No. 014-08-00886-CV

FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS

BENSON BAILESS and ALNET BAILESS,
Appellants

v.

KAISER GYPSUM COMPANY, INC., et al.
Appellees.

Appeal from the 11th Judicial District Court of Harris County,
Honorable Mark Davidson Presiding

BRIEF OF AMICUS CURIAE NATIONAL PAINT AND COATING ASSOCIATION

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INTEREST OF AMICUS

The National Paint and Coatings Association ("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.*, No. 07-0040, 2008 WL 5105257, *2 (Tex. Dec. 5, 2008) (asbestos litigation has resulted in the bankruptcies of many

[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 November 9, 2009).

companies, the loss of thousands of jobs, enormous litigation expenses, and crowded dockets). A majority of plaintiffs 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 answered "no" to the question "whether a person's exposure

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[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 November 9, 2009) (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,' nowithstanding 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)).

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* joined many other courts “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 specific causation tying the particular defendant’s product to the particular plaintiff’s illness.[5]

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[4] Landin at 605.

[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

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

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supplied the product which caused the injury." *Gaulding v. Celotex Corp.*, 772 F.W.2d 66, 69 (1989).

[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.'")

[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), *áff'd in part and vacated and remanded in part on other grounds*, 221 F.3d 293 (2d Cir. 2000).

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. Although Appellants attempted to quantify Benson Bailess's exposure to "asbestos" from Kelly-Moore's product, they failed to tie that exposure to sufficient scientific evidence that such exposure (calculated at 0.07 f/ml-years) can or does cause mesothelioma. Rather, Appellants relied upon antiquated rubrics such as their experts' opinions that "each exposure to asbestos … was a substantial contributing factor in the development of [Mr. Bailess's] mesothelioma." Appellants' Brief at 5 (quoting Dr. Hammar). In other words, they took the exact same approach as did plaintiffs in *Borg-Warner* and *Stephens*, *i.e.*, that once some exposure greater than background exposure has been shown, their burden of proving specific causation by sufficient evidence has been met. Just as did the plaintiffs in *Borg-Warner*, appellants here argue that the product at issue – "asbestos" – must be held to no true causation standard because it allegedly causes a disease in a "dose-response" fashion and because every dose contributes to the aggregate

dose, which is itself allegedly sufficient. Moreover, Appellants here seek to avoid *Borg-Warner* entirely because the adverse effect about which they claim is mesothelioma, not asbestosis, *i.e.*, because "asbestos" is allegedly a carcinogen, asserted by Appellants in their briefs to be a "mutagen," a "primary carcinogen," and a cancer "promoter." Appellants' Brief at 23-26; Appellants' Reply Brief at 5.

Appellants' reading of *Borg-Warner* eviscerates its holding that there must be sufficient evidence that exposure to the defendant's specific product was a substantial factor in causing the asbestos-related disease. As it was required to do, the trial court assessed the sufficiency of Appellants' evidence of substantial factor causation and found it wanting. *See Merrell-Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997) (directed verdict entered because of insufficient evidence, *inter alia*, of specific causation).

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

As noted above, Appellants premise much of their argument on the testimony of their expert witnesses that every contribution to asbestos exposure above background is

a substantial contributing factor to the development of mesothelioma. 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.

Nothing about the fact that this case involves cancer compels a different result here as compared to *Borg-Warner*. For example, the benzene cancer cases squarely reject the no-threshold model as a basis for "determining causation in an individual instance." *Sutera v. The Perrier Group of America, Inc.*, 986 F. Supp. 655, 666 (D. Mass. 1997); *see Wills v. Amerada Hess Corp.*, No. 98-CIV. 7126(RPP), 2002 WL 140542, *14 (S.D.N.Y. Jan. 31, 2002) (rejecting no-threshold model for "demonstrating the probability that the toxin caused this particular plaintiff's illness"); *Austin v. Kerr-McGee Ref. Corp.*, 25 S.W.3d 280 (Tex. App. – Texarkana 2000) ("Specific causation requires that a plaintiff show that the injured person is similar to those in the epidemiological studies, that he was exposed to the same substance, and that the exposure or dosage levels were comparable to or greater than those in the studies.")

