No. 05-08-01390-CV

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

GEORGIA-PACIFIC CORPORATION,

Appellant,

v.

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.

APPELLANT GEORGIA-PACIFIC CORPORATION'S REPLY BRIEF

On Appeal from County Court at Law No. 1, Dallas County, Texas

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INTRODUCTION

Georgia-Pacific's opening brief challenged Plaintiffs to answer three critical questions regarding the legal sufficiency of the evidence supporting the jury's causation finding:

- Where is the record evidence that Timothy Bostic was exposed to Georgia-Pacific's asbestos-containing joint compound?
- Where is the record evidence of the dose of asbestos from Georgia-Pacific asbestos-containing joint compound to which Timothy Bostic was allegedly exposed?
- Where is the record evidence of any epidemiological studies that show a doubling of the risk of developing mesothelioma from the use of chrysotile-containing joint compound by persons with exposures similar to Timothy Bostic's alleged exposures?

See Georgia-Pacific Br. at 17-29 (discussing the substantial factor causation test set forth in *Borg-Warner v. Flores*, 232 S.W.3d 765 (Tex. 2007), and *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304 (Tex. App.—Houston [1st Dist.] 2007, pet. denied)). Plaintiffs wholly failed to answer these questions in their response brief. Instead, with bald allegations of "10 years of frequent, proximate, and regular exposure to Georgia-Pacific asbestos containing joint compound," *see* Pls.' Br. at xii, xiv, 2, 4, 23, Plaintiffs affirmatively misstate the record evidence regarding whether Timothy Bostic was exposed to any Georgia-Pacific joint compound, falsely claim that their experts calculated the dose to which Timothy Bostic was exposed, fail to address their lack of epidemiological studies (instead simply listing certain papers in a footnote), and finally, deny that their causation experts relied upon the "each and every exposure" theory of causation (despite their testimony to the contrary). This Court

cannot rely upon Plaintiffs' brief for an accurate account of the proceedings below.

ARGUMENT

I. THERE IS NO EVIDENCE THAT TIMOTHY BOSTIC WAS EXPOSED TO GEORGIA-PACIFIC ASBESTOS-CONTAINING JOINT COMPOUND.

To recover on their negligence or defective marketing claims, Plaintiffs were required to prove that Timothy Bostic was actually exposed to Georgia-Pacific chrysotile-containing joint compound. *See Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989). Glossing over the multiple and significant sources of Timothy Bostic's exposure to asbestos from other sources, Plaintiffs attempt to create the impression that Timothy had "10 years of exposure to Georgia-Pacific asbestos containing joint compound" as a result of daily construction work with his father when he was between the ages of five and fifteen (1967-1977).[1] Plaintiffs also rely upon Harold Bostic's conclusory statements that he used Georgia-Pacific joint

[1] Plaintiffs brush aside Timothy Bostic's exposure to other sources of asbestos, asserting that it was no more than "three months working in the 'hot section' [at] 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." *See* Pls.' Br. at 4, 6-7. But this exposure to asbestos products was far more significant than his alleged exposure to chrysotile-containing joint compound. At Knox Glass, he swept up asbestos dust on the floors, 7 RR 174, 8 RR 29; removed "flaking" asbestos from machines and replaced it with asbestos he cut from sheets; wore asbestos gloves to "rub the asbestos arms down through there so the glue would stick to the metal," 8 RR 33, 7 RR 173-74; and breathed asbestos-laden air circulated throughout the plant by the ventilation fans, 8 RR 29. Timothy was also exposed to asbestos five days a week throughout his childhood from his father's "dirty, dusty clothing." 7 RR 177. His father was exposed to multiple sources of asbestos at Knox Glass and brought home asbestos on his clothing throughout Timothy's infancy and childhood. 12 RR 18-19, 67-73. Timothy's sworn Work History Sheets reflect 21 years (1962-1983) of exposure to asbestos from his father's clothing. DX-33. Plaintiffs' expert witnesses agreed that exposure to asbestos from clothing is a recognized cause of mesothelioma. 4 RR 182-83; 10 RR 167-68; 11 RR 48, 105-08. Both Timothy and his treating physicians believed that his mesothelioma resulted from the years of daily exposure to his father's clothing and Timothy's own employment at Knox Glass. 12 RR 68-73; 7 RR 171-77; 8 RR 21-23, 26-35; DX-33; DX-35; DX-36; DX-37.

compound "many, many times" or "98 percent" of the time—without reference to time or location. The specific record evidence, however, reflects that Timothy Bostic was not exposed to any Georgia-Pacific chrysotile-containing joint compound during the relevant time period.

First, Harold and Timothy Bostic did not work in the construction industry. Harold worked at the Knox Glass Plant, and Timothy was in school. Timothy helped his father on construction projects for family and friends after work hours and on weekends until Timothy was ten. 12 RR 24-26. After Timothy turned ten in 1972, his parents divorced, and Timothy only spent the weekends, some holidays, and summers with his father. 12 RR 26-27.

Second, Harold and Timothy did only one construction project at a time, and each project took a year to complete. 12 RR 83. Thus, Harold and Timothy could have worked on no more than eleven construction projects between 1967 and 1977. Harold only recalled having worked on eight projects. Of those eight projects, however, only three involved *any* drywall work at all. 12 RR 78-93, 109-37. The other projects involved demolition, framing, electrical, and plumbing work. *See* 12 RR 78-93, 109-25.

