

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 DONNAHOW, AND KYLE ANTHONY BOSTIC

Petitioners,

v.

GEORGIA-PACIFIC CORPORATION,

Respondent.

ON APPEAL FROM THE FIFTH COURT OF APPEALS,
DALLAS, TEXAS (NO. 05-08-01390-CV)

**BRIEF OF COALITION FOR LITIGATION JUSTICE, INC., TEXANS
FOR LAWSUIT REFORM, CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, AMERICAN TORT REFORM
ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS,
NFIB SMALL BUSINESS LEGAL CENTER, NATIONAL ASSOCIATION
OF MUTUAL INSURANCE COMPANIES, PROPERTY CASUALTY
INSURERS ASSOCIATION OF AMERICA, AND AMERICAN
INSURANCE ASSOCIATION AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICI CURIAE

Amici are civil justice organizations and organizations whose members are defendants in asbestos cases and insurers. Accordingly, *amici* have a substantial interest in ensuring that Texas follows sound science and fair liability rules in asbestos cases, and continues to reject the *any exposure* theory as a basis for expert testimony or causation evidence in mesothelioma cases.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici file this brief to assist the Court in addressing Plaintiffs' attack on *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007), rejecting the *any exposure* theory.² Before *Flores*, asbestos litigation in Texas had become a world unto its own where plaintiffs only needed to show exposure to get to a jury. *Flores* restored order to Texas asbestos litigation, at least in the context of asbestosis cases, by requiring a professional estimation – not an exact calculation – of the dose and some demonstration the dose was sufficient to cause disease via epidemiology studies of similarly-exposed populations.

¹ Counsel state that this brief was paid for entirely by the *amici*.

² Plaintiffs' experts who support the *any exposure* theory opine that any occupational or product-related exposure to asbestos above or different from background exposures is a substantial contributing factor to the ultimate disease, without regard to dose. See Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501, 528 (2009).

Since *Flores*, Texas appellate courts have repeatedly rejected plaintiffs' attempts to weaken or narrow the Court's holding. For example, the court in *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304 (Tex. App.–Houston [1st Dist.] 2007), rejected the argument that *Flores* does not apply to mesothelioma cases. Two of the key arguments plaintiffs typically raise are part of this appeal: (1) whether the Court should exclude mesothelioma cases from *Flores*, and (2) whether the Court should back off its determination that a dose assessment is needed when plaintiffs can show multiple exposures from asbestos products.

Amici urge the Court to reject these invitations to upend what has become settled law. The Court got it right in *Flores* and does not need to weaken or carve out exceptions to that holding. *Flores* was grounded in toxicology principles, and its requirement of a dose assessment is standard in toxic tort litigation. Mesothelioma presents no different situation, although the causative dose may be different. Plaintiffs still should have to demonstrate a causative dose rather than tell the jury that mere exposure is enough. Particular products or activities should not escape the need for a dose assessment simply because they occur frequently or release some quantity of asbestos fibers. This is the whole purpose of a dose assessment – to determine whether the exposures match up with epidemiology studies that under *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997) would be considered sufficient as a medical and legal cause of disease. *See*

Merck & Co. v. Garza, 347 S.W.3d 256, 265-66 (Tex. 2011). With respect to the joint compound exposures in this case – how potent are the fibers; how much lifetime exposure did the plaintiff receive; and what studies show that such exposures will actually (and not theoretically) cause disease? Both practicing toxicologists and experts in toxic tort cases utilize this type of analysis on a daily basis. Asbestos is no different in this regard.

Rather than reject or weaken *Flores*, the Court should use this opportunity to acknowledge the correctness of the holdings in *Stephens* and other recent appellate asbestos matters, and confirm that the requirement of proving a causative dose applies to all asbestos cases. This requirement is not harsh, nor is it an impossible standard. Plaintiffs who received consequential exposures that are consistent with the epidemiological literature showing disease will have their day in court.

