SUPREME COURT OF TEXAS

No. 10-0775

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.

On Petition for Review from the Fifth Court of Appeals,
Dallas, Texas Court of Appeals No. 05-08-01390-CV

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

J. DAVID BREEMER
Counsel of Record
Tex. Bar No. 24085837
DEBORAH J. LA FETRA,
Of Counsel
Cal. Bar No. 148875
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: jdb@pacificlegal.org
E-mail: dlafetra@pacificlegal.org

Attorneys for Amicus Curiae Pacific Legal Foundation

IDENTITY OF PARTIES AND COUNSEL

1. **Petitioners/Appellees/Plaintiffs: Susan Elaine Bostic, Individually and as Personal Representative of the Heirs and Estate of Timothy Shawn Bostic, Deceased, Helen Donnahoe, and Kyle Anthony Bostic**

   Additional Plaintiff: Harold Bostic

Trial & Appellate Counsel for Petitioners/Appellees/Plaintiffs:

Denyse F. Clancy
John L. Langdoc
Baron & Budd, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219
Tel: (214) 521-3605
Fax: (214) 521-1181

Additional Trial Counsel for Plaintiffs:

D. Leanne Jackson
Formerly with Baron & Budd, PC

Christopher J. Panatier
Simon, Eddins & Greenstone, L.L.P.
3232 McKinley Avenue, Suite 610
Dallas, TX 75204
Tel: (214) 276-7680
Fax: (214) 276-7699

Charla G. Aldous
Aldous Law Firm
3211 Cedar Springs Road, Suite 200
Dallas, TX 75201
Tel: (214) 526-5595
Fax: (214) 526-5525

2. Respondent/Appellant/Defendant: Georgia-Pacific Corporation

Appellate Counsel for Georgia-Pacific Corporation:

Ms. Deborah G. Hankinson
Mr. William Richard Thompson II
Hankinson Levinger LLP
750 N. St. Paul Street, Suite 1800
Dallas, TX 75201
Tel: (214) 754-9190
Fax: (214) 754-9140

Trial Counsel for Georgia Pacific Corporation:

Mr. Melvin David Bailey
Bailey Crowe & Kugler
901 Main Street, Suite 6550
Dallas, TX 75202
Tel: (214) 231-0555
Fax: (214) 231-0556

Mr. James Bachman Greer
Kane Russell Coleman & Logal, PC
1601 Elm Street, Suite 3700
Dallas, TX 75202
Tel: (214) 777-4252
Fax: (214) 777-4299

3. Additional Defendants and their Trial Counsel:

Ametek, Inc.

Represented by:

Karen K. Maston
Johnson Spalding Doyle West & Trent LLP - Houston
919 Milan Street, Suite 1700
Houston, TX 77002
Tel: (713) 222-2323
Fax: (713) 222-2226

Ametek, Inc.
Champlain Cable Co.

Represented by:

Raul M. Calderon
700 Louisiana, Suite 1850
Houston, TX 77002
Tel.: (713) 980-1700
Fax: (713) 980-1701

Anchor Hocking, Inc.

Represented by:

Nancy M. Bell
Jones Gill, LLP
6363 Woodway, Suite 1100
Houston, TX 77057
Tel.: (713) 652-4068
Fax: (713) 651-0716

Aqua-Chem
Congoleum Corp.

Represented by:

Clay M. White
White Shaver, PC
Republic Center
325 N. St. Paul Street, Suite 1865
Dallas, TX 75201
Tel.: (214) 954-0041
Fax: (214) 954-0479

Asten Johnson, Inc.

Represented by:

R. Mark Willingham
Willingham, Futz & Cougill LLP
5625 Cypress Creek Pkwy, Sixth Floor
Houston, TX 77069
Tel.: (713) 333-7600
Fax: (713) 333-7601

Babcock Borsig Power, Inc.
Certainteed
Champlain Cable Co.
Cooper Industries; Dana Corp.
Hanson Permanente Cement, Inc.
Hanson Aggregates West, Inc.
Hanson Building Materials, Inc.
Kelly Moore Paint Co.
Kaiser Cement Corp.
Kaiser Gypsum Co.
Pneumo Abex Corp.

