

TEXAS CIVIL JUSTICE LEAGUE
400 West Fifteenth Street, Suite 1400
Austin, Texas 78701-1648
512.320.0474 (T)
www.tcjl.com

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August 19, 2013

Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Re: No. 10-0775; *Bostic v. Georgia-Pacific Corporation*.

To the Honorable Members of the Texas Supreme Court:

Pursuant to Rule 11, Texas Rules of Appellate Procedure, *amicus curiae* Texas Civil Justice League files this *amicus* letter in the above-referenced cause.

Statement of Interest

The Texas Civil Justice League (“TCJL”) is a non-profit association of Texas businesses, health care providers, professional and trade associations, and individuals dedicated to maintaining a fair and balanced civil justice system. Since its inception in 1986, TCJL has consistently striven, through legislative advocacy and judicious participation in important matters before the Court, to achieve a fair and balanced tort liability system that provides adequate judicial remedies for legitimate claims, while encouraging capital investment and job creation in this state. TCJL’s membership includes numerous manufacturers and other businesses that are

defendants or responsible third parties in asbestos litigation. The outcome of this case is of critical importance to these businesses and to their employees. It is equally important to the jurisprudence of this state. This letter has been prepared in the ordinary course of TCJL's operations.

Summary of Argument

TCJL concurs with the Respondent that the Fifth Court of Appeals properly construed and applied this Court's holding in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007) with respect to substantial factor causation in an asbestos case. This *amicus* letter, however, will focus on the Petitioners' claim that the Legislature in 2009 attempted to repeal lower court interpretations of *Borg-Warner*, and that this attempt evidences "profound confusion" regarding the proper application of the substantial factor test laid down in that case. Petitioners' characterization of the Legislature's involvement is seriously misleading and must be corrected.

Argument

The legislative debate in 2009 did not reflect any "confusion" about the application of *Borg-Warner* by the intermediate courts. Rather, the debate turned squarely upon whether the *Borg-Warner* or *Lohrmann* standard should be applied in a mesothelioma case. Presented with a clear public policy choice, the Legislature opted to retain *Borg-Warner*.

During the 2009 legislative session, TCJL was one of the leading voices in opposition to S.B. 1123 and its companion, H.B. 1811. This issue

did not, however, arise in a vacuum and must be viewed in its larger public policy context. As this Court is undoubtedly aware, asbestos litigation in Texas became highly controversial in the later 1990's and early 2000's, as plaintiff's attorneys filed tens of thousands of asbestosis claims with no evidence of impairment in Texas courts. Frequently, these claims were "bundled" in a manner that, for purposes of extracting settlements from defendants, combined large numbers of unimpaired claims with claims involving serious asbestosis, asbestos-related cancer, or malignant mesothelioma. The Texas Legislature responded in 2005 by enacting S.B. 15, which established medical criteria for determining impairment from asbestos exposure.¹ The House committee bill analysis for S.B. 15 stated the purpose of the bill as follows:

Currently, there is no specific state law relating to personal injury claims for asbestos exposure or silica exposure. It is the purpose of this Act to protect the right of people with asbestos-related and silica-related injuries to pursue their claims for compensation in a fair and efficient manner through the Texas court system. The Act aims to prevent scarce judicial and litigant resources from being misdirected by the claims of individuals who have been exposed to asbestos or silica, but have no functional or physical impairment from asbestos-related or silica-related disease. To accomplish this purpose, the Act adopts medically accepted standards for differentiating between individuals with nonmalignant disease causing functional impairment and individuals with no functional impairment, provides a method to obtain the dismissal of lawsuits in which the exposed person has no functional impairment while protecting a person's right to bring suit

¹ S.B. 15, 79th Leg., R.S. (2009).

on discovering an impairing injury, and creates an extended period before limitations begin to run in which to bring claims for injuries caused by the exposure to asbestos or silica to preserve the right of those who have been exposed but are not yet impaired to bring a claim later in the event that they develop an impairing disease or injury. *See* S.B. 15, House Committee Report, May 4, 2005, 79th Leg., R.S. (2005).