ARGUMENT

I. THE FLORES DOSE-BASED CAUSATION STANDARD NOW REPRESENTS MAINSTREAM ASBESTOS LAW AND IS NOT “TOO HARD” ON PLAINTIFFS

Since *Flores* rejected *any exposure*-based causation opinions, plaintiffs have decried the decision as setting too difficult a standard. That is not the case. Over

thirty courts around the country have rejected *any exposure* testimony.³ Quite simply, *Flores* and its progeny are mainstream. Indeed, *Flores* turned out to be anything but an outlier – it set the course for a reform of asbestos litigation nationwide, bringing treatment of asbestos cases in line with general tort principles, and led a tide of decisions still spreading to this day.⁴

A. “The Dose Makes the Poison”

The *any exposure* theory – no matter what name it goes by – is flawed and full of scientific and logical error.⁵ The most critical flaw is that the theory ignores the principle of dose - “the dose makes the poison.” Federal Judicial Center, *Reference Manual on Scientific Evidence, Reference Guide on Toxicology* 403 (2d

³ See Mark A. Behrens & William L. Anderson, *The “Any Exposure” Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 Sw. U. L. Rev. 479 (2008); William L. Anderson et al., *The Any Exposure Theory Round II – Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008*, 22 Kan. J.L. & Pub. Pol’y 1 (2012). The trend continues. *See infra*.

⁴ See Victor E. Schwartz, *A Letter to the Nation’s Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 Am. J. of Trial Advoc. 1, 29 (2012) (“In recent years, a growing number of courts have excluded or criticized any exposure testimony.”).

⁵ The Court should not get caught up in the specific words these experts use – if they have failed to develop a lifetime dose assessment based on the number of exposures, duration and intensity of those exposures, and potency of the fiber type, and then have also failed to compare that dose to relevant epidemiology studies, they are engaged in a standard-less approach that is contrary to science and causation principles.

ed. 2000). “Dose is the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect.” David L. Eaton, *Scientific Judgment and Toxic Torts – A Primer In Toxicology For Judges and Lawyers*, 12 J.L. & Pol’y 5, 11 (2003). Courts must also pay attention to this inquiry when making the causation assessment. A proper analysis should begin with a measurement, or at least a reasonable estimate, of the likely dose received by the plaintiff. The expert should then compare that dose to the dose known to cause the subject disease.⁶

B. Since Flores, Rejection of Any Exposure Testimony Has Spread

Before *Flores*, several courts had rejected *any exposure* testimony – *Flores* was by no means the first.⁷ Since *Flores*, the rejection of this theory has spread:

- The Supreme Court of Pennsylvania joined this Court in soundly rejecting *any exposure* testimony and requiring experts to prove a causative dose. See *Betz v. Pneumo Abex LLC*, 44 A.3d 27 (Pa. 2012).

⁶ See *Wintz v. Northrop Corp.*, 110 F.3d 508 (7th Cir. 1997); *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105 (8th Cir. 1996); *Bartel v. John Crane, Inc.*, 316 F. Supp. 2d 603, 611 (N.D. Ohio 2004), *aff’d sub nom. Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488 (6th Cir. 2005); see also Federal Judicial Center, *Reference Manual on Scientific Evidence, Reference Guide on Epidemiology* 338 (3d ed. 2011).

⁷ See, e.g., *Bartel*, 316 F. Supp. 2d at 607-08; *In re Toxic Substances Cases*, 2006 WL 2404008 (Pa. Ct. Com. Pl. Allegheny County Aug. 17, 2006).

