No. 02-08-00198-CV

COURT OF APPEALS
SECOND DISTRICT OF TEXAS

ROSEMARY SMITH, BRADY SMITH and DONNA HUBBARD, Individually and as Personal Representative of the Heirs and Estate of DORMAN SMITH, Deceased,
Appellants

v.

BONDEX INTERNATIONAL, INC., RPM, INC. and KELLY-MOORE PAINT COMPANY, Inc.
Appellees.

Appeal from the 348th Judicial District Court of Tarrant County,
the Honorable Kenneth Curry presiding

BRIEF OF AMICUS CURIAE NATIONAL PAINT AND COATINGS ASSOCIATION, INC.

National Paint & Coatings Association, Inc.
Thomas J. Graves
Vice President and General Counsel
1500 Rhode Island Avenue, N.W.
Washington, DC 20005
(202) 462-8743

Spriggs & Hollingsworth
Eric G. Lasker
Bruce J. Berger
1350 I Street, N.W., Ninth Floor
Washington, D.C. 20005
(202) 898-5843

Counsel for *Amicus Curiae* National Paint & Coatings Association, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTEREST OF AMICUS

The National Paint and Coatings Association, Inc. ("NPCA") is a voluntary, nonprofit trade association – established more than a century ago – and the preeminent organization in the United States representing paint and coatings manufacturers, raw materials suppliers, and distributors. NPCA's primary role is to serve as ally and advocate on legislative, regulatory, and judicial issues at the federal, state, and local levels.

Many of NPCA's members acquired companies that at one time sold products containing asbestos. NPCA's members have a vital interest in assuring that defendants in asbestos cases are held liable only for injuries for which they are actually responsible and not merely because of limited, non-causative contact between the products that they once sold and plaintiffs. Appellee Kelly-Moore Paint Company ("Kelly Moore") is a member of NPCA but is not sponsoring or paying for this amicus brief.

ARGUMENT

I. The Asbestos Crisis Continues Unabated and, Without Proper Controls, Threatens the Bankruptcies of Many Companies Whose Products Were Only Minimally Involved.

The "asbestos-litigation crisis" aptly recognized by the United States Supreme Court in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997), has not abated in the least. It has been described as an "elephantine mass of asbestos cases," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999), or an "avalanche," *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005).[1]

The result is that many companies only peripherally involved with asbestos products have been dragged through court at unprecedented expense, gone into bankruptcy, and gone clear out of business. As of 2004, 73 companies had either dissolved or filed for Chapter 11 protection as a direct result of asbestos litigation; more than half of the 73 companies met their demise in this decade alone. Rand Report at 109. *See also In re GlobalSantaFe Corp.*, 275 S.W.3d 477, 482 (Tex. 2008) (asbestos litigation has

[1] Through 2002, roughly 730,000 people brought asbestos claims against 8,400 businesses. Rand Institute for Civil Justice, Asbestos Litigation at 107 (2004), *available at* http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf (last visited February 27, 2009).

resulted in the bankruptcies of many companies, the loss of thousands of jobs, enormous litigation expenses, and crowded dockets). A majority of plaintiffs now sue defendants with whose products they have had minimal contact.[2] Indeed, a "hallmark of the [asbestos] litigation has been the mass filing of ... claims made by plaintiffs without reliable proof of causation, ... forc[ing] scores of defendant companies into bankruptcy."[3]

II. The Policy Behind Borg-Warner Certainly Extends to All Toxic Tort Cases, Including Those Involving Mesothelioma and Other Forms of Cancer.

With this history in mind, the Texas Supreme Court decided *Borg-Warner v. Flores*, 232 S.W.3d 765 (Tex. 2007), noting that asbestos claims had been in the court system for decades but that "courts have continued to struggle with the appropriate parameters for lawsuits alleging asbestos-related injuries." *Id.* at 766. It resoundingly

---

[2] American Enterprise Institute for Public Policy Research, Making the FAIR Act Fair (2006) ("AEI Report") *available at http://www.aei.org/publications/filter.all,pubID.23973/pub_detail.asp* (last visited February 29, 2007) (citing Lester Brickman, "On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality," 31 *Pepperdine L. Rev.* 33 (2004)).