Subsequent to the passage of S.B. 15, this Court decided *Borg-Warner v. Flores*, adopting the position that a claimant in a claim for an injury caused by exposure to asbestos must prove, as part of substantial factor causation, a quantitative dose of asbestos fibers to which the claimant has been exposed. Shortly thereafter, the multidistrict litigation judge issued a ruling in which he rejected the plaintiffs' arguments that *Borg-Warner* did not apply to mesothelioma claims. *See* Judge Mark Davidson, 11th District Court, July 18, 2007, Re: Cause No. 2004-3,964, *In Re: Asbestos*, etc.

Having failed to persuade the courts, opponents of the *Borg-Warner* decision turned to the Legislature in 2009, and S.B. 1123 and H.B. 1811 were introduced. Representatives of the League testified in opposition to the bill in both the Senate and House committees.² It also distributed information regarding the bill to members of the House and Senate.³

² *See* Senate State Affairs Committee Witness List, S.B. 1123, March 23, 2009, <http://www.capitol.state.tx.us/tlodocs/81r/witlistbill/html/SB01123S.HTM> (accessed May 1, 2013); and House Judiciary & Civil Jurisprudence Comm., Witness List, Tex. H.B. 1811, 81st Leg., R.S. (2009).

³ *See* Appendix 1.

Ultimately, the efforts of TCJL and other groups were successful. S.B. 1123 passed the Senate in a closely contested vote, but did not advance beyond the committee stage in the House.⁴

TCJL does not here argue that the failure to enact S.B. 1123 indicates explicit legislative approval of the application of the *Borg-Warner* substantial factor causation standard in a mesothelioma case, although we believe that the Legislature knew precisely what it was doing when it declined to enact S.B. 1123.⁵ TCJL does, however, categorically reject the Petitioners' mischaracterization of the Legislature's action.

The Petitioners' Brief on the Merits urges this Court to "grant review in this case, in order to clarify the confusion that has led to conflicts in the Courts of Appeal, *the concerned interference of the Texas legislature*, as well as an absolute scientific bar to causation proof in an asbestos case."⁶ The Petitioners go on to say that S.B. 1123 was intended to "legislatively

⁴See Texas Legislature Online, Actions for S.B. 1123, 81st Leg., R.S. (2009), <http://www.capitol.state.tx.us/BillLookup/Actions.aspx?LegSess=81R&Bill=SB1123> (accessed May 1, 2013).

⁵ As this Court has previously held, legislative inaction indicates either legislative approval of the judicial construction of the issue or that "the general dissatisfaction therewith was not of sufficient strength to impel legislative action." *Moss v. Gibbs*, 370 S.W.2d 452, 458 (Tex. 1963). The Court has also noted that it is "entitled to assume that the legislature, through its inaction, indicated its approval." *Allen Sales & Servicenter, Inc. v. Ryan*, 525 S.W.2d 863, 866 (Tex. 1975).

⁶ See Petitioners' BOM, p. 3 (emphasis added).

repeal portions of the lower courts' interpretations of *Borg-Warner*.”⁷ As reflected in the legislative record itself, these claims are half-truths at best.

The plain fact is that S.B. 1123 aimed to exempt mesothelioma cases from the *Borg-Warner* requirement that a claimant show approximate numerical dose, not to clear up any “confusion” in the intermediate courts. As originally introduced, S.B. 1123 added a new Section 90.013, Civil Practice and Remedies Code, to establish the “exclusive means of proving causation for claims in which the claimant seeks recovery for malignant mesothelioma allegedly caused by exposure to asbestos fibers.” *See* S.B. No. 1123, Introduced, 81st Leg., R.S., February 25, 2009. The remaining text of the bill, in pertinent part, is as follows:

(b) Notwithstanding any other law, to recover damages on a claim to which this section applies, the claimant must prove:

(1) that a defendant's product or conduct was a substantial factor in causing the injury to the exposed person, as described by Subsection (c);

(2) foreseeability, if the cause of action is one in which foreseeability is an element of causation; and

(3) that the exposed person's cumulative exposure to asbestos fibers was a cause of the person's mesothelioma.