Represented by:

Gary D. Elliston
Jennifer Judin
Paul E. Hamilton
Dehay & Elliston, LLP
Bank of America Plaza Building
901 Main Street, Suite 3500
Dallas, TX 75202-3736
Tel.: (214) 210-2400
Fax: (214) 210-2500

Cooper Industries
Pneumo Abex Corp.

Represented by:

Jim Zadeh
Law Office of Jim Zadeh PC
115 West 2nd Street, Suite 201
Fort Worth, TX 76102
Tel.: (817) 335-5100

Bondex International Inc.
Proko Industries

Represented by:

David D. Reynard
Jenkins Martin LLP
2615 Calder Avenue, Suite 500
Beaumont, TX 77702
Tel.: (409) 832-4100

Burns International Services Corp. f/k/a/ Borg-Warner

Represented by:

Elizageth Phifer
Phifer & Colvin LLP
15150 Preston Road, Suite 200
Dallas, TX 75248
Tel.: (972) 432-5993
Fax: (972) 503-6301

Colfax Corp.

Represented by:

J. Michael Jordan
Steven C. Lockhart
Gardere Wynne Sewell LLP
1601 Elm Street, Suite 3000
Dallas, TX 75021
Tel.: (214) 999-3000
Fax: (214) 999-4667

Crane Co.

Represented by:

Michael John Ramirez
Warren Westberg
K&L Gates LLP
1717 Main Street, Suite 2800
Dallas TX 75201
Tel.: (214) 939-5500
Fax: (214) 939-5849

Charles J. Blanchard
Carrington Coleman Sloman & Blumenthal, LLP
901 Main Street, Suite 5500
Dallas, TX 75202
Tel.: (214) 855-3000
Fax: (214) 855-1333

Daimler Chrysler Corp.

Represented by

Robert Thackston
Hawkins Parnell Thackston & Young LLP
Highland Park Place
4514 Cole Avenue, Suite 500
Dallas, TX 75205
Tel.: (214) 780-1500
Fax: (214) 780-5200

Ford Motor Co.
General Motors Corp.

Represented by:

Dawn Marie Wright
Thompson & Knight LLP
1722 Routh Street, Suite 1500
Dallas, TX 75201
Tel.: (214) 969-1700
Fax: (214) 969-1751

Ford Motor Co.

Represented by:

Tammy M. Holt
Brown McCarroll, LLP
2000 Tramel Crow Center
2001 Ross Avenue, Suite 2000
Dallas, TX 75201
Tel.: (214) 999-6100
Fax: (214) 999-6170

Foster Wheeler
Garock, Inc.
IMO Industries, Inc.
Metropolitan Life Ins. Co.
Rapid American Corp.

Represented by:

James Old
Germer PLLC
550 Fannin, Suite 400
Beaumont, TX 77701
Tel.: (409) 654-6700
Fax: (409) 835-2115

Rapid American Corp.

Represented by:

Joseph Blizzard
Andrews Kurth LLP
1717 Main Street, Suite 3700
Dallas, TX 75201
Tel.: (214) 659-4400
Fax: (214) 659-4401

Garlock, Inc.

Represented by:

Raymond P. Harris, Jr.
Schachter Harris LLP
220 Canal Centre
400 E. Las Colinas Blvd.
Irving, TX 75039
Tel.: (214) 999-5700
Fax: (214) 999-5747

Garlock Sealing Technologies, LLC

Represented by:

Laurel A. Fay
Schachter Harris LLP
220 Canal Centre
400 E. Las Colinas Blvd.
Irving, TX 75039
Tel.: (214) 999-5700
Fax: (214) 999-5747

General Refractories

Represented by:

Neil Rambin
Sedgwick, Detert, Moran, & Arnold
1717 Main Street, Suite 5400
Dallas, TX 75201
Tel.: (469) 227-8200
Fax: (469) 227-8004

Guard-Line, Inc.