[3] Landin, et al., *Lessons Learned from the Front Lines: A Trial Court Checklist for Promoting Order and Sound Policy in Asbestos Litigation*, 16 JLPOLY 589, 592 (2008) ("Landin"). There are now "scores of peripheral defendants." *Id.* at 600. "'Most plaintiffs sue every known manufacturer of asbestos products,' notwithstanding the plaintiff's marginal contact, if any, with a particular defendant's product." *Id.* at 631 (quoting *Lohrnmann v. Pittsburgh Corning Corp.*, 782 F.3d 1157, 1162 (4th Cir. 1986)).

answered "no" to the question "whether a person's exposure to 'some' respirable fibers is sufficient to show that a product containing asbestos was a substantial factor" in causing that person's asbestos-related disease. *Id.* Thus, the Texas Supreme Court in *Borg-Warner* agreed with many other courts across the country in "taking a more thorough look at [plaintiffs'] unsound causation claims."[4]

Over the years, courts relaxed traditional rules of causation to allow more and more tenuous asbestos cases to get to sympathetic juries. But the relaxation of traditional rules has meant that companies not truly responsible for plaintiffs' illnesses have been forced nonetheless to compensate them. *Borg-Warner* made it clear that asbestos cases should be governed by the traditional rules that have always worked well in non-asbestos contexts. In light of *Borg-Warner*, asbestos cases are to be treated like other toxic tort cases, *i.e.*, before a case can be sent to the jury there must be real proof of

[4] Landin at 605.

specific causation tying the particular defendant's product to the particular plaintiff's illness.[5]

In *Georgia-Pacific v. Stephens*, 239 S.W.3d 304 (Tex. App. - Houston [1st Dist.] 2007, pet. denied), this fundamental proposition of law was applied in due course to a mesothelioma case. The *Stephens* ruling shows that *Borg-Warner's* return to bedrock causation principles for asbestos cases applies equally well when the disease at issue is cancer as opposed to asbestosis.

Both *Borg-Warner* and *Stephens* reflect the time-tested principle that liability must be founded upon proof that the agent at issue is a substantial contributing factor in causing the alleged harm.[6] The phrase "substantial factor" expresses an important concept of relativity, contrasting meaningful contributions to a plaintiff's injury, deserving of liability, from trivial contributions having no

---

[5] As such, *Borg-Warner* manifests the continuing intent of the Texas Supreme Court to apply, in asbestos cases, the "fundamental principle of traditional products liability law ... that the plaintiff must prove that the defendants supplied the product which caused the injury." *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 69 (Tex. 1989) (rejecting theories of *Summers v. Tice*, 199 P.2d 1 (Cal. 1948), that would relieve plaintiff of his burden of proof).

[6] *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003) ("The test for cause in fact ... is whether the act or omission was a substantial factor in causing the injury 'without which the harm would not have occurred.'")

appreciable effect.[7] It is a principle premised upon "basic notions of sound public policy and overall fairness."[8]

The present mesothelioma case, like *Stephens*, is typical of situations in which, prior to *Borg-Warner*, courts sent cases to the jury even in the absence of adequate evidence of specific causation. Dorman Smith claimed 22-years of working with asbestos products, but began using Kelly-Moore products only in the last four. He thus had occupational exposure to asbestos dust for 18 years before ever encountering Kelly-Moore's products. Plaintiffs could not quantify his exposure from Kelly-Moore products as compared to all other asbestos dust to which he was exposed for the 22 years. Plaintiffs could not even estimate his exposure from Kelly-Moore products as compared to other asbestos dust he used during those last four years. Thus, plaintiffs showed only "some" exposure within the meaning of *Borg-Warner*. Without dose information, the trial court followed *Borg-Warner* and concluded that there was no evidence that Kelly-Moore products were a

---

[7] *See Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471-72 (Tex. 1991); *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 401 & n.3 (Tex. 1993).