Third, of the three projects requiring drywall work, Harold recalled using Georgia-Pacific joint compound on only one project. Harold, however, could not remember whether Timothy had helped him with the drywall work, although Harold remembered that Timothy dug the sewer on that project. 12 RR 120-21.

Given the absence of any evidence that Timothy Bostic was ever exposed to Georgia-Pacific joint compound, Plaintiffs' bald allegation of "10 years of exposure" is disingenuous.

There is no evidence to establish any exposure to Georgia-Pacific joint compound at all, much less to chrysotile-containing joint compound, and therefore Plaintiffs' negligence and defective marketing claims against Georgia-Pacific fail as a matter of law. *See Gaulding*, 772 S.W.2d at 68 ("A fundamental principle of traditional products liability law is that the plaintiff must prove that the defendants supplied the product which caused the injury.").

II. THERE IS NO DOSE EVIDENCE.

To recover in an asbestos case, there also must be reliable evidence of "dose"—*i.e.*, how much respirable asbestos a plaintiff was exposed to, whether that amount exceeded the threshold level necessary to cause the asbestos-related disease complained of, and the amount attributable to the defendant's product. *See Flores*, 232 S.W.3d at 771-72; *Stephens*, 239 S.W.3d at 312. It should come as no surprise to the Court that there is no evidence of the alleged dose of asbestos to which Timothy Bostic was exposed, given the absence of any evidence that he was ever exposed to Georgia-Pacific chrysoltile-containing joint compound.

Plaintiffs attempt to create evidence of "dose" by pointing to the studies and testimony of Dr. Longo, a material scientist. But Dr. Longo did not opine that Timothy Bostic was exposed to anything. That was not his role at trial. 10 RR 115. Dr. Longo's studies were designed to demonstrate the amount of asbestos fibers released during the mixing, sanding, and sweeping of Georgia-Pacific's joint compound in a controlled environment. *See* 10 RR 71-72; PX 67-69. But as Dr. Longo readily admitted, his studies cannot be used to establish the actual exposure level or "dose" for any particular person, including Timothy Bostic:

- "There's too many variables out in the work site [to mimic any one person's

actual exposure to asbestos in my studies.] And we're not mimicking the work environment. You can't do that either. . . . [W]e're not saying that I measured this amount in my work practice study, so I would expect this person to have exactly this amount. I don't think that's possible." (10 RR 73-74)

- "[I]t all depends upon the activity. That's why you can't say any one person had fully specific exposure, because all of these measurements, depending on how much the work activities, the ventilation could be higher or lower, but what this demonstrates is that everybody proved one thing. That when you use these products, you're exposed to asbestos. Now we come down to the argument, well, how much? Well, how much did he do? Well, he didn't do a lot. Well, he did do a lot. Well, he sanded real hard. Well, he didn't sand real hard. But no matter what he did or what they did, they all had exposure to airborne asbestos from these types of products." (10 RR 90-91)

- "[I can qualify the type of exposures that Timothy Bostic would have had to Georgia Pacific joint compounds] [o]nly in a general sense because nobody took samples during Timothy Bostic's work history. You never know exactly what he was exposed to." (10 RR 106-07)

By Dr. Longo's own admission, merely testing the release of asbestos fibers from Georgia-Pacific chrysotile-containing joint compound in a laboratory does not provide any evidence of the level of Timothy Bostic's exposure, even assuming there was such exposure.[2] Dr. Longo did not examine the amount of time that Timothy Bostic allegedly mixed or sanded joint compound, whether he personally mixed or sanded (or was merely present), or any of

[2] Plaintiffs suggest that Dr. Longo's studies showed that the mixing, sanding, and sweeping of Georgia-Pacific chrysotile-containing joint compound in a controlled environment released a level of asbestos fibers that exceeds current OSHA workplace regulations for an 8-hour time-weighted average. *See* Pls.' Br. at 8-9. Current OSHA regulations, however, are immaterial. It is well-settled in Texas that the "common law duties imposed by state law are not expanded by OSHA regulations." *McClure v. Denham*, 162 S.W.3d 346, 353 (Tex. App.—Fort Worth 2005, no pet.); *see Abarca v. Scott Morgan Residential, Inc.*, __ S.W.3d __, 2009 WL 3050873, at *15 (Tex. App.—Houston [1st Dist.] Sept. 24, 2009, no pet. h.); *Richard v. Cornerstone Constructors, Inc.*, 921 S.W.2d 465, 468 (Tex. App.—Houston [1st Dist.] 1996, writ denied). In any event, current OSHA regulations are not relevant because they are 20 to 50 times higher than OSHA standards between 1967 and 1977.

the other factors necessary to calculate dose. His testimony thus provides no "quantification" of the asbestos fibers to which Timothy Bostic was allegedly exposed while working with Georgia-Pacific joint compound as required by Texas law. *Flores*, 232 S.W.3d at 771-72.

Plaintiffs also failed to present any scientifically reliable proof of the threshold level of asbestos exposure necessary to cause mesothelioma. *See Flores*, 232 S.W.3d at 771-72; *Stephens*, 239 S.W.3d at 312. Dr. Hammar—Plaintiffs' specific causation expert—did not, as Plaintiffs' contend, "analyze[] the mathematical threshold of asbestos exposure leading to a multiple increased risk of mesothelioma." Pls.' Br. at 16. Rather, Dr. Hammar reviewed Timothy Bostic's pathology materials, medical records, and work history sheets, and based solely on these records, opined that Timothy Bostic was exposed to asbestos from joint compound at levels sufficient to cause his mesothelioma. 11 RR 46-47, 77.