Represented by:

Robert Wilkinson
Dogan & Wilkinson PLLC
1010 Lamar, Suite 860
Houston, TX 77002
Tel.: (713) 333-5750
Fax: (713) 228-0701

Henry Vogt Machine Co.

Represented by:

J. Frank Kinsel, Jr.
Cantey & Hanger LLP
600 W. 6th Street, Suite 300
Fort Worth, TX 76102-3685
Tel.: (817) 877-2800
Fax: (817) 877-2807

Ingersoll-Rand Com.
Uniroyal Holding, Inc.
Zurn Industries, Inc.

Represented by:

Kyle C. Steele
Laura Frase
Forman Perry Watkins Krutz & Tardy LLP
2001 Bryan Street, Suite 1300
Dallas, TX 75201
Tel.: (214) 905-2924
Fax: (214) 905-3976

Johns-Manville
3M Company
Mid-Valley Inc.

Represented by:

Jack Jamison
Godwin Ronquillo PC
1201 Elm Street, Suite 1700
Dallas, TX 75270
Tel.: (214) 939-4400
Fax: (214) 760-7332

Maremont Corp.

Represented by:

Jill Arntz
Jeffrey L. Larson
Kasowitz Benson Torres & Friedman LLP
700 Louisiana Street, Suite 2200
Houston, TX 77002
Tel.: (713) 220-8800
Fax: (713) 222-0843

Union Carbide Corp.

Represented by:

Sharla Frost
Wilson Elser Moskowitz Edelman & Dicker LLP
5847 San Felipe Street, Suite 2300
Houston, TX 77057
Tel.: (713) 353-2000
Fax: (713) 785-7780

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Rule

Miscellaneous

Page

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Respondent Georgia-Pacific Corporation, pursuant to Texas Rule of Appellate Procedure 11.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is the oldest and largest public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Thousands of individuals across the country, including residents of Texas, support PLF, as do numerous organizations and associations nationwide.

In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation created its Free Enterprise Project. Through that project, the Foundation seeks to protect the free enterprise system from abusive regulation, the unwarranted expansion of claims and remedies in state civil justice system, and barriers to the freedom of contract. PLF has participated in cases before this Court and others on matters affecting the public interest, including issues of duty

and causation in tort, and particularly in the asbestos context. *Georgia-Pacific LLC v. Farrar*, Md. S. Ct. docket no. 102 (pending); *Howard v. A.W. Chesterton*, Penn. S. Ct. docket no. 48 EAP 2012 (pending); *O'Neil v. Crane Co.*, 53 Cal. 4th 335 (2012); *Macias v. Saberhagen Holdings, Inc.*, 175 Wash. 2d 402 (2012); *Certified Question to the Fourteenth District Court of Appeals of Texas* (*Miller v. Ford*), 479 Mich. 498, 740 N.W.2d 206 (2007); *Olivo v. Owens-Illinois, Inc.*, 186 N.J. 394, 895 A.2d 1143 (2006). PLF attorneys also have published on the impact of tort liability. *See*, *e.g.*, Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006), Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003). PLF attorneys are familiar with the legal issues raised by this case and the briefs on file in this Court. PLF believes that its public policy perspective and litigation experience will provide a helpful additional viewpoint on the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Timothy Bostic died from mesothelioma, which was allegedly caused by his exposure to asbestos from a variety of sources, including his alleged use of asbestos-containing joint compound manufactured by Georgia-Pacific Corporation. *Georgia-Pacific Corp. v. Bostic*, 320 S.W.3d 588, 590 (Tex. 2010). His survivors sued 48 defendants for negligence, strict liability, and gross negligence. All defendants other than Georgia-Pacific either settled or were dismissed. After three trials, two by jury, the court awarded more than $13 million in actual and punitive damages against Georgia-Pacific. *Id.* at 590-91. The appellate court reversed, finding no evidence of causation. *Id.* at 602. This Court granted review.