[8] *Brown v. U.S. Stove Co.*, 484 A.2d 1234 (N.J. 1984); *accord, White v. ABCO Eng. Co.*, 992 F. Supp. 630, 633 (S.D.N.Y. 1998), *aff'd in part and vacated and remanded in part on other grounds*, 221 F.3d 293 (2d Cir. 2000).

substantial contributing factor to the development of Smith's mesothelioma.

III. Appellants' Extreme Position That Dose Does Not Matter At All Negates The Specific Causation Requirement Completely.

In response to Kelly-Moore's motion for summary judgment, plaintiffs took the extreme position that dose did not matter at all because "each exposure to asbestos is a substantial contributing factor." Appellants make the same unavailing argument here. They urge this Court to ignore *Borg-Warner*, relegating Texas in mesothelioma cases to the unfairness of the illusory asbestos causation rules of the past, in which causation "in the popular sense" was mocked and "the idea of responsibility" was ignored. Their arguments negate the concept of specific causation entirely. This is exactly the outcome that *Borg-Warner* sought to prevent.

Nothing about the fact that this case involves cancer compels a different result here as compared to *Borg-Warner*. Cancer may arise in a single cell, but that does not allow courts to ignore the requirement of quantifying the dose.

In benzene cases, *e.g.*, that the cancer starts in a single cell does not negate the requirement of quantifying

the dose. *See Sutera v. The Perrier Group of America, Inc.*, 986 F. Supp. 655 (D. Mass. 1997) (using quantitative dose reconstruction to conclude that the science did not support plaintiff's claim that benzene exposure caused his acute myelogenous leukemia, even though plaintiffs argued a "no-threshold model");[9] *Wills v. Amerada Hess Corp.*, No. 98-CIV. 7126(RPP), 2002 WL 140542, *10 (S.D.N.Y. Jan. 31, 2002) (rejecting argument that plaintiff was not required "to quantify Decedent's level of exposure" in squamous cell carcinoma case); *Austin v. Kerr-McGee Ref. Corp.*, 25 S.W.3d 280, 292-93 (Tex. App. - Texarkana 2000, no pet.) (plaintiffs must show a specific level of exposure in chronic myelogenous leukemia case) (citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 720 (Tex. 1997)).

In radiation cases, that cancer starts in a single cell does not negate the requirement of quantifying the dose. *Cano v. Everest Minerals Corp.*, 362 F. Supp. 2d 814, 824 (W.D. Tex. 2005) (as part of specific causation plaintiffs

---

[9] Although the trial court here did not grant summary judgment based upon the scientific unreliability of plaintiffs' expert testimony on the "no-threshold" model, other courts have deemed such opinions unreliable. *See, e.g., Sutera*, 986 F. Supp. at 666; *Cano*, 362 F. Supp. 2d at 849; *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 25 (D. Mass. 1995)(linear non-threshold model "has been rejected by the overwhelming majority of the scientific community").

must prove "that the exposure or dose levels were comparable to or greater than those in the studies" upon which they relied; plaintiffs must "prove the levels of exposure that are hazardous to human being generally *as well as the plaintiff's actual level of exposure to the defendant's toxic substance*") (quotation omitted; emphasis added); *Burleson v. Texas Dept. of Crim'l Justice*, 393 F.3d 577, 587 (5th Cir. 2004) (criticizing expert's failure to determine plaintiff's radiation dose from thoriated tungsten rods in throat and lung cancer case).

In ethylene oxide cases, that cancer starts in a single cell does not negate the requirement of quantifying the dose. *See Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194, 195-96 (5th Cir. 1996).

That this case involves mesothelioma - as opposed to some other form of cancer - does not alter the law that should be applied. The policies underlying *Borg-Warner* are as applicable to mesothelioma cases as to any non-cancer case, and this Court should "[a]dhere to traditional elements of substantial factor causation."[10]

---

[10] Landin at 607.