- The Virginia Supreme Court held that experts “must opine as to what level of exposure is sufficient to cause mesothelioma, and whether the levels of exposure at issue...were sufficient.” *Ford Motor Co. v. Boomer*, 736 S.E.2d 724, 733 (Va. 2013). This is precisely the holding in *Flores*. See also *Wannall v. Honeywell Int’l, Inc.*, 2013 WL 1966060 (D.D.C. May 14, 2013).
- The Sixth Circuit has rejected *any exposure* testimony three times since *Flores* was decided. See *Moeller v. Garlock Sealing Techn., LLC*, 660 F.3d 950 (6th Cir. 2011); *Martin v. Cincinnati Gas & Elec. Co.*, 561 F.3d 439 (6th Cir. 2009); *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671 (6th Cir. 2011) (benzene).
- A Georgia appellate court rejected *any exposure* testimony, requiring experts to present competent dose and causation evidence. See *Butler v. Union Carbide Corp.*, 712 S.E.2d 537 (Ga. Ct. App. 2011).
- Several federal district courts have rejected *any exposure* testimony since *Flores*: *Smith v. Ford Motor Co.*, 2013 WL 214378 (D. Utah Jan. 18, 2013); *Anderson v. Ford Motor Co.*, 2013 WL 3179497 (D. Utah June 24, 2013); *Sclafani v. Air & Liquid Sys. Corp.*, 2013 WL 2477077 (C.D. Cal. May 9, 2013); *In re W.R. Grace & Co.*, 355 B.R. 462 (Bankr. D. Del. 2006), *appeal denied*, 2007 WL 1074094 (D. Del. Mar. 26, 2007); see also *Newkirk v. ConAgra Foods, Inc.*, 727 F. Supp. 2d 1006 (E.D. Wash. 2010), *aff’d*, 438 Fed. Appx. 607 (9th Cir. 2011) (popcorn); *Henricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142 (E.D. Wash. 2009) (benzene).
- A Washington court found the any exposure theory to be an unproven hypothesis. See *Free v. Ametek*, 2008 WL 728387 (Wash. Super. Ct. Feb. 28, 2008); see also *McPhee v. Ford Motor Co.*, 135 Wash. App. 1017, 2006 WL 2988891 (Wash. App. Div. 1 Oct. 16, 2006).
- A Mississippi court precluded the *any exposure* theory as inconsistent with Mississippi’s causation rules. See *Anderson et al.*, *supra*, at 31 n.161 (citing *Nix v. AGCO Corp.*, No. 2010-85-CVS (Miss. Cir. Ct. Jones County Sept. 9, 2011)); see also *Brooks v. Stone Architecture, P.A.*, 934 So. 2d 350 (Miss. Ct. App. 2006).

- A Florida court determined that the *any exposure* opinion offered was inadmissible because it was insufficient to prove that exposure to a particular product was capable of causing disease. *See Daly v. Arvinmeritor, Inc.*, 2009 WL 4662280 (Fla. Cir. Ct. Broward County Nov. 30, 2009).⁸

Demonstrating that this is not just an asbestos issue, a number of courts have rejected attempts to export *any exposure* testimony into other kinds of toxic tort litigation:

- In 2011, the Sixth Circuit considered the testimony that any exposure to benzene can cause non-Hodgkin’s Lymphoma. The Court held that “it is well-settled that the mere existence of a toxin in the environment is insufficient to establish causation without proof that the level of exposure could cause the plaintiff’s symptoms.” *Pluck*, 640 F.3d at 679.
- In 2011, the Vermont Supreme Court said, “In addition to showing general causation through epidemiological studies, plaintiffs in toxic tort cases must demonstrate specific causation by submitting evidence concerning ‘the amount, duration, intensity, and frequency of exposure.’” *Blanchard v. Goodyear Tire and Rubber Co.*, 30 A.3d 1271, 1275 (Vt. 2011) (quoting *White v. Dow Chem. Co.*, 321 Fed. Appx. 266, 273 (4th Cir. 2009)).
- In 2010, an Ohio federal court identified numerous flaws in the any exposure theory, stating “since benzene is ubiquitous, causation under a one-hit theory could not be established because it would be just as likely that ambient benzene was the cause of Plaintiffs’ illness.” *Baker v. Chevron USA, Inc.*, 680 F. Supp. 2d 865, 887 n.9 (S.D. Ohio 2010), *aff’d*, 2013 WL 3968783 (6th Cir. Aug. 2, 2013).

⁸ *See also* David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook. L. Rev. 51, 59 (2008) (“The recent, increasingly strict exposure cases...reflect a welcome realization by state courts that holding defendants liable for causing asbestos-related disease when their products were responsible for only *de minimis* exposure to asbestos, and other parties were responsible for far greater exposure, is not just.”).

- In 2009, a Washington federal district court performed an extensive review of the scientific literature surrounding benzene exposures and concluded that experts who “opine on specific causation must pay careful attention to the dose-response relationship” and the “amount of exposure the plaintiff allegedly suffered.” *Henricksen*, 605 F. Supp. 2d at 1157.
- In a 2011 diesel fumes case, an Arkansas court held that “causation requires more than mere proof of exposure to above-ambient levels of the alleged toxin, and instead requires evidence of the levels of exposure that are hazardous to human beings generally, as well as the plaintiff’s actual level of exposure to the [] toxic substance.” *Richardson v. Union Pac. R.R. Co.*, 386 S.W.3d 77, 79 (Ark. Ct. App. 2011).
- In *Newkirk*, the Washington district court excluded the testimony of a frequent asbestos *any exposure* expert, in part, because he failed to cite literature demonstrating that exposure to diacetyl in microwave popcorn could cause lung disease at low levels. 727 F. Supp. 2d at 1024.
- In a 2010 groundwater exposure case, a court excluded an expert who opined that there was “no safe level” of exposure to perfluorooctanoic acid and related chemicals because the expert failed to establish the concentrations of those chemicals led to the identified harmful effects. *See Emerald Coast Util. Auth. v. 3M Co.*, 746 F. Supp. 2d 1216, 1223 (N.D. Fla. 2010).