Since the issue first arose in the 1970s, courts have struggled to create rules for causation in asbestos cases. Many courts established new rules that lowered traditional causation standards in an attempt to lessen the inherent burden asbestos plaintiffs face proving specific causation. 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, 479-80 (2008). Yet, as tort

rules departed further and further from the precision of traditional causation standards, courts increased the risk that innocent parties could be forced to compensate plaintiffs for injuries inflicted by others. *See* Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 70 (1982) ("the extension of liability increases the likelihood . . . that the substantive legal rule will be applied erroneously"). The result was an unprecedented explosion in litigation so large that by 1997, the Supreme Court declared that the nation was in the midst of an asbestos "litigation crisis." *Anchem Products, Inc. v. Windsor*, 521 U.S. 591, 597-98 (1997).

This Court responded to the quickly expanding docket of asbestos litigation, that swept in both uninjured plaintiffs and extremely tangential defendants, by restoring more traditional causation standards in place of the formerly lax causation standards that had been created specifically for asbestos cases. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 770 (Tex. 2007). In *Borg-Warner*, this Court emphasized that circumstantial evidence of frequency, regularity, and proximity cannot wholly substitute for a plaintiff's burden to prove causation in

fact, that is, "but for" causation; the plaintiff also needs to provide evidence of the dose. *Id.* at 770, 773.

In this case, this Court should continue to uphold traditional tort principles that require that plaintiffs bear the burden of proving actual causation by a preponderance of the evidence, not merely that they were exposed to a risk. The Court should specifically reaffirm the *Borg-Warner* formulation because it properly incorporates "but for" causation principles; specially calling out an element of causation analysis that some courts forego when applying the frequency-regularity-proximity test. Relatedly, this Court should also reject "alternative liability" theories that shift the burden of causation to defendants, demanding that each defendant prove it did *not* cause the plaintiff's injury. This Court has been correct in requiring toxic tort plaintiffs to meet their burden of proof, regardless of their particular injury, and it should not retreat from that position in this dispute.

ARGUMENT

I

THIS COURT SHOULD REAFFIRM *BORG-WARNER*

A. "But For" Causation Is Consistent with the Frequency-Proximity-Regularity Test

This Court requires plaintiffs, even plaintiffs in asbestos cases, to prove each element of their claim. *Sw. Refining Co., Inc. v. Bernal*, 22 S.W.3d 425, 438 (Tex. 2000) ("The plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim."). Because causation in asbestos cases can prove a difficult hurdle due to the latency of some asbestos-related diseases, some courts developed a test for the type of circumstantial evidence that would prove causation. This is the "frequency, regularity, and proximity" test pioneered by the Fourth Circuit in *Lohrmann v. Pittsburgh Corning Corp*., 782 F.2d 1156, 1163 (4th Cir. 1986). The *Lohrmann* test allows a plaintiff to prove that a defendant's product caused his injury, even absent direct evidence that he inhaled asbestos fibers from that product, if he can show circumstantial evidence that exposure to the product was frequent, regular, and within a close proximity. *Id*.

In *Borg-Warner*, 232 S.W.3d at 770, this Court adopted the "frequency, regularity, and proximity" language. But, in so doing, the Court emphasized that this type of circumstantial evidence does not wholly replace a plaintiff's burden to prove causation in fact, that is, "but for" causation. *Id.* at 770, 773. Thus, this Court has held that the plaintiff needs to provide evidence of the dose, in addition to *Lohrmann*-type circumstantial evidence. *Id.* at 770, 773; *see also Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995) ("defendant's conduct or product be a substantial factor in bringing about the plaintiff's injuries."). Once a plaintiff has proffered evidence of the requisite approximate doses, he must compare those doses with other evidence to show that each defendant-specific dose of asbestos exposure has substantially increased his chances of contracting the asbestos-related disease. *Borg-Warner*, 232 S.W.3d at 773. Thus, every plaintiff alleging that a defendant injured him in tort must prove that the named defendant did, in fact, cause the plaintiff's injury.