IV. Appellants' Assertion that Mesothelioma Is a "No-Threshold" Disease Does Not Justify Abandonment of Traditional Rules of Toxic Tort Causation.

Appellants argue that mesothelioma is well-accepted as a "no threshold" disease and that therefore they need not show any particular dose. This argument has been rejected repeatedly, because it provides no means whatsoever of allowing a jury to distinguish among exposures, *i.e.*, among exposures for which the defendant is responsible and those for which it is not.

The logical impossibility into which Appellants' argument places them can be seen easily. For example, applying Appellants' theory allows no way of excluding ambient environmental exposures as the sole cause of the subsequent "no threshold" disease.[11] *See, e.g., Wills*, 2002 WL 140542 at *15:

> Dr. Bidanset's [no-threshold] theory would lead to an impossible link of causation. If one exposure is sufficient for causation, there would be no way to

[11] The requirement to reliably rule out other plausible alternative causes is set forth in a variety of *Daubert* cases. "[W]here a defendant points to a plausible alternative cause and the doctor offers *no* explanation for why he or she has concluded that was not the sole cause, that doctor's methodology is unreliable." *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 759 n.27 (3d Cir. 1994); *Turner v. Iowa Fire Equipment Co.*, 229 F.3d 1202, 1209 (8th Cir. 2000) (expert "did not scientifically eliminate other causes of [the] condition"); *In re Paoli Railroad Yard PCB Litigation*, 2000 WL 274262 (E.D. Pa. 2000) (expert failed to show how she reasonably determined that plaintiff's cancer was not caused by smoking). *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706 (1997), accords with these cases on specific causation.

> determine which exposure caused a particular cancer since we are exposed to carcinogens to some degree in the ambient environment on a daily basis.

See also Sutera, 986 F. Supp. at 659 (benzene is "found in the environment (air, water, soil) both as a result of human activity and due to natural processes").

Just as benzene is ubiquitous in the environment, as noted in *Wills* and *Sutera*, and just as ionizing radiation is ubiquitous in the environment, as noted in *Cano*, so are asbestos fibers ubiquitous.[12] The "no threshold" model advocated by Appellants, even if true, thus provides no basis for distinguishing between exposures that are meaningful in the development of a disease and exposures that are trivial.

Finally, Appellants contend that, because it is not possible to identify the precise asbestos fibers that in fact damaged the chromosomes in the single cell of Smith's pleura in which mesothelioma began, their sole burden should be to identify exposures that increased his risk.

---

[12] Smith had 15 years exposure to asbestos fibers in the ambient atmosphere before ever working with asbestos-containing products and another 22 years of such exposure while he worked with asbestos-containing products. Accepting plaintiffs' assertion that only three weeks' exposure is sufficient to cause mesothelioma, Smith had ample opportunity to contract the disease from ambient exposures as well as from all of the exposures to other asbestos-containing products encountered in the 18 years he worked with such products before ever using a Kelly-Moore product.

By this contention, they seek to relieve themselves of the requirement to establish specific causation by traditional means, but their argument - that every exposure to a carcinogen must be a "substantial contributing factor" to a subsequent cancer - has been squarely rejected. *See Cano*, 362 F. Supp. 2d at 840-41 ("[a] specific causation expert cannot merely assert that every risk factor is a cause"), 844 (rejecting position that "once a person develops cancer, all possible causes of [that cancer] … are substantial contributing factors"), 845 (rejecting argument that "every possible cause … was also a but-for cause"). As the court summed up:

> This is prime false-cause reasoning. Simply because each of the possible causes preceded the cancer and therefore could have caused the cancer does not mean that they did cause the cancer. It is possible that all of the possible causes contributed or that only some did. ... The fact that exposure to ionizing radiation from uranium may be a risk factor for cancer does not make it an actual cause simply because cancer developed.