Dr. Hammar mentioned the 1986 Federal Register level of 0.1 fibers/cc years as a minimum threshold level of exposure to increase the risk of developing mesothelioma, but then immediately dismissed this standard as unreliable:

> "[The 1986 Federal Register level of 0.1 fibers/cc years is] an extrapolation from higher levels to lower levels. And whether that really exists at that low level, I don't know. But it's also no different than what Hodgson and Darnton did when they got their ratio of crocidolite to amosite to chrysotile as 500 to 100 to one, that's not real epidemiology, that was extrapolation from high to low levels."

11 RR 95-96. Dr. Hammer admitted that he could not identify a threshold level at which the risk of developing mesothelioma increased:

> "[The Federal Register level of 0.1 fibers/cc years] is based on something I haven't done. It's based on what has been published by Nicholson from

> extrapolation. And I would be the first one to say you are not going to ever find a group of people who have been exposed to only 0.1 fiber/cc years of asbestos that you could follow those people, and then say this number developed mesothelioma. . . . The real question to me is: If that's how much it took, how are you sure that's how much it took? How do you know it only took a tenth of what they were exposed to? Why didn't the rest of those people, all those miners and millers in Canada get mesothelioma? Just like why don't the insulators get mesothelioma, all of them, one hundred percent of them?
>
> I just think that scientifically nobody can get up here, and I would put myself at the top of the line, and say it takes exactly this amount of asbestos to cause mesothelioma in any given individual."

11 RR 103. Dr. Hammar's admissions completely undermine Plaintiffs' claims that he presented any evidence that Timothy Bostic was exposed to asbestos from Georgia-Pacific joint compound at a level that increased his risk of developing mesothelioma. And Plaintiffs' failure to establish the threshold level of asbestos exposure necessary to cause mesothelioma means their negligence and defective marketing claims must fail. *See Flores*, 232 S.W.3d at 771-72; *Stephens*, 239 S.W.3d at 312.

III. PLAINTIFFS' EXPERTS RELIED UPON THE "EACH AND EVERY EXPOSURE" THEORY OF LIABILITY THAT HAS BEEN REJECTED BY THE TEXAS SUPREME COURT.

The Texas Supreme Court has squarely rejected the "each and every exposure" theory of liability—*i.e.*, that each and every exposure to asbestos contributes to the development of mesothelioma and that there is no level of asbestos exposure below which the potential to develop mesothelioma is not present. *See Flores*, 232 S.W.3d at 773. As a result, Plaintiffs devote an entire section of their brief trying to explain that their experts did not rely upon the "each and every exposure" theory to prove substantial factor causation. *See* Pls.' Br. at 33-34. That effort fails. A review of Plaintiffs' experts' testimony confirms their unqualified

reliance on this rejected theory.

Plaintiffs' epidemiologist—Dr. Lemen—testified that "each and every exposure" to asbestos contributed to an increased risk of developing mesothelioma and stated that "each exposure that deposits asbestos fibers in one's lung adds to the fiber burden in the body and as such can increase the risk of developing an asbestos-related disease." 6 RR 75; *see* 5 RR 132; 6 RR 74-82, 110-12. Dr. Arnold Brody—a cell biologist and experimental pathologist who testified on general causation—similarly opined that "every time a person is exposed to asbestos from whatever the source is, some proportion of those fibers will concentrate in the lung and some of those fibers will reach that site where the disease develops. There's no way to exclude any of them. There's no way to extract any of them. So everything the person's exposed to is contributing and making it more likely that the person gets disease." 4 RR 94-95; *see* 4 RR 154, 168-70, 172, 183. Finally, Dr. Hammar, Plaintiffs' only specific causation expert, also relied upon the "each and every exposure" theory of causation:

> Plaintiffs' counsel: And is it fair to say then that to a reasonable degree of medical possibility, that if somebody has mesothelioma that each and every exposure to asbestos that that person had would be a significant contributing factor to the development of mesothelioma?
>
> Dr. Hammar: I believe so, at least potentially a contributing factor, yes.

11 RR 40-41.

> Plaintiffs' counsel: In your opinion, do each and every exposure to asbestos that Timothy Bostic had from Georgia-Pacific joint compound materials, increase his total cumulative dose of asbestos that he had in his lungs?
>
> Dr. Hammar: Yes.

Plaintiffs' counsel: And did each and every exposure that Timothy Bostic had to Georgia-Pacific joint compounds and wallboard materials increase his risk of mesothelioma?

Dr. Hammar: Yes.

* * *

Plaintiffs' counsel: And can you discount, to the extent that Timothy Bostic had any exposure at the Knox Glass Plant, can you discount that in the role of mesothelioma?

Dr. Hammar: No.

Plaintiffs' counsel: And is that consistent with your opinion that each and every exposure to asbestos is a contributing factor?

Dr. Hammar: Yes.

11 RR 50-51; *see also* 11 RR 48-49, 52, 80-83, 86, 89, 118-19. Dr. Hammar admitted that his basic opinion was that all of Timothy Bostic's asbestos exposures, regardless of the source, had the *potential* to contribute to the development of his mesothelioma. 11 RR 83.