Three years after *Borg-Warner*, this Court echoed *Borg-Warner*'s approach of demanding but-for causation in concert with the frequency, regularity, and proximity test in the different context of workers' compensation. *See Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 224

(Tex. 2010). In *Crump*, the Court specifically stated: "we cannot conceive of causal connection analysis without consideration of *cause in fact*." *Id*. (emphasis added). The phrase "cause in fact" refers to that which is "actually responsible for the ultimate harm. The cause must be more than one of the countless ubiquitous and insignificant causes that in some remote sense may have contributed to a given effect." *Id*. For this reason, this Court holds that "but-for language repeated something already included in the usual and ordinary meaning of 'cause' and draws juror attention to the importance of an unbroken causal connection."). *Id*. citing *Texas Indem. Ins. Co. v. Staggs*, 134 S.W.2d 1026, 1030 (Tex. 1940). Therefore, in *Crump*, the Court held that a jury instruction intended to convey the definition of "producing cause" in a workers' compensation case as "a substantial factor in bringing about the injury or death and without which the injury or death would not have occurred" was invalid because it failed expressly to include a but-for component. *Crump*, 330 S.W.3d at 227.

In sum, while some states still treat standard precepts of tort law as inapplicable to asbestos cases, Texas has moved to reincorporate asbestos cases within standard tort doctrine. It is not the only state to do so. Recently, in *Ford Motor Co v. Boomer*, 285 Va. 141, 158, 736

S.E.2d 724, 732 (2013), the Virginia Supreme Court adopted a "'sufficient'-to-have-caused standard" as the "proper way to define the cause-in-fact element of proximate cause." In so doing, the court held that the *Lohrmann* test standing alone was insufficient to hold the plaintiff to his proof that any particular defendant should be held responsible for the plaintiff's illness. *Id*. at 154, 736 S.E.2d at 730. The plaintiff in this case had worked in a shipyard (a high-risk location for developing asbestos-related diseases) prior to taking a job that involved brake inspections (a lower-risk exposure to asbestos). *Id*. at 159, 736 S.E.2d at 733. Upon adopting the "sufficient-to-have-caused" approach, which apparently differs from "but-for" only in semantics, the Virginia high court remanded the case for the plaintiff to "show that it is more likely than not that [the plaintiff's] alleged exposure to dust from Ford brakes occurred prior to the development of [his] cancer and was sufficient to cause his mesothelioma." *Id*.

Petitioners argue that any "but-for" causation requirement would exonerate all culpable parties. Pet. Rhrg. at 9. This is clearly not a case in which there is any potential of exonerating all culpable parties. As the court below noted, Timothy Bostic received a settlement from Knox Glass prior to filing this lawsuit and some number of the other 47

defendants in this case paid Timothy a settlement. *Bostic*, 320 S.W.3d at 590; Georgia-Pacific Brief on the Merits at 4 n.5 (citing to the record regarding the settlement from Knox Glass). This Court's decision in *Borg-Warner* was sound and reflective of the realities of asbestos litigation in this state. The causation analysis developed in that case should be reaffirmed.

B. Alternative Liability as in *Summers v. Tice* Should Not Be Extended to Asbestos Cases

Bostic urges this Court to adopt an alternative liability theory such as the California Supreme Court did in *Summers v. Tice*, 33 Cal. 2d 80, 82 (1948), the archetypal case of two hunters, both of whom are shooting, and one of whom injures a bystander. With no means whatsoever to determine which of the two shooters caused the harm, the California court held that equity demanded that the shooters bear the burden of proving they did not cause the injury, rather than requiring an impossibility of the injured, innocent plaintiff, who would otherwise be unable to recover from anybody. *Id*. at 86-87; *see also Rutherford v. Owens-Illinois, Inc*., 16 Cal. 4th 953, 970 (1997) (identifying the specific facts and equities of *Summers* that justified shifting the burden to the defendant). Using *Summers* as a springboard, Bostic focuses on

several cases that applied this type of alternative liability. They all share one particular trait, however: The multiple tortfeasors can be counted on one hand. Pet. Rhrg. at 11 (two hunters; two motorcycles; two fires; five assailants). In asbestos cases, plaintiffs routinely sue not two, and not five, defendants, but dozens upon dozens of defendants (48 in this case).