(citing *Havner*, 953 S.W.2d at 720). The same is true in radiation cases, *see Cano v. Everest Minerals Corp.*, 362 F. Supp. 2d 814, 840-41 (W.D. Tex. 2005)("[a] specific causation expert cannot merely assert that every risk factor is a cause"); *Burleson v. Texas Dept. of Crim'l Justice*, 393 F.3d 577, 587 (5th Cir. 2004) (opinion based upon radiation dose to single cell rejected), and ethylene oxide cases, *see Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194, 198 (5th Cir. 1996) (alleged mutagenicity of ethylene oxide does not show that it caused cancer "in Allen's particular case"). [9]

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 cancer cases as to any non-cancer case,

[9] *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 the it "materializes in injury to the plaintiff").

and this Court should "[a]dhere to traditional elements of substantial factor causation."[10]

IV. Application of the Doubling of the Risk Standard of *Havner* Is Particularly Important to Assure that Liability Is Not Assessed for *De Minimis* Increases in Risk.

The parties have fully briefed the applicability of *Havner's* double-the-risk standard, and this Court should make no mistake concerning the great importance of that issue to amicus and to all potential defendants in asbestos cases. As the asbestos litigation continues to drag on and third- and fourth-generation defendants continue to be pulled closer to the brink of bankruptcy – or in some cases over the edge – the Court should recognize that, under appropriate application of *Havner*, no defendant should be liable unless exposure to its product at least doubled the risk that the exposed individual be diagnosed with mesothelioma.

There is no real difference between the *Havner* situation and that of the present case involving multiple "asbestos" exposure. In neither situation can there be direct evidence of specific causation, *i.e.*, in neither

[10] Landin at 607.

situation can the exposed person be tested to demonstrate what exactly caused the defect or illness. The Texas Supreme Court in *Havner* recognized that there were multiple potential causes of the limb defect at issue there other than defendant Merrell's product, just as it recognized in *Borg-Warner* that there were multiple potential causes other than the alleged exposure to Borg-Warner's product. In both situations, the added risk of the negative outcome from the alleged exposure must have "sufficiently contributed" to be "considered a substantial factor in causing" the disease.

In this very situation, *Havner* articulates a doubling of the risk standard and frames that standard from the point of view of the epidemiologic studies upon which plaintiffs' experts may rely. *Havner* clearly teaches that mere elevation of risk as a result of exposure is not enough to constitute sufficient evidence of specific causation. Rather, the risk must be "sufficiently elevated." *Id.* at 715. The Texas Supreme Court has taken great pains in its seminal *Havner* opinion to explain what "sufficiently elevated" means. To find that a given exposure is a cause of a specific plaintiff's condition,

the plaintiff must show on the basis of valid and statistically-significant studies that her risk has been doubled by exposure to the particular defendant's product. And this Court of Appeals has applied *Havner* in identical situations to affirm the grant of a no-evidence summary judgment motion. *See Frias v. Atlantic Richfield Co.*, 104 S.W.3d 925 (Tex. App. – Houston [14 Dist.] 2003) (affirming grant of no-evidence summary judgment based upon failure to meet *Havner* doubling of the risk standard in benzene aplastic anemia case). It should do so again here, on the same basis.

CONCLUSION

In summary, without submitting admissible evidence of dose and demonstrating that Mr. Bailess's alleged dose of "asbestos" from Kelly-Moore's product was equal to or higher than the doses shown to cause mesothelioma, Appellants cannot 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.

Texas toxic tort cases demand proof of causation generally and, specifically, that the alleged causative agent for which the defendant is responsible has at least doubled the risk that the injured party be diagnosed with mesothelioma. Texas law emphatically rejects Appellants' argument that, because mesothelioma is allegedly a "no threshold" disease, *every* exposure must therefore constitute a significant contributing factor.

November 18, 2009

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

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