Dr. Hammar concluded his testimony with the sweeping statement that Timothy Bostic's history of occupational exposure to asbestos alone was sufficient to attribute his mesothelioma to exposure to asbestos products, regardless of the type of asbestos or the duration or intensity of the exposure. According to Dr. Hammar, "each and every exposure that [Timothy Bostic] had to asbestos, regardless of the source to the extent he had an exposure, that those were significant and contributing factors in the development of his mesothelioma." 11 RR 152-53. For Plaintiffs to suggest that their experts did not rely upon the discredited "each and every exposure" theory of causation is simply not credible.

IV. THERE ARE NO RELIABLE EPIDEMIOLOGICAL STUDIES SHOWING A DOUBLING OF THE RISK OF DEVELOPING MESOTHELIOMA FROM THE USE OF JOINT COMPOUND.

In the absence of any direct evidence of the cause of Timothy Bostic's mesothelioma, Plaintiffs were required to present epidemiological studies showing more than a doubling of the risk of developing mesothelioma as a result of exposure to asbestos from the use of joint compound—*i.e.*, it must show a relative risk greater than 2.0 at a confidence level of 95%, with a confidence interval that does not include 1.0. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 714-18 (Tex. 1997). Such studies, however, "are without evidentiary significance" if the studies do not involve persons exposed to the same substance in the same or similar manner at a dose level that is "comparable to or greater than those in the studies." *Flores*, 232 S.W.3d at 771-72.

Plaintiffs state that Dr. Lemen "relied upon epidemiological studies showing more than a doubling of the risk in developing mesothelioma as a result of exposure to chrysotile asbestos." *See* Pls.' Br. at 11. Plaintiffs listed the four studies allegedly relied upon by Dr. Lemen in a footnote without further discussion:

- 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).

- 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).

- Camus, *et al.*, "Nonoccupational exposure to mesothelioma and the risk of cancer," N. ENGL. J. MED., 338:1565071 (1998).

Pls.' Br. at 11 n.11. None, however, show a doubling of the risk of developing mesothelioma from joint compound or otherwise satisfy the *Havner* and *Flores* reliability requirements.

First, none of the studies involve exposure to asbestos from joint compound and thus do not involve the same substance and dose. Second, Plaintiffs failed to prove the reliability of these studies—*i.e.*, that the studies showed more than a doubling of the risk of developing mesothelioma with a relative risk greater than 2.0 at a confidence level of 95%, with a confidence interval that does not include 1.0. *See Havner*, 953 S.W.2d at 714-15. The Pialotto study of chrysotile miners and millers did not show any statistically significant increase in the risk of developing any asbestos-related lung cancers like mesothelioma. PCX-3. Dr. Lemen admitted that the Cullen study did not include the relative risk calculation required by *Havner*. 5 RR 115-19. Neither the Camus nor Lemen studies were even admitted as court exhibits and therefore are not included in the record evidence. Finally, and most importantly, none of the four studies touted by Plaintiffs as showing more than a doubling of the risk of developing mesothelioma satisfy *Havner* because none of the studies are epidemiological studies of the risk of developing mesothelioma from asbestos exposure from joint compound, much less chrysotile-containing joint compound. Indeed, Dr. Lemen admitted that no such epidemiological studies exist. 6 RR 212-15; 7 RR 23-33. The four studies cited by Plaintiffs are thus no evidence supporting causation.[3]

[3] Plaintiffs also discuss the 1977 Consumer Product Safety Commission's Proposed Rules, PX-26, as evidence that exposure to asbestos from joint compound doubles the "risk of death." *See*

V. PLAINTIFFS WERE REQUIRED TO MEET THE SCIENTIFIC RELIABILITY STANDARDS SET FORTH IN *HAVNER* TO SUPPORT A FINDING OF SPECIFIC CAUSATION.

In the absence of the required epidemiological studies, Plaintiffs seek to make *Havner* irrelevant. Plaintiffs contend that they were not required to produce studies showing more than a doubling of the risk because *Havner* is a general causation case that has no application in proving specific causation—the contested issue on appeal. *See* Pls.' Br. at 29-31. To the contrary, in *Havner*, the Court set forth scientific guidelines for epidemiological studies regarding both general and specific causation:

> Sometimes, causation 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. In some cases, controlled scientific experiments can be carried out to determine if a substance is capable of causing a particular injury or condition, and there will be objective criteria by which it can be determined with reasonable certainty that a particular individual's injury was caused by exposure to a given substance. However, in many toxic tort cases, direct

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Pls.' Br. at 14. The Commission based its assessment on exposure data in the 1975 Rohl study and "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." PX-26 at 38787 (citing the 1973 Selikoff study of insulation workers). The Commission's Proposed Rules are not evidence supporting a causation finding for numerous reasons. First, the Proposed Rules are not an epidemiological study. Second, Plaintiffs' expert witnesses never discussed the Commission's assessment at trial, other than to cite it for the ban on joint compound in 1977 and never stated that they relied upon this document in forming their opinions. Third, the Proposed Rules do not meet any of the reliability requirements set forth in *Havner*. Fourth, the Proposed Rules constitute the type of "data reanalysis" that was expressly rejected in *Havner* and *Stephens*. *Havner*, 953 S.W.2d at 726; *Stephens*, 239 S.W.3d at 318 n.10. Fifth, the Proposed Rules do not state the methodology by which the calculations were made. Sixth, the report is based on data from the 1975 Rohl asbestos release study, and the Rohl study was called into question in the 1980 Berman and Middleton study as showing asbestos release levels that were too high to be consistent with later test results. And seventh, the *Stephens* court discounted the value of the 1975 Rohl study because it did not correlate the reported exposure levels with any asbestos-related diseases, including mesothelioma. *Stephens*, 239 S.W.3d at 316-17.