What the standards in these cases have in common is an understanding that expert causation testimony, accompanied by no attempt whatsoever to assess the actual dose, is testimony with no foundation and no grounding in science.

A handful of courts have taken a different path. These courts have declined to conduct a thorough analysis of the scientific viability of *any exposure* testimony. *See Dixon v. Ford Motor Co.*, 2013 WL 3821431 (Md. July 25, 2013). These courts instead adopted a plain *Lohrmann* causation rule allowing experts to testify without a dose estimate if the exposures were frequent, regular, and proximate.

See Holcomb v. Georgia Pacific, LLC, 289 P.3d 188 (Nev. 2012). This unfortunate approach forces state trial judges to decide whether, for example, ten exposures over a year is sufficiently regular and frequent to be a cause of disease. This Court should not be tempted by that route.⁹

Thus, based on the direction of the case law noted above, *Flores* can today be described as the dominant law in asbestos and toxic tort litigation, at least in states whose trial and appellate courts have considered the issue. Rather than representing an “impossible” standard, the requirement of a proper assessment of a causative dose is simply Toxicology 101. End-running good science is not a path

⁹ A few courts have permitted *any exposure* testimony but only by declining to investigate the foundation of the theory and, instead, accepting what the experts say at face value. This is error and a failure of the judicial gatekeeping function. *See, e.g., Buttitta v. Allied Signal, Inc.*, 2010 WL 1427273 (Super. Ct. App. Div. Apr. 5, 2010), *cert. denied*, 4 A.3d 1025 (N.J. 2010); *see also In re Asbestos Prods. Liab. Litig. (No. VI) (Larson v. Bondex Int'l)*, 2010 WL 4676563 (E.D. Pa. Nov. 15, 2010); *In re Asbestos Prods. Liab. Litig. (No. VI) (Anderson v. Saberhagen Holdings, Inc.)*, 2011 WL 605801 (E.D. Pa. Feb. 16, 2011); *In re Asbestos Prods. Liab. Litig. (No. VI) (Rabovsky v. Air & Liquid Sys. Corp.)*, 2012 WL 252919 (E.D. Pa. Jan. 25, 2012), *adopted*, 2012 WL 876752 (E.D. Pa. Mar. 13, 2012) (Robreno, J.). *Larson* has been undercut by a recent opinion that essentially reversed the federal MDL judge, *Anderson v. Ford Motor Co.*, 2013 WL 3179497 (D. Utah June 24, 2013). *Anderson v. Saberhagen Holdings* is erroneous under Washington law as stated in *Free v. Ametek* and *McPhee v. Ford Motor Co.*, *supra*. *Rabovsky* turned out to be erroneous under the Pennsylvania Supreme Court’s *Betz* decision. Additionally, a federal MDL magistrate has noted that “a mere ‘minimal exposure’ to a defendant’s product [is] not sufficient to establish causation.” *In re Asbestos Prods. Liab. Litig. (No. VI) (Sweeney v. Saberhagen Holdings, Inc.)*, 2011 WL 346822, *6 (E.D. Pa. Jan. 13, 2011), *adopted*, 2011 WL 359696 (E.D. Pa. Feb. 3, 2011).

any court should go down – that course will only encourage frivolous litigation and allow recovery where none is scientifically or medically justified.¹⁰

II. THE HOLDING IN FLORES SHOULD APPLY TO MESOTHELIOMA AND ALL ASBESTOS PRODUCTS AND CASES

Plaintiffs in *Bostic* contend that mesothelioma is a different disease than asbestosis and should be subject to different causation and proof requirements. They also contend that certain products (in this instance, joint compound) should be exempt from *Flores* because they are friable (loosely bound and can be crumbled with hand pressure). Neither contention is scientifically or legally viable, and the Court should reject them both.

