

According to Andrew Schirrmeister, plaintiffs' lawyers specializing in toxic tort litigation are scrambling. On June 8, 2007, in *Borg-Warner Corp. v. Flores*,¹ the Texas Supreme Court issued a significant opinion, which establishes a new "dose" requirement in asbestos litigation. Because the Flores plaintiff could not meet this requirement, the Court found the plaintiff failed to establish that his exposure to "some" respirable asbestos fibers from grinding brake pads was a substantial factor in causing his asbestosis. *Id.* at *1. The Supreme Court held that without any evidence of dose, the jury was unable to evaluate the quantity of respirable asbestos exposure and whether that quantity was a substantial factor in causing plaintiff's asbestosis. *Id.*

With *Borg-Warner*, the Texas Supreme Court has for the first time in effect established a "dose" requirement that plaintiffs must establish to prove that exposure to a defendant's specific asbestos product was in fact sufficient to cause their disease. Thus a plaintiff must now show both (1) that their disease is one caused by exposure to the specific product and (2) that the specific exposure was of a sufficient quantity to have been a substantial factor in causing the disease.

Although *Borg-Warner* is a product case, it is likely that its "substantial causation" test will be applied by the courts in premises cases also. Further, it is probable that its "dose-substantial causation" requirement and analysis will be equally applicable in benzene and other toxic exposure cases.

Although *Borg-Warner* is currently pending rehearing before the Texas Supreme Court, we have taken advantage of this ruling in our practice by serving interrogatories to Plaintiffs based on the Supreme Court's *Borg-Warner* holding.²

A summary and analysis of *Borg-Warner* is attached.

¹ See *Borg-Warner Corp. v. Flores* 2007 WL 1650574, 50 Tex. Sup. Ct. J. 851 (Tex. June 8, 2007) (NO. 05-0189); petition for rehearing filed (Jun 22, 2007).

² An example of *Borg-Warner* style interrogatories already being served on plaintiffs by defendants in asbestos related cases is below:

For each Defendant listed in Plaintiffs' Petition, please provide:

- a.. The approximate dose of each product manufactured or sold by each Defendant to which Plaintiff was exposed that is alleged to have caused harm to Plaintiff;
- b. The methodology used to calculate the dose; and
- c. Evidence that the dose was a substantial factor in causing the harm to Plaintiff.

(See *Borg-Warner Corp. v. Flores*, _____ S.W.3d _____ #05-0189 (Tex. June 8, 2007)).

SUMMARY AND ANALYSIS

BORG-WARNER CORP. V. FLORES

On June 8, 2007, the Texas Supreme Court issued a significant opinion in *Borg-Warner Corp. v. Flores*,³ reversing the Corpus Christi Court of Appeals, and holding that the plaintiff failed to establish that his exposure to “some” respirable asbestos fibers from grinding brake pads was a substantial factor in causing his asbestosis. *Id.* at *1. The Supreme Court held that without any evidence of dose, the jury was unable to evaluate the quantity of respirable asbestos exposure and whether that quantity was a substantial factor in causing plaintiff’s asbestosis. *Id.*

Case Posture and Background

Arturo Flores sued Borg-Warner and three other brake pad manufacturers for damages arising from his use of their brake pads while employed at Sears from 1966 to 2001. *Id.* The other manufacturers settled with Flores before trial. *Id.* at *3. The case was tried before a jury, which found Borg-Warner liable for negligence and strict liability, and that Borg-Warner acted with malice. *Id.* The jury awarded \$104,000 in compensatory damages and \$55,000 in punitive damages. *Id.*

Borg-Warner appealed, arguing that the evidence was legally insufficient to prove negligence. *Borg-Warner Corp. v. Flores*, 153 S.W.3d 209, 213 (Tex.App.—Corpus Christi 2005), *rev’d* 2007 WL 1650574, 50 Tex. Sup. Ct. J. 851 (Tex. June 8, 2007) (NO. 05-0189); petition for rehearing filed (Jun 22, 2007). Borg-Warner argued that there was no evidence that asbestos fibers were released from its brake pads and thus no evidence its brake pads caused Flores’ injury. *Id.* The Court of Appeals affirmed, holding that there was legally sufficient evidence of negligence, and stating that “[i]n the context of asbestos-related claims, if there is sufficient evidence that the defendant supplied *any* of the asbestos to which the plaintiff was exposed, then the plaintiff has met the burden of proof.” *Id.* (internal citation omitted). Borg-Warner petitioned for review to the Supreme Court, arguing that a plaintiff claiming to be injured by an asbestos-containing product must meet the same causation standards that other Texas plaintiffs do. 2007 WL 1650574 at *4.

Flores alleged that he suffered from asbestosis caused by working with brake pad for more than three decades. *Id.* at *1. He alleged that he used Borg-Warner pads from 1972 – 1975 on five to seven out of approximately 20 brake jobs performed each week. *Id.* Seven to twenty-eight percent of each Borg-Warner pad’s weight was composed of chrysotile asbestos fibers. *Id.* Installation of the brake pads involved grinding the pads, which generated clouds of dust which Flores inhaled while working in an 8’ by 10’ room.⁴ *Id.* Flores also admitted to smoking from

³ See *Borg-Warner Corp. v. Flores* 2007 WL 1650574, 50 Tex. Sup. Ct. J. 851 (Tex. June 8, 2007) (NO. 05-0189); petition for rehearing filed (Jun 22, 2007).

⁴ Additionally, Flores was exposed to dust while blowing out the accumulated dust in the brake housing, although any such dust would not have come from the new brake pad Flores was installing. *Id.* at *6 and FN 12.

the age of twenty-five to three weeks before the trial, which his cardiologist reported as a 50-pack year smoking history. *Id.* at *3.

Plaintiff relied on two experts. The first was Dr. Dinah Bukowski, a board-certified pulmonologist, who examined Flores on a single occasion and reviewed his x-rays which revealed interstitial lung disease. *Id.* at *1. She diagnosed asbestosis based on Flores' work as a brake mechanic and an adequate latency period. *Id.* However, Dr. Bukowski acknowledged that everyone is exposed to asbestos in the ambient air, which is "'very plentiful in the environment, if you're a typical urban dweller.'" *Id.* And the second expert relied on by Plaintiff was Dr. Barry Castleman, Ph.D., an "'independent consultant in ... the field of toxic substance control,'" who testified that he had written numerous articles in peer-reviewed journals and a book entitled, *Asbestos: Medical and Legal Aspects*, which included a chapter entitled "Asbestos Disease in Brake Repair Workers." *Id.* at *1 and *2. Although he did not conduct independent research regarding the brake industry or regarding Borg-Warner or its brake pads and only looked at literature that "was publicly available" from the late 1960s and 1970s, Dr. Castleman testified that brake mechanics can be exposed to asbestos by grinding of brake pads or by blowing out the accumulated dust in the brake housing while doing a brake service or repair job. *Id.* at *2.

Causation

The Texas Supreme Court took the opportunity presented by *Flores* to review the *Lohrmann* "frequency, regularity, and proximity" test, which it noted is perhaps the most widely cited standard nationwide for proving causation in asbestos cases. *Id.* at *4 (citing *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986)). *Lohrmann* held that "'[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period or time in proximity to where the plaintiff actually worked.'" *Id.* at *4 (citing *Lohrmann* at 1162-63). The *Lohrmann* court concluded that "[i]n effect, this is a *de minimis* rule since a plaintiff must prove more than a casual or minimum contact with the product." *Id.* However, the Texas Supreme Court did not adopt *Lohrmann*, although it agreed that its "frequency, regularity and proximity" test is appropriate. *Id