> experimentation cannot be done, and *there will be no reliable evidence of specific causation.*
>
> In the absence of direct, scientifically reliable proof of causation, claimants may attempt to demonstrate that exposure to the substance at issue increases the risk of their particular injury.

Havner, 953 S.W.2d at 714-15 (emphasis added); *see Stephens*, 239 S.W.3d at 310 ("In *Havner*, the Texas Supreme Court held that, *in cases in which no direct evidence of specific causation exists*, plaintiffs may rely on studies showing an increased risk of their particular injury resulting from exposure to the substance at issue to raise a fact question on causation." (emphasis added)). Thus, Plaintiffs' argument that *Havner* does not apply to specific causation determinations finds no support in Texas law.

VI. PLAINTIFFS WERE REQUIRED TO PROVE THAT TIMOTHY BOSTIC WOULD NOT HAVE CONTRACTED MESOTHELIOMA BUT FOR HIS ALLEGED EXPOSURE TO GEORGIA-PACIFIC ASBESTOS CONTAINING JOINT COMPOUND.

Plaintiffs contend that the substantial factor causation standard set forth in *Flores* does not require them to prove "but for" causation. *See* Pls.' Br. at 31-32. This argument, however, misstates the substantial factor causation standard. "But for" causation is subsumed within substantial factor causation.[4]

[4] Plaintiff's negligence and defective marketing claims also require them to prove "but for" causation as one element of proof of "proximate cause" and "producing cause" respectively. CR 200-01. Proximate and producing cause both require a plaintiff to show that the use of a defendant's product was a "cause in fact" of his injuries. *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 357 (Tex. 1993). And as the Supreme Court and this Court have recognized, "cause in fact" is the same thing as "but for" causation. *See LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006); *Patino v. Complete Tire, Inc.*, 158 S.W.3d 655, 661 (Tex. App.—Dallas 2005, pet. denied).

In *Flores*, the Texas Supreme Court affirmed the substantial factor test set forth in Section 431 of the Restatement Second of Torts. *Flores*, 232 S.W.3d at 770. The comments to Section 431 make clear:

> In order to be a legal cause of another's harm, *it is not enough that the harm would not have occurred had the actor not been negligent. . . . [T]his is*
>
> *necessary,* but it is not of itself sufficient. The negligence must also be a substantial factor in bringing about the plaintiff's harm.

RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965) (emphasis added). Thus, to prove substantial factor causation, a plaintiff must prove that the harm would not have occurred "but for" the defendant's conduct. *See Flores*, 232 S.W.3d at 770.

Plaintiffs' effort to have this Court redefine substantial factor causation not only runs afoul of Texas law as set forth in *Flores*, but also speaks volumes regarding the failures of their causation proof. Indeed, Dr. Hammar—Plaintiffs' only specific causation expert—admitted that he could not opine that Timothy Bostic would not have developed mesothelioma "but for" his exposure to Georgia-Pacific's joint compound. 11 RR 139.

VII. THERE IS NO EVIDENCE TO SUPPORT A FINDING OF GROSS NEGLIGENCE.

To prove their claim for gross negligence, assuming Plaintiffs could show substantial factor causation, Plaintiffs were further required to show by clear and convincing evidence (1) that when viewed from Georgia-Pacific's standpoint from 1967 through 1977, its manufacturing of chrysotile-containing joint compound involved "an extreme degree of risk, considering the probability and magnitude of the potential harm to others" (the objective prong), and (2) that Georgia-Pacific had "actual, subjective awareness of the risk involved,

but nevertheless proceed[ed] with conscious indifference to the rights, safety, or welfare of others" (the subjective prong). *See* TEX. CIV. PRAC. & REM. CODE §§ 41.001(2), 41.003; *Exxon Mobil Corp. v. Altimore*, 256 S.W.3d 415, 418 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Plaintiffs attempt to meet this burden by citing a handful of documents that collectively show a general awareness of potential harms resulting from the use of asbestos generally. *See* Pls.' Br. at 17-21, 34-37. Neither prong, however, can be met with such generalized proof. *See Altimore*, 256 S.W.3d at 418.

The Gypsum Association documents cited by Plaintiffs—PX-5 and PX-6—do not evidence the requisite knowledge to sustain a gross negligence finding. Document PX-5 discusses the possibility that lung diseases have developed in asbestos industry workers generally, not from the use of joint compound. *See* PX-5. Document PX-6 is a memo discussing asbestos air pollution from a pipe insulating plant. *See* PX-6. At trial, Dr. Lemen admitted that neither document suggested that asbestos-containing joint compound posed any health threat. 6 RR 168-81.

Similarly, in 1970, Georgia-Pacific received a report that a spot had been found on the lung of one drywall worker, but Georgia-Pacific never received any follow-up information and did not hear of any injuries related to the use of its chrysotile-containing joint compound. 8 RR 175-76. Upon receiving the report of this isolated injury, Georgia-Pacific employee Matt Fink wrote a letter to the Gypsum Association. PX-9. Plaintiffs point to this letter as proof of Georgia-Pacific's subjective knowledge of the hazards of using joint compound. But that letter was never seen or approved by any vice-principal of Georgia-Pacific. 8 RR

191-96. Georgia-Pacific's management did not consider their joint compound to pose a risk of harm because they "felt that the percentage of asbestos in our product precluded any possibility of it being harmful." 8 RR 193-95. In sum, none of the documents cited by Plaintiffs amount to any evidence—much less clear and convincing evidence—that Georgia-Pacific had any objective or subjective awareness of an extreme risk of developing mesothelioma from exposure to asbestos from its chrysotile-containing joint compound as required by Texas law. *See Altimore*, 256 S.W.3d at 423, 425.