A. Mesothelioma Should Not Be Excused From Dose Assessment

Nothing about the genesis and etiology of mesothelioma justifies special rules. Mesothelioma, like other cancers, can arise from the body's own spontaneous errors in cell division, from known sources such as radiation and asbestos, from unknown asbestos exposures, or from currently unknown causes.¹¹

¹⁰ See Jim Sinunu, *The Rise of Gatekeepers and the 'Single Fiber' Theory*, 35:11 Westlaw Asbestos J. 1 (Mar. 15, 2013) (plaintiffs' exposures to asbestos have "continued to drop, to the point where some companies are defending against doses admittedly equal to or less than the dose the average citizen would receive from the atmosphere.").

¹¹ A significant number of mesotheliomas each year are considered *idiopathic*, meaning they arise spontaneously or from unknown asbestos or other exposures. See, e.g., Victor Roggli et al., *Pathology of Asbestos-Associated Diseases* 108

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According to the record, the plaintiff, for instance, apparently had a significant exposure to insulation in his job at Knox Glass Plant and as a welders assistant, which defendants argue could potentially account for his disease. It is the job of the testifying expert to sort through the various exposures a plaintiff received and determine which were sufficient to cause mesothelioma, based on the published literature, and which were not. An expert who instead simply declares, “this person had workplace exposures so each and every one of those exposures must be

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(Springer 2d ed. 2004); Christine Rake et al., *Occupational, Domestic and Environmental Mesothelioma Risks in the British Population: A Case Control Study*, 100 *Brit. J. Cancer* 1175, 1181 (2009) (unexplained cases accounted for 14% of male and 68% of female mesotheliomas in Britain); Mary Jane Teta et al., *US Mesothelioma Patterns 1973-2002: Indicators of Change and Insights into Background Rates*, 17 *Eur. J. Cancer Prevention* 525, 534 (2008) (upwards of 300 cases of mesothelioma every year “may be unrelated to asbestos exposure” and may “reflect spontaneous causes”); Brooke T. Mossman et al., *Asbestos: Scientific Developments and Implications for Public Policy*, *Science* (Jan. 19, 1990), at 294 (“approximately 20 to 30% of mesotheliomas occur in the general population in adults not exposed occupationally to asbestos”). Some mesotheliomas are produced by radiation treatments received in past decades. *See, e.g.*, Mary Jane Teta et al., *Therapeutic Radiation for Lymphoma: Risk of Malignant Mesothelioma*, 109 *Cancer Radiotherapy & Mesothelioma* 1432 (2007). Based on a study of vehicle mechanics, experts have concluded it is likely that persons with mesothelioma but no known heavy amphibole exposures either did have amphibole exposures (thus causing their disease) or their lungs are within normal limits and the cancer is probably spontaneously induced. *See* Kelly J. Butnor et al., *Exposure to Brake Dust and Malignant Mesothelioma: A Study of 10 Cases with Mineral Fiber Analyses*, 47 *Ann. Occup. Hyg.* 325, 327 (2003).

considered a cause” is not doing his or her job and should not be allowed to so testify.

Also, like other toxins, asbestos is widely believed to have a threshold below which exposures likely do not overwhelm the body’s many defenses against cancerous cells to cause mesothelioma.¹² Identifying where the threshold may lie can be difficult, but that does not mean one does not exist or that the expert can simply ignore the reality of a threshold and assume none exists:

To make a rational estimate of the risk associated with [carcinogens in] the diet one must know the level of exposure as well as the carcinogenic potency of a suspected chemical.... [B]ased upon existing exposure data, the great majority of individual naturally occurring and synthetic chemicals in the diet appears to be present at levels below which any significant adverse biologic effect is likely, and so low that they are unlikely to pose an appreciable cancer risk.¹³

Asbestos is no different. Groups of workers exposed to chrysotile (the fiber type involved in most modern, low-dose asbestos litigation) have only rarely developed mesotheliomas, and then only under the highest exposure scenarios.¹⁴

¹² See also David L. Eaton, *Scientific Judgment and Toxic Torts - A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & Pol’y 5, 13 (2003) (carcinogens require repeated and significant exposures).

¹³ National Academies of Science, *Carcinogens and Anticarcinogens in the Human Diet: A Comparison of Naturally Occurring and Synthetic Substances*, Committee on Comparative Toxicity of Naturally Occurring Carcinogens, National Research Council, Preface p. iv (1996).

¹⁴ Cohorts of workers exposed to amphiboles, especially prior to OSHA standards issued in 1972, show high levels of mesothelioma. But similar cohorts

(continued...)