Id. at 846. Thus, even though plaintiffs were not required to show the *precise* level of radiation to which they were exposed, it was still absolutely necessary that a quantitative dose estimate "play a role in determining the

probability that the radiation played a causal role in the development of the individual's cancer." *Id.* at 848.[13]

The *Borg-Warner* requirement that a plaintiff demonstrate his specific dose to asbestos makes as much sense in the context of a purportedly "no threshold" disease as it does in the context of asbestosis. Specific causation in either of these contexts requires quantification of the toxic dose attributable to a particular product. Only by means of such quantitative comparisons can legal - instead of theoretical - responsibility for causing a particular disease be demonstrated. *See Exxon Mobil Corp. v. Altimore*, 256 S.W.3d 415, 425 n.12 (Tex. App. - Houston [14th Dist.] 2008, no pet.) (plaintiff in mesothelioma case would have "similar hurdles" to overcome as did plaintiff in *Borg-Warner*).

---

[13] *See also Nat'l Bank of Commerce v. Assoc. Milk Producers, Inc.*, 22 F. Supp. 2d 942, 961 (E.D. Ark. 1998) ("[e]stablishing that the risk of causation 'is not zero' falls woefully short of the degree of proof required by *Daubert* and its progeny"); *Bartel v. John Crane Inc.*, 316 F. Supp. 2d 603 (N.D. Ohio 2004) (directing verdict against plaintiff who failed to prove that exposure to asbestos-containing gaskets or packing was a substantial factor in causing decedent's mesothelioma); *Lindstrom v. AC Prods. Liab. Trust*, 264 F. Supp. 2d 583 (N.D. Ohio 2003) (argument that any exposure can cause mesothelioma renders the substantial factor test "meaningless"); *see also* Weinrib, *Causation and Wrongdoing*, 63 CHIKLR 407, 430 (1987) (liability for risk does not arise until it "materializes in injury to the plaintiff").

V. It Is Reasonable to Impose Upon Mesothelioma Plaintiffs the Requirement Found in Other Toxic Tort Cases of Quantifying Their Exposure to the Defendant's Particular Product.

Appellants contend that it would be unreasonable for them to be bound by the causation tests that non-mesothelioma plaintiffs must meet - quantification of the dose of the harmful substance - because such a showing would impose intractable difficulties. But, in fact, such quantifications are always required in situations in which exposures may have occurred decades prior to the appearance of the disease. "Dose reconstruction" or "retrospective exposure assessment" is a cottage industry for litigation experts.[14] The federal government itself performs dose

---

[14] http://www.dotsongroup.com (last visited Feb. 27, 2009) (legal support services of services of Kyle Dotson, CIH, CSP, BCEE, have included serving as a consulting and/or testifying expert witness in workplace injury and wrongful death litigation involving a wide range of toxic tort issues including occupational exposure to asbestos (including state-of-the-art *and semi-quantitative dose reconstruction*) (emphasis added); http://www.jurispro.com/DanNapierMSCIHCSP (last visited February 27, 2009) (advertising expertise in forensic reconstruction of hazardous exposure); http://www.jurispro.com/JosephGuthPhDCertifiedIndustrialH (last visited March 2, 2009) (advertising expertise in asbestos exposure and "retrospective hazardous exposure assessments"); http://jhguth1942.tripod.com/ (last visited March 2, 2009) (advertising "Retrospective and Present-Day Toxic/Carcinogenic Exposure Studies") http://www.exponent.com/dose_reconstruction/ (last visited February 27, 2009) (dose reconstruction includes extrapolations to historic conditions based on current data, mathematical modeling, exposure simulations, etc.); http://www.exponent.com/jeffrey_hicks/#tab_profile (last visited March 5, 2009) (expert in dose reconstruction for asbestos); http://www.sph.unc.edu/images/stories/biosketches/700342905_bs.doc (last visited March 2, 2009) (listing three peer-reviewed publications on tomographic reconstruction of indoor air pollution); http://www.pcapca.com/our-services/industrial-hygiene (last visited March 2, 2009) (advertising "assessment of occupational exposures");

reconstructions,[15] and industrial hygienists give courses and lectures on asbestos dose reconstruction.[16] Nothing except their desire to avoid the likely answer prevented Appellants from engaging such experts, qualified in this field, to perform the necessary dose estimations. The mere fact that Appellants' expert Dr. Longo in this case "doesn't know how to do that" hardly means that the exercise could not have been performed by someone else competent in the field.