Plaintiffs also wholly ignore the applicable scope of review. In reviewing the legal sufficiency of evidence of gross negligence, this Court must review all of the evidence, not just evidence favorable to a finding of gross negligence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 817 (Tex. 2005). The overwhelming weight of the evidence presented at trial showed that Georgia-Pacific did not know, and could not have known, that using chrysotile-containing joint compound posed an extreme risk of causing mesothelioma. Between 1967 and 1977 (when Georgia-Pacific stopped making chrysotile-containing joint compound), the scientific and medical community as a whole believed that there was a safe level below which persons could be exposed to asbestos for eight hours a day, five days a week, without any respiratory protection, without any increased risk for developing any asbestos-related disease. *See* PX-4. Dr. Lemen acknowledged at trial that the United States Public Health Service did not even suggest a ban on asbestos-containing joint compound until 1976, despite being the governmental agency that conducted the most research into the effects of asbestos exposure at that time. 6 RR 152-54. It therefore defies reason to expect that Georgia-Pacific

should have reached an opposite conclusion based on the same evidence that was available to these governmental agencies and the scientific community. Indeed, even today, there are no epidemiological studies demonstrating a doubling of the risk of developing mesothelioma from use of chryostile-containing joint compound. Plaintiffs' argument that Georgia-Pacific should have known of an extreme risk of developing mesothelioma from use of its joint compound between 1967 and 1977 finds no support in the record.[5] In the absence of any clear and convincing evidence of gross negligence, the award of $6,038,910 in punitive damages must be reversed.[6]

VIII. THE TRIAL COURT INITIALLY ABUSED ITS DISCRETION BY REFUSING TO GRANT A NEW TRIAL AND THEN LATER ABUSED ITS DISCRETION BY VACATING THE ORDER GRANTING A NEW TRIAL TO GEORGIA-PACIFIC.

Judge Montgomery's refusal to grant Georgia-Pacific's motion for mistrial and Judge Benson's vacatur of Judge Roden's order granting a new trial (signed more than two years

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[5] Plaintiffs also attempt to leave the impression with the Court that Georgia-Pacific was not diligent in placing warning labels on its products or in ceasing production of its asbestos-containing joint compound in 1977. *See* Pls.' Br. at 19-21. Plaintiffs are incorrect. Georgia-Pacific added cautionary language on its labels beyond that mandated by OSHA regulations. *See* 8 RR 203-09. Georgia-Pacific, along with the rest of the joint-compound industry, did not initially label its Readi-Mix product under the belief that it was not required to do so since the asbestos was contained within the product in a form that precluded the release of any dust. *See* 8 RR 208-09; 9 RR 5-9. When Georgia-Pacific reached an agreement with OSHA on the requirement for labeling the Readi-Mix, Georgia-Pacific again placed larger labels with more cautionary language than required. 9 RR 5-9. Georgia-Pacific also led the industry in developing asbestos-free joint compound products. 9 RR 24-30. Upon learning of the CPSC ban on asbestos-containing joint compounds in 1977, Georgia-Pacific's management instructed all of its plants to immediately cease production and shipment of asbestos-containing joint compound. 9 RR 32-34; DX-19.

[6] In footnote 19 of the opening brief, Georgia-Pacific mistakenly argued that the trial court erred in apportioning punitive damages between Susan and Kyle Bostic. This apportionment error, however, was corrected by the trial court in the First Amended Final Judgment, SCR 7, and need not be addressed by this Court.

after the second trial) constitute clear abuses of discretion and warrant a new trial. *See* GP Br. at 37-50. Although Plaintiffs defend the actions of Judge Montgomery, Juror Courtney Jackson, and the bailiff, and insist that any alleged misconduct did not result in any probable injury to Georgia-Pacific, Plaintiffs ignore Texas law, the record evidence, and the arguments presented in Georgia-Pacific's opening brief.

A. Judge Montgomery Improperly Informed the Jury That Plaintiff Harold Bostic Collapsed Outside the Courthouse Because He Was Required to Testify Against Georgia-Pacific at Trial.

Judge Montgomery improperly commented on the weight of the evidence when she told the jury that Plaintiff Harold Bostic collapsed due to "the stress of his testimony" against Georgia-Pacific. *See* Georgia-Pacific Br. at 38-40. Citing two jury charge instruction cases, Plaintiffs maintain that a judge may make any comment to the jury so long as she does not "suggest to the jury the trial court's opinion concerning a matter upon which the jury must decide." Pls.' Br. at 40. Plaintiffs then (without citation to any authority) narrowly define "a matter upon which the jury must decide" as matters that require the jury to fill in a blank on the jury charge: "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." Pls.' Br. at 41. This argument, however, misstates Texas law and ignores the record evidence.

To begin, the two jury charge instruction cases that Plaintiffs cite do not stand for the proposition that a comment on the weight of the evidence is limited to matters requiring the jury to fill in a blank on the jury charge. Because the jury charge in both of these cases was

properly worded, the Court concluded that the charge did not amount to a comment on the weight of the evidence under Texas Rule of Civil Procedure 277. *See Barham v. Turner Constr. 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.).[7] To the extent that these Rule 277 cases can be considered relevant, they do not purport to limit the definition of "comment on the weight of evidence" to comments directly related to a particular award of damages. Rather, the cases properly reflect that a judge comments on the weight of the evidence whenever she makes any comments calculated to influence the jurors' minds in regard to facts in issue:

> To constitute a comment on the weight of the evidence, an issue must be so worded as to indicate an opinion by the trial judge as to the verity of a fact.