Sometimes, a difference in number is so great that it moves from a difference in degree to a difference in kind. *See Michels v. Boruta*, 122 S.W.2d 216, 220 (Tex. App. - Eastland 1938) (a "difference between negligence and willfulness is a difference in kind and not merely a difference in degree"). These differences are particularly important when it comes to the type of line-drawing required in tort law. *Irwin v. Gavitt*, 268 U.S. 161, 168 (1924) (line drawing is "the question in pretty much everything worth arguing in the law."); *Harrison v. Schaffner*, 312 U.S. 579, 583 (1941) ("drawing the line" is a recurrent difficulty in those fields of the law where differences in degree produce ultimate differences in kind.). As Prof. David Post explains, "[r]ules and principles that may be quite reasonable at one scale may become incoherent and unreasonable at another." David G. Post, *Against "Against Cyberanarchy"*, 17 Berkeley Tech. L.J. 1365, 1378 (2002).

Any number of factors can contribute to the occurrence of any event, and "at some point, it is generally agreed that [an] act cannot fairly be singled out from the multitude of other events that combine to cause loss." Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 70 (1982). Accordingly, some articulable standard for where to draw the line establishing liability is necessary. *Id*. at 71.

The California Court of Appeal specifically rejected a plaintiff's bid to use *Summers v. Tice* as a means to avoid proving causation in his asbestos-related claims, finding the extension of *Summers* to this context "troublesome." *Lineaweaver v. Plant Insulation Co.*, 31 Cal. App. 4th 1409, 1418 (1995). The *Lineaweaver* court recognized that *Summers* may be equitable in cases involving a small number of equally-potentially liable defendants, but is less so when a court is confronted with the "hundreds of possible tortfeasors among the multitude of asbestos suppliers." *Id*. As a statistical matter, the "probability that any one defendant is responsible for plaintiff's injury decreases with an increase in the number of possible tortfeasors," so the probability that any of the dozens of asbestos defendants is responsible for the plaintiff's injury "becomes so remote that it is unfair to require defendants to

exonerate themselves." *Id*. *See also In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 447 F. Supp. 2d 289, 303 (S.D. N.Y. 2006) (In a case involving 50 defendants and actions over 25 years, "it would be fundamentally unfair to hold these defendants jointly and severally liable.").

The equities in asbestos cases are further removed from *Summers* because the probability of harm caused by a particular asbestos supplier is dependent on the nature of the particular product, given that asbestos products have widely divergent toxicities. *Lineaweaver*, 31 Cal. App. 4th at 1418; *accord Goldman v. Johns-Manville Sales Corp*., 514 N.E.2d 691, 697 (Ohio 1987) ("Asbestos-containing products do not create similar risks of harm because there are several varieties of asbestos fibers, and they are used in various quantities, even in the same class of product."). These points of distinction were persuasive in *Lineaweaver*: "Unlike the negligent hunters of *Summers*, all asbestos suppliers did not fire the same shot. Yet, under a burden-shifting rule, all suppliers would be treated as if they subjected plaintiff to a hazard identical to that posed by other asbestos products." *Lineaweaver*, 31 Cal. App. 4th at 1418.

