Georgia-Pacific in 1977 contained asbestos. 8 RR 54, 9 RR 65.

[8] 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, Inc.*, 689 S.W.2d 415, 419 (Tex. 1985).

III. ARGUMENT

A. Substantial factor causation does not require "but for" causation.

The court of appeals erred in holding that the substantial factor test includes the requirement of "but for" causation. *Bostic*, 320 S.W.3d at 597. The substantial factor test is a separate test from "but for" causation. *See Union Pump v. Allbritton*, 898 S.W.2d 773, 776-77 (Tex. 1995). The substantial factor test protects against those circumstances where "the defendant's conduct or product does no more than furnish the condition that makes the plaintiff's injury possible," and instead requires that the "defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause . . . ." *Union Pump*, 898 S.W.2d at 776, quoting RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965); *see also Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 472 (Tex. 1991).

Georgia-Pacific fails to recognize that the substantial factor test is an entirely different test than "but for" causation, and thus misreads the RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965), and therefore, this Court's decisions in *Union Pump*, and *Borg-Warner*.[9] Resp. Br. at 9. Section 431 cmt. a of the RESTATEMENT (SECOND) OF TORTS states the same principles as reiterated by this Court in *Union Pump* and *Borg-Warner*: that "substantial factor" requires that the "defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause . . . ." *Id.*

[9] Each of the cases cited by Georgia-Pacific involves instances where there is a single alleged cause at issue. *See Gen. Motors v. Saenz*, 873 S.W.2d 353 (Tex. 1993) (an inadequate warning); *Transcon. Ins. v. Crump*, 330 S.W.3d 211 (Tex. 2010) (an injury to the knee in a workers' compensation case); *LMB v. Moreno*, 201 S.W.3d 686 (Tex. 2006) (allegations of a premises defect leading to a pedestrian struck by a car); *Marathon Corp. v. Pitzner*, 106 S.W.3d 724 (Tex. 2003) (allegations of a premises defect causing an electrician to fall off a roof).

Therefore, when this Court states in *Borg-Warner* that Texas jurisprudence requires more than the *Lorhmann* "frequency, regularity, and proximity" test, and also requires the "substantial factor test," this Court is not adding to asbestos cases the requirement of "but for" causation.[10] *Borg-Warner*, 232 S.W.3d at 770 (quoting *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162 (4th Cir. 1986)).

That the substantial factor test does not incorporate "but for" causation is exemplified by this Court's citation to *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1219 (Cal. 1997). *Rutherford* emphasizes that substantial factor causation does not encompass the scientifically impossible "but for" standard in an asbestos case.[11] *Borg-Warner*, 232 S.W.3d at 772-73, quoting *Rutherford*, 941 P.2d at 1219; *see also Jones v. John Crane*, 35 Cal. Rptr. 3d 144, 149 n. 3 (Cal. Ct. App. 2005) (holding that *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff's risk or probability of developing cancer, but not "but for" causation).

B. The court of appeals did not follow the proper standard of review.

Georgia-Pacific's claim that the court of appeals followed the proper evidentiary standard of review in holding that Timothy Bostic's exposure to Georgia-Pacific's asbestos joint compound "many, many times" is without support in the law. In *Jackson*

[10] Inexplicably Georgia-Pacific states that Section 27 of the RESTATEMENT (THIRD) OF TORTS "does not support" the statement that "but for" causation is not required in a case where multiple products may combine to produce a plaintiff's disease. Georgia-Pacific's Brief at 10, n. 9. In fact, the RESTATEMENT (THIRD) OF TORTS expressly states that "but for" causation is not required this situation. *See* RESTATEMENT (THIRD) OF TORTS § 27, cmt. g (2002).

[11] *See also* 63 AM. JUR. 2d *Prods. Liab.* § 27 (2010) ("In concurrent cause situations in which any one concurrent cause operating alone could have produced the harm, however, "but for" causation is not a necessary element of "substantial factor" causation, and the "substantial factor" test is truly a substitute test.")

v. Anchor Packing Co., 994 F.2d 1295, 1308 (8th Cir. 1993), the Eighth Circuit held that while evidence of the use of an asbestos product "many times" satisfies the "frequency, regularity and proximity" test, the plaintiff did not testify that he used defendant's gaskets "many times." *Id.* at 1308. In contrast, Harold Bostic testified that for ten years while he worked with Timothy, he used Georgia-Pacific asbestos joint compound "many, many times," and that he used Georgia-Pacific joint compound 98% of the time or more.[12] 12 RR 39, 137. If the court of appeals had followed the proper standard of review, and viewed this evidence in a light most favorable to Plaintiffs, it would have concluded that this satisfies the "frequency, regularity, and proximity" test.

C. The court of appeals erred in requiring Plaintiffs to calculate the exact dose of asbestos inhaled by Timothy Bostic.

In *Borg-Warner*, the plaintiff did not bring an expert to testify as to the quantity of asbestos emitted upon grinding Borg-Warner brake pads; indeed, the plaintiff's expert admitted that "he had not researched Borg-Warner products and did not have any specific knowledge about them." *Id.* at 767. Thus, this Court concluded that there was "no evidence of the approximate quantum of Borg-Warner fibers to which Flores was exposed . . . ." *Id.* at 772.

Here, Plaintiffs' expert Dr. William Longo tested Georgia-Pacific's asbestos joint compound and measured exposure levels to asbestos that were thousands of times greater than background exposure. 10 RR 95, 136. Dr. Longo measured 16 billion asbestos structures on the clothing of a worker who sanded Georgia-Pacific asbestos joint

[12] Further, Georgia-Pacific's asbestos joint compound contains chrysotile, and Georgia-Pacific's expert, Dr. Richard Kronenberg, testified that there were chrysotile asbestos fibers found in Timothy Bostic's lungs. 15 RR 199.

compound. 10 RR 239-40. This evidence, coupled with the fact that Timothy Bostic was exposed to Georgia-Pacific asbestos joint compound continuously for ten years, does not equate to the problematic "indeterminate amount" that may have originated with Borg-Warner products. On the contrary, this evidence satisfies this Court's substantial factor requirement that the Plaintiffs provide "[d]efendant-specific evidence relating to the approximate dose to which plaintiff was exposed," which "need not be reduced to mathematical precision." *Borg-Warner*, 232 S.W.3d at 773. The court of appeals errs in holding that Plaintiffs failed to satisfy *Borg-Warner*'s substantial factor requirements, because Dr. Longo testified that it would be a scientific impossibility to recreate a plaintiff's exact asbestos inhalations without having taken contemporaneous measurements at the time of exposure.[13] *Bostic*, 320 S.W.3d at 601.

IV. CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court grant this Petition for Review, reverse the decision of the court of appeals, and for such other relief as to which Plaintiffs may be entitled.

[13] 10 RR 73-74.

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CERTIFICATION OF COUNSEL

I certify that I have reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

_____
Eric Policastro

CERTIFICATE OF SERVICE

I certify that pursuant to the Texas Rules of Civil Procedure, I have served a true copy of the foregoing Reply to Response to Petition for Review by certified mail, return receipt requested on April 5, 2011:

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