In today's asbestos litigation, since most of the older thermal insulation-related defendants are bankrupt, plaintiffs often allege that smaller and less potent chrysotile exposures in the workplace are the cause of the disease. They do so by ignoring the known amphibole exposures in many plaintiffs' work histories (such as plaintiff's insulation exposures), or if such exposures did not occur, by ignoring the reality of idiopathic causes. The crux of these cases is whether the scientific literature supports the claim that relatively low doses of chrysotile could be the real cause of these mesotheliomas. If the literature does not support such a claim, these mesotheliomas cannot be attributed to workplace chrysotile exposures, and these cases should not be part of Texas asbestos litigation.

Thus, there is no scientific reason why mesothelioma should be considered a "doseless" disease or excused from an assessment of dose. In *Havner*, *Flores*, and

(continued)

exposed chiefly or only to chrysotile fibers, during the same era of limited regulation, show very few mesotheliomas, if any. See David Rees et al., *Case-Control Study of Mesothelioma in South Africa*, 35 *Am. J. Indus. Med.* 213, 220 (1999) (no mesotheliomas among heavy-exposed chrysotile mining cohort); Misty Hein et al., *Follow-Up Study of Chrysotile Textile Workers: Cohort Mortality and Exposure-Response*, 64 *Occup. Envir. Med.* 616, 618, Table 2, 620 (2007); see also John M. Dement et al., *Follow-Up Study of Chrysotile Textile Workers: Cohort Mortality and Case-Control Analyses*, 26 *Am. J. Indus. Med.* 431, 437-38 (1994) (only a handful of mesotheliomas among textile workers, and those only in highest exposed jobs); H.F. Thomas et al., *Further Follow-Up Study of Workers from an Asbestos Cement Factory*, 39 *Brit. J. Indus. Med.* 273, 275 (1982) (no mesotheliomas among 1261 cement plant workers).

other cases, the courts of Texas have recognized the critical necessity of identifying a dose of exposure to the alleged toxic substance that matches up with studies showing a doubling of the risk to persons exposed to similar amounts of that or a very similar substance.¹⁵ Mesothelioma fits squarely into this equation.

Plaintiffs also argue that because “low amounts” of asbestos cause mesotheliomas, they should be excused from any assessment of dose and merely show exposure. This is a transparent effort to re-inject the *any exposure* theory into asbestos litigation in Texas. And since today’s docket is made up mostly of mesothelioma cases, the exception would quickly gut the rule. There are multiple problems with this argument but *amici* focus on only two, either of which is sufficient to discredit it.

First, whatever “low” means in this argument, it certainly does not mean “any.” Plaintiffs must define how much is enough. This is no different than the process for asbestosis, or lung cancer, or benzene-induced AML, or tobacco-induced lung cancer. Simply declaring all workplace exposures causative on the assumption that “low doses” cause mesothelioma, with no assessment of where that “low dose” is, does not make sense.

¹⁵ For example, a plaintiff exposed to encapsulated asbestos products should not be permitted to rely on studies involving friable products, and a plaintiff exposed to chrysotile fibers should not be permitted to rely on studies involving amphibole fibers.

Second, plaintiffs engage in a misdirection with their claim that low doses of “asbestos” cause mesothelioma. This is because these are typically chrysotile-exposure cases, but the expert’s reference is based on highly dissimilar studies of a different fiber type – amphiboles. Like some sort of shell game, plaintiffs switch from talking about chrysotile to referring only to “asbestos” when they make this argument. As they freely admit, these experts have *no epidemiology studies at all demonstrating that low doses of chrysotile cause mesothelioma – they are testifying to an unproven (and discredited) hypothesis*. Dr. Samuel Hammar, one of plaintiffs’ key medical experts in this case, testified in a federal district court in Washington that his theory that chrysotile causes mesothelioma at virtually any workplace dose was an unproven hypothesis and that he could not point to chrysotile-based studies demonstrating that point.¹⁶ Dr. Lemen, also a testifying expert in this case, has admitted that there are “no data points” showing actual chrysotile-induced mesotheliomas in the epidemiological literature below *nine fibers per cubic centimeter* exposure.¹⁷ All asbestos fibers are not the same, and plaintiffs should not be permitted to rely on amphibole studies to prove chrysotile fiber causation. References to “one day” or “low doses” causing mesotheliomas

¹⁶ See *Free*, 2008 WL 728387, at *3-4.