Durham, 683 S.W.2d at 491; *see Barham*, 803 S.W.2d at 737 (citing *Durham*).

Moreover, when Judge Montgomery told the jury that Mr. Bostic collapsed due to the stress of testifying against Georgia-Pacific, Mr. Bostic was a Plaintiff in this lawsuit with pending claims for mental anguish damages against Georgia-Pacific. CR 159-69. This fact is conveniently omitted from Plaintiffs' discussion of this issue. The fact that Mr. Bostic died and his claims for damages were not ultimately submitted to the jury did not remedy the injury to Georgia-Pacific resulting from Judge Montgomery's comments. Her comments,

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[7] *See* TEX. R. CIV. P. 277 ("The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or definition.").

coupled with Mr. Bostic's dramatic collapse in front of the jury following his emotional testimony on direct examination, tipped the balance so far against Georgia-Pacific that a mistrial was mandated to ensure a fair trial.

B. Juror Courtney Jackson Engaged in Juror Misconduct.

Juror Courtney Jackson—the emergency medical technician who (at the direction of Judge Montgomery) provided assistance to Mr. Bostic when he collapsed—contacted a co-worker at his hospital and learned that Mr. Bostic died after his collapse. *See* 16 RR 123-24, 130-33, 137-40. He told at least three other jurors that Mr. Bostic died and informed others that Mr. Bostic was in intensive care. *Id.* Without citation to a single case, Plaintiffs state that "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." Pls.' Br. at 45. To the contrary, juror misconduct occurs whenever "any outside influence [is] improperly brought to bear upon any juror." TEX. R. CIV. P. 327b. "Outside influence" is defined as something that "originates from sources other than the jurors themselves." *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 370 (Tex. 2000). It is undisputed that Juror Jackson transmitted this information regarding the death of Mr. Bostic into the jury room from an outside source. That is, by definition, juror misconduct, *see id.*, and Plaintiffs fail to cite any legal authority to the contrary. *See* Pls.' Br. at 45.

C. The Bailiff Also Engaged in Misconduct.

Without citing or discussing Texas Rule of Civil Procedure 283, Plaintiffs allege that the bailiff's conversations with jurors were "neutral" and thus did not amount to misconduct.

See Pls.' Br. at 46-47. Even assuming the bailiff's communications with the jurors could be considered neutral, Plaintiffs' argument fails for two reasons—neither of which is addressed in Plaintiff's brief.

First, Rule 283 prohibits a bailiff from instructing the jury regarding evidence to be considered as part of its deliberations. *See Logan v. Grady*, 482 S.W.2d 313, 322 (Tex. Civ. App.—Fort Worth 1972, no writ); TEX. R. CIV. P. 283. Judge Montgomery's bailiff instructed the jury that "they were not to consider anything that happened in this hall, that they were to consider only the stuff that happened in the courtroom." 16 RR 156. A bailiff may not take it upon himself to instruct the jury regarding their deliberations. This instruction should have come from Judge Montgomery, not the bailiff, and amounted to misconduct. *See* Georgia-Pacific Br. at 47-48.

Second, Plaintiffs ignore the fact that the bailiff approached Plaintiffs' counsel, advised her of the juror's questions regarding Mr. Bostic's condition and Plaintiffs' counsel's decision to wear black clothing for several days following Mr. Bostic's death, and instructed her to wear a different color—all in violation of Texas Rule Civil Procedure 285, which requires a bailiff to direct any questions from the jury to the judge so that the judge may address the jury's questions "in open court." *See* 16 RR 157-59; TEX. R. CIV. P. 285.

D. The Misconduct of Judge Montgomery, Juror Courtney Jackson, the Bailiff, and the Cumulative Effect of this Misconduct Injured Georgia-Pacific and Required a New Trial.

Incredibly, Plaintiffs argue that Georgia-Pacific did not present evidence of probable injury resulting from any act of misconduct. *See* Pls.' Br. at 38-39, 43-46. This is incorrect

for two reasons. First, the prejudicial impact of the misconduct is evidenced by a comparison of the damages awarded in the first and second trials. And second, the pervasiveness of the misconduct caused the trial to spiral out of control and deprived Georgia-Pacific of a "just, fair, equitable and impartial adjudication of [its] rights under established principles of substantive law." TEX. R. CIV. P. 1; *see* Georgia-Pacific Br. at 49-50.

In the first trial, the jury awarded the four plaintiffs $3.1 million in compensatory damages and $6.2 million in punitive damages. CR 110-20. The first trial was closer in time to Timothy Bostic's death, Plaintiff Susan Bostic had not yet remarried, and Plaintiff Kyle Bostic was still a minor. Nevertheless, in the second trial, the jury awarded the three remaining plaintiffs $7.5 million in compensatory damages and $6 million in punitive damages. CR 198-217. The compensatory damages more than doubled in the second trial even though there were fewer plaintiffs and the damages evidence presented in the second trial was less compelling. The only explanation is that the jury in the second trial was influenced by their sympathy for the Bostic family (*i.e.*, Plaintiffs) in the wake of Mr. Bostic's death. Plaintiffs wholly failed to address this evidence or this argument in their brief. Given the obvious injury to Georgia-Pacific resulting from the misconduct, the trial court was obligated to grant a new trial. *See* Georgia-Pacific Br. at 46-47.