The *Lineaweaver* court was not unsympathetic to the difficulties plaintiffs may have in proving causation in asbestos litigation and their claims that it would be unfair to deny them a remedy for the wrong inflicted upon them. *See Summers*, 33 Cal. 2d at 86 (the fundamental justification for shifting the burden is to prevent all defendants escaping liability and leaving the plaintiff "remediless."). But, the court ruled, ultimately "it is the wrongdoer who caused the harm that should bear the cost, and it serves no justice to fashion rules which allow responsible parties to escape liability while demanding others to compensate a loss they did not create." *Id.*; *accord Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 378 (3rd Cir. 1990) ("in asbestos-related personal injury cases, general products liability principles apply; the plaintiff is required to establish that the product of a specific manufacturer caused the injury alleged").

In short, the *Summers v. Tice* alternative theory of liability applies in cases where a small number of defendants acted simultaneously, the actions were of the same character, creating the same risk of harm, and where all potential tortfeasors were joined as defendants. But it cannot justly be applied in a case, such as this one, where there are dozens of defendants who created different products with different uses and

divergent risks. This Court should reject the invitation to expand that narrow *Summers* exception to standard tort principles of causation into wide-ranging asbestos litigation.

II

PUBLIC POLICY FAVORS THE *BORG-WARNER* CAUSATION REQUIREMENT IN ASBESTOS CASES

The public policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potentially innocent defendant to have a causative link proven between that defendant's specific tortious acts and the plaintiff's injuries. *Blair v. Eagle-Picher Indus*., 962 F.2d 1492, 1496 (10th Cir. 1992) (quoting *Case v. Fibreboard*, 743 P.2d 1062, 1067 (Okla. 1987)) (requiring the plaintiffs to "show that there is a significant probability that the defendant's products caused their injuries" and holding that the "trial court wrongly assumed that sufficient contact could be shown by proof that a Defendant's product was somewhere inside a forty-acre facility at the same time as a Plaintiff"). Absent clear and robust causation standards, the mere creation of risk in combination with other risks, would support a claim for damages. *See* Jane Stapleton, *The Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims*,

74 Brook. L. Rev. 1011, 1029 (2009). This potential for asbestos tort liability without proof of causation is particularly worrisome, because there is no principled reason why expansive causation rules would necessarily be limited to asbestos-related cancer cases—they may be expanded to lead paint-related illnesses, workplace injuries, or to injuries caused through the instrumentality of a product. *Id*. at 1030, 1036.

Because of the lack of any inherent limiting factor in an approach that relieves plaintiffs of the burden of proving causation, courts limit tort liability through the concept of proximate causation, which deals with the "problem of the scope of the legal obligation to protect the plaintiff against an intervening cause." W. Page Keeton, *Prosser and Keeton on the Law of Torts* 313 (5th ed. 1984). As is true in the context of duty, proximate cause stems from policy considerations placing manageable limits upon the liability that flows from negligent conduct. *See Pittway Corp. v. Collins*, 409 Md. 218, 246 (2009) ("[P]ublic policy considerations that may play a role in determining legal causation include 'the remoteness of the injury from the negligence [and] the extent to which the injury is out of proportion to the negligent party's culpability . . .'.") (citation omitted); *see also Peterson v. Underwood*,

258 Md. 9, 16-17 (1970) (The determination of proximate cause "is subject to considerations of fairness or social policy as well as mere causation. Thus, although an injury might not have occurred 'but for' an antecedent act of the defendant, liability may not be imposed if . . . the negligence of one person is merely passive and potential, while the negligence of another is the moving and effective cause of the injury . . ., or if the injury is so remote in time and space from defendant's original negligence that another's negligence intervenes . . . .") (citations omitted).

Plaintiffs cannot be excused from the need to prove proximate cause in cases involving asbestos-related injuries. The Eleventh Circuit identified three policy reasons for maintaining traditional causation analysis in asbestos cases. "First, elimination of a causation requirement would render every manufacturer an insurer of not only its own products, but also of all generically similar products manufactured by its competitors." *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1483 (11th Cir. 1985) (citation omitted). "Second, expanding culpability of asbestos manufacturers could reduce the ability to spread losses by insurance and otherwise distribute risk." *Id.* Finally, "application of such a novel theory of causation would raise serious

questions of fairness due to the fact that different manufacturers' asbestos products differ in degrees of harmfulness." *Id.*; *see also Betz v. Pneumo Abex LLC*, 44 A.3d 27, 58 (Pa. 2012) (plaintiffs with low threshold diseases may not circumvent the requirement that they eliminate other possible sources of asbestos as a cause for their injuries).