¹⁷ Deposition of Richard Lemen, *Pellegal v. Northrup Grumman Ship Sys.*, No. 07-7749, at 126-128 (La. Civ. Dist. Ct.-Orleans Parish, May 9, 2008).

are also not derived from epidemiology studies – they come from mere case reports of a person who incurred mesothelioma and also had a few days or months of very high exposures to amphiboles. Whether or not those exposures were the cause is unproven because case reports are not sufficient to prove causation.¹⁸ Nor can these references come close to satisfying *Havner*.

B. Friable Product Exposures Also Require Dose Assessment

Plaintiffs are also incorrect in contending that certain friable products that release fibers should merit an exclusion from *Flores*. Whether or not a product is friable or bonded, the *dose* is still a critical element because the quantity of fibers released even from a friable product could be quite small. Picking up a piece of friable insulation would result in an infinitesimally small dose, if any exposure at all, and should not be considered a cause of disease. Chrysotile fiber joint compound can produce breathable fibers if mixed dry or when sanded, but the dose is a critical factor. Thus, while products differ in their propensity to release fibers, friable products are subject to the need for a dose and potency assessment as any other kind of release.

Plaintiffs have not provided this Court with any good reason to create holes in the *Flores/Havner* causation standards. These standards should apply to all

¹⁸ See, e.g., *In re Toxic Substances Cases*, 2006 WL 2404008, at *5; *Betz*, 44 A.3d at 46-47.

asbestos cases just as they apply to toxic tort cases in Texas. *Amici* urge the Court to hold the line and ensure that the old version of asbestos litigation does not return.

PRAYER

For these reasons, the Court should affirm the decision below.

Respectfully Submitted,

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Dated: August 21, 2013

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2) because it contains less than 4,500 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Manuel López _____
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CERTIFICATE OF SERVICE

I certify that I have served a true copy of the foregoing Brief electronically
on August 21, 2013.

/s/ Manuel López

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APPENDIX: AMICI CURIAE STATEMENTS OF INTEREST

The Coalition for Litigation Justice, Inc. (“Coalition”) is a nonprofit association formed by insurers in 2000 to address and improve the litigation environment for asbestos and other toxic tort claims.¹⁹ The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment and may reduce or eliminate inequities that exist in the current civil justice system.

Texas for Lawsuit Reform’s (“TLR”) objective is to restore litigation to its traditional and appropriate role in our society. TLR has been working for more than a decade to create a civil justice system that discourages non-meritorious lawsuits or outrageous claims for damages. TLR strives for a trial environment in which the outcome is based solely on the merits of each party's case. Additionally, TLR has been actively engaged with the Texas legislature when it has considered legislation governing asbestos litigation in Texas.

The Chamber of Commerce of the United States of America (“U.S. Chamber”) is the world’s largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an

¹⁹ The Coalition includes Century Indemnity Company, Chubb & Son, a division of Federal Insurance Company, Fireman’s Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive agencies. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of approximately 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 350,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Founded in 1895, National Association of Mutual Insurance Companies ("NAMIC") is the largest and most diverse property/ casualty trade association in the country, with 1,400 national, regional and local mutual insurance member companies serving more than 135 million auto, home, and business policyholders. These companies write in excess of \$196 billion in annual premiums, accounting for 50 percent of the automobile/homeowners market and thirty-one percent of the business insurance market. More than 200,000 people are employed by NAMIC members. NAMIC benefits its members through public policy development, advocacy, and member services.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies, representing the broadest cross-section of any national trade association. PCI promotes and protects the viability of a competitive private insurance market for

the benefit of consumers and insurers. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. PCI members write more than \$190 billion in annual premium, forty percent of the nation's property casualty insurance. Member companies write forty-six percent of the U.S. automobile insurance market, thirty-two percent of the homeowners market, thirty-eight percent of the commercial property and liability market, and forty-one percent of the private workers compensation market. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI is interested in the resolution of the issue before the Court on behalf of its members and their interests.

The American Insurance Association (“AIA”), founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association representing major property and casualty insurers writing business nationwide and globally. AIA members range in size from small companies to the largest insurers with global operations. On issues of importance to the property and casualty insurance industry and marketplace, AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and files *amicus curiae* briefs in significant cases before federal and state courts, including this Court.