Plaintiffs also maintain that Georgia-Pacific failed to prove any probable injury because "every juror testified that Harold Bostic's death had no influence on their decision." Pls.' Br. at 43. This argument misses the mark, because probable injury is not proven by direct testimony from a juror that a particular act of misconduct influenced his decision

regarding the verdict. Under Texas Rule of Civil Procedure 327, a juror may not testify as to "the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith." TEX. R. CIV. P. 327(b). This Court must instead review the entire record to determine whether the misconduct "most likely caused a juror to vote differently than he would otherwise have done on one or more issues vital to the judgment." *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 661 (Tex. App.—Dallas 2002, pet. denied). In this case, the probable harm is evidenced by the sheer pervasiveness of the misconduct at trial as well as the comparison of the second jury's verdict with the first jury's verdict.[8]

E. Georgia-Pacific Was Denied Its Constitutional Right to Cross-Examine Harold Bostic.

The sequence of events at the second trial—Mr. Bostic's emotional direct testimony; his collapse immediately thereafter in full view of the jury; Mr. Bostic's death; the revelation to the jury from an outside source that Mr. Bostic had died; Judge Montgomery's decision to strike Mr. Bostic's live testimony; followed by the reading of Mr. Bostic's testimony from the first trial, which included the statement that he "just wanted to die" because of his son's death—denied Georgia-Pacific its constitutional right to cross-examine Mr. Bostic. *See* TEX.

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[8] Plaintiffs rely heavily on *Sharpless v. Sim*, 209 S.W.3d 825 (Tex. App.—Dallas 2007, pet. denied), to support their no-misconduct arguments. *See* Pls.' Br. at 43-45. In *Sim*, the defendant's truck snagged a communication cable, causing a telephone pole to strike the plaintiff's vehicle. 209 S.W.3d at 827. The defendant moved for a new trial after discovering that a juror had researched the defendant's driving record on a public data website. *Id.* at 828. This Court concluded that there was no probable injury because the juror "did not communicate the information to the other jurors" and because the juror had not voted in favor of the verdict for the plaintiff. *Id.* These facts distinguish *Sim* from this case.

CONST. art. I, § 19; *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987).

In response, Plaintiffs cite three federal court cases involving a criminal defendant's right to cross-examine witnesses and argue 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"—as was done in this case. *See* Pls.' Br. at 24, 49-50. It is true that striking a witness's testimony may be sufficient to cure a violation of the Sixth Amendment right to confront witnesses under certain circumstances. But as the Fifth Circuit recognized in *Fountain v. United States*, 384 F.2d 624, 628 (5th Cir. 1967), the "ultimate inquiry is whether the defendant has been deprived of his right to test the truth of the direct testimony." The three cases cited by Plaintiffs did not prevent the defendant from testing the truth of the witness's testimony—unlike in this case.

In *Fountain*, following his direct examination, a prosecution witness asserted his Fifth Amendment right against self-incrimination and refused to answer two questions regarding "collateral" issues that were likely of "minimal value" to the defense. *See* 384 F.2d at 628. In *United States v. Malsom*, 779 F.2d 1228 (7th Cir. 1985), a fact witness died after his direct testimony but before his cross-examination by the defense. The Seventh Circuit concluded that the inability to cross-examine the witness did not violate the Sixth Amendment because the witness's direct testimony was struck in its entirety, was "primarily cumulative," and "involved only twelve pages of testimony" from a lengthy trial. *Id.* at 1239. And in *United States v. Siefert*, 648 F.2d 557 (9th Cir. 1980), the court of appeals found no violation of a defendant's Sixth Amendment right to cross-examination resulting from a witness's refusal

to answer one question during a lengthy cross-examination. *Id.* at 562.

These three federal cases stand in stark contrast to this case. Georgia-Pacific was not permitted to test the truth of Mr. Bostic's live trial testimony in the second trial. Mr. Bostic provided the critical testimony on the alleged nature, duration, and proximity of Timothy Bostic's exposure to Georgia-Pacific chrysotile-containing joint compound, and this live testimony conflicted with his original testimony from the first trial regarding several key areas. For example, his live testimony conflicted with his original testimony from the first trial regarding the formulation of Georgia-Pacific joint compound that he used (dry mix or pre-mixed, which affects the probability that he used a chrysotile-free formula), *compare* 9 RR 130-31 (dry mix only) *with* 12 RR 36 (pre-mixed); and the age at which Timothy Bostic allegedly used or was exposed to Georgia-Pacific joint compound, *compare* 9 RR 123-24 (10 to 12 years old in the first trial) *with* 12 RR 83, 116-17 (5 years old in the second trial). When the Court struck Mr. Bostic's live testimony and permitted his testimony from the first trial to be read to the jury, the Court proscribed Georgia-Pacific's ability to demonstrate the inconsistencies in his testimony that arose during the second trial. The fact that Mr. Bostic could not be effectively cross-examined was extremely prejudicial.

PRAYER

For these reasons, Appellant Georgia-Pacific Corporation respectfully requests that this Court reverse the trial court's judgment and render judgment that Plaintiffs take nothing. Alternatively, Appellant requests that this Court grant a new trial to Appellant. Appellant additionally prays for any further relief at law or in equity to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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