(c) A defendant's product or conduct was a substantial factor in causing the exposed person's injury if the exposure to the asbestos fibers for which that defendant is alleged to be responsible contributed to the cumulative exposure of the exposed person and was more than purely trivial when considering the following qualitative factors:

(1) the frequency of exposure;

(2) the regularity of exposure; and

⁷ *Ibid.*, p. 2.

(3) the proximity of the exposed person to the source of the asbestos fibers.

* * *

(e) *Nothing in this section requires a claimant or a defendant who seeks a determination of the percentage of responsibility of another person under Section 33.003(a) to prove, for any purpose, a quantitative dose, or estimated quantitative dose of asbestos fibers to which the exposed person was exposed.*

In laying out the bill for Senate floor debate, the Senate author correctly explained that *Borg-Warner* establishes a “quantitative approach” that requires approximate dose. He then stated that the asbestos multi-district litigation judge subsequently applied *Borg-Warner* to mesothelioma claimants, as well as to defendants seeking to prove the liability of a responsible third party. The author went on to argue, *inter alia*, that while *Borg-Warner* may establish an appropriate quantitative standard for asbestosis cases, it should not be applied to mesothelioma claims because the evidentiary burden of proving dose is too prohibitive.⁸ Therefore, he concluded, the substantial causation test established in *Lohrmann v. Pittsburgh Corning Corp., et al.*, 782 F.2d 1156 (4th Cir., 1986) and codified by S.B. 1123, should be adopted as the appropriate test in a mesothelioma

⁸ Much of the floor debate on S.B. 1123 centered on the validity of this argument.

case.⁹ In the end, the Legislature did not agree, and no bill seeking a similar result has been introduced in the last four years.

To put it bluntly, the Petitioners ask this Court to do something that the Legislature, presented with clear, fully vetted, and strongly advocated policy alternatives from both the plaintiff and defense perspectives, refused to do. It was as hard fought a legislative contest as TCJL has ever been involved in, but the decision went against S.B. 1123, at least partly on the basis that *dose matters* when properly assigning the very substantial liability defendants in these cases can and do incur. We urge the Court to consider the Legislature's "interference" in 2009 as what it really was: non-interference in a decision that this Court properly made in 2007 and that has been appropriately applied by lower courts ever since.

Conclusion and Prayer

TCJL respectfully requests this Court to affirm the Court of Appeals' decision in all respects.

Respectfully submitted,

/s/ George S. Christian
GEORGE S. CHRISTIAN
State Bar No. 04227300

⁹ See Debate on Tex. S.B. 1123 on the Floor of the Senate, 81st Leg., R.S. (April 16, 2009), from approximately 3:21:00 to 3:34:40, <http://www.senate.state.tx.us/avarchive/?mo=04&yr=2009&lim=50> (accessed April 30, 2013).

400 West 15th Street, Suite 400
Austin, Texas 78701
512.791.1429
george@thechristianco.com
**ATTORNEY FOR *AMICUS*
CURIAE TEXAS CIVIL
JUSTICE LEAGUE**

CERTIFICATE OF COMPLIANCE

I certify that this document contains 1,601 words in the portions of the document that are subject to the word limits of Texas Rule of Appellate Procedure 9.4(i), as measured by the undersigned's word-processing software.

/s/ George S. Christian

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *amicus* letter has been served by electronic mail to all attorneys of record as listed below on August 19, 2013.

**Appellate Counsel for
Georgia-Pacific Corporation:**

Deborah G. Hankinson
Jennifer R. Stagen
Rick Thompson
HANKINSON LLP
750 N. St. Paul St., Suite
1800
Dallas, TX 75201

**Appellate Counsel for
Petitioners/Appellees/Plaintiffs:**

Denyse Clancy
John Langdoc
BARON & BUDD, P.C.

3102 Oak Lawn Avenue, Suite
1100
Dallas, TX 75219

**Counsel for *Amicus Curiae*
Pacific Legal Foundation:**

J. David Breemer
Deborah J. La Fetra
PACIFIC LEGAL
FOUNDATION
930 G Street
Sacramento, CA 95814

/s/ George S. Christian
George S. Christian