Should liability be found in this case, it is difficult to imagine where such liability would stop. *See* Gerald W. Boston, *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 Envtl. L. 549, 551 n.1 (1995) (Toxic tort cases have included exposure to asbestos, cigarette smoke, fumes from mildew, formaldehyde vapors, pesticides, contaminated water supply, and others; absolving plaintiffs of the need to prove an essential element of their claim in the asbestos context could well transfer to other types of cases in which diseases are latent for long periods before they are manifest). One scholar sums up the policy implications of causation problems this way:

> Where a plaintiff may recover even with weak proof of causation, litigation will be brought, not based on whether the causative inference is likely to be true, but based on the potential for recovery. The incentive to pursue those cases in which the harm alleged is most likely due to the defendant's conduct will evaporate. Under an eroded causation standard, the plaintiff is incentivized in the weakest possible manner to pursue damages only against those who caused his injury. Potential defendants cannot

> effectively regulate their conduct where the scope of their liability is so unclear.

Jonathan C. Mosher, *A Pound of Cause for a Penny of Proof: The Failed Economy of an Eroded Causation Standard in Toxic Tort Cases*, 11 N.Y.U. Envtl. L.J. 531, 616 (2003).

The tort system is supposed to create an incentive mechanism that allows businesses to predict, on the basis of anticipated costs and benefits, what sort of risks and practices are legitimate in their pursuit of customer satisfaction. *See generally* Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 Cal. L. Rev. 677, 678, *et seq.* (1985) (describing cost-benefit analysis expectations and limitations). Without some clear principle of fault, businesses will disregard the confusing signals that tort liability sends them, and will simply consider the cost of tort liability as a general cost of doing business. As the RAND Institute for Civil Justice points out, "[i]f business leaders believe that tort outcomes have little to do with their own behavior, then there is no reason for them to shape their behavior so as to minimize tort exposure." Stephen J. Carroll, *et al.*, RAND Institute for Civil Justice, *Asbestos Litigation* 129 (2005).[1]

---

[1] *Available at* http://www.rand.org/pubs/monographs/MG162/index.html (last visited June 13, 2013).

CONCLUSION

Pennsylvania Supreme Court Justice Flaherty described the need for balancing the social benefits and burdens which result from an expansion of tort liability:

> As it is with everything, a *balance* must be struck – certain limits drawn. We are, in the end, dealing with money, and that money must come from somewhere – from someone: the public pays for the very most part by increased insurance premiums, taxation, prices paid for consumer goods, medical services, and in loss of jobs when the manufacturing industry is too adversely affected. A sound and viable tort system – generally what we now have – is a valuable incident of our free society, but we must protect it from excess lest it becomes unworkable and alas, we find it replaced with something far less desirable.

Mazzagatti v. Everingham by Everingham, 512 Pa. 266, 281, 516 A.2d 672, 680 (1986) (Flaherty, J., concurring) (emphasis original). This Court can strike the correct balance and guard against the excesses of a loose tort system by continuing to uphold traditional causation standards.

The decision of the Court of Appeals should be affirmed.

DATED: June 13, 2013.

Respectfully submitted,

J. DAVID BREEMER,
Counsel of Record

DEBORAH J. LA FETRA,
Of Counsel

By /s/ J. David Breemer
J. DAVID BREEMER

Attorneys for Amicus Curiae
Pacific Legal Foundation

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 3,977 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(l).

/s/ J. David Breemer
J DAVID BREEMER

CERTIFICATE OF SERVICE

I certify that pursuant to the Texas Rules of Appellate Procedure, I have served a true copy of the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT electronically on June 14, 2013.

/s/ J. David Breemer
J. DAVID BREEMER