---

http://www.chemrisk.com/expdose.aspx (last visited March 2, 2009) (advertising "knowledge of dose reconstruction techniques [where] ... the exposure of workers and citizens was reconstructed using historical industrial hygiene and work records, as well as corporate and industry documents [and the conduct of] ... more than $40,000,000 in dose reconstruction studies for the government and as many as a dozen studies of various workplaces").

[15] http://www.atsdr.cdc.gov/asbestos/sites/libby_montana/public_response.html (last visited Feb. 27, 2009) (Agency for Toxic Substance and Disease Registry subregistry); http://www.dol.gov/esa/owcp/energy/regs/compliance/PolicyandProcedures/finalbulletinshtml/Bulletin_04-01_NIOSH_DR_Reworks/Bulletin_04-01_NIOSH_DR_Reworks.doc (last visited Feb. 27, 2009) (NIOSH reliance on dose reconstruction).

[16] http://www.cmjlaw.com/pdf/Mealey's%20Asbestos%20Conference%20Brochure.pdf (last visited Feb. 27, 2009) (presentations of James Rasmuson, PhD, CIH, DABT, Senior Scientist and Chief Executive Officer, Chemistry & Industrial Hygiene, Inc., Wheat Ridge, CO and John Spencer, CIH, CSP, President, Environmental Profiles, Inc., concerning, *inter alia, the effective use of dose reconstruction (or Retrospective Exposure Assessment–REA)* (emphasis added); http://www.aiha.org/aihce05/bytopic.htm (last visited Feb. 27, 2009) (course sponsored by A.I.H.A. on Reconstructing Exposure and Dose); http://stevenpaskal.net/ (last visited March 2, 2009) (presentation of program by CIH on "assessment of occupational exposures").

CONCLUSION

In summary, without submitting admissible evidence of dose and demonstrating that a plaintiff's dose was equal to or higher than the doses shown to cause the disease in issue, plaintiffs in any toxic tort case cannot begin to demonstrate specific causation. There is no good policy reason for giving mesothelioma plaintiffs a "free pass" in order to impose liability upon companies whose products may not have significantly contributed to their disease.

May 18, 2009

Respectfully submitted,

National Paint & Coatings Association, Inc.
Thomas J. Graves
Vice President and General Counsel
1500 Rhode Island Avenue, N.W.
Washington, DC 20005
(202) 462-8743

Spriggs & Hollingsworth
Eric G. Lasker
Bruce J. Berger
1350 I Street, N.W., Ninth Floor
Washington, D.C. 20005
(202) 898-5843

Counsel for *Amicus Curiae* National Paint & Coatings Association, Inc.

Certificate of Service

I certify that on May 18, 2009, a true and correct copy of the foregoing Brief of Amicus Curiae, National Paint and Coatings Association, Inc., was served on the following counsel of record by First Class, United States mail:

Charles S. Siegel
Loran Jacobson
WATERS & KRAUSE, L.L.P.
3219 McKinney Avenue, Suite 3000
Dallas, Texas 75204-7495

Counsel for Appellants

T. Lynn Walden
Martha R. Campbell
JENKINS & MARTIN, L.L.P.
P.O. Box 26008
2615 Calder, Suite 500
Beaumont, Texas 77720

Counsel for Appellees Bondex International, Inc., and RPM, Inc.

Craig A. Morgan
ATTORNEY AT LAW
718 Sunfish
Austin, Texas 78734-4410

Counsel for Appellee Kelly-Moore Paint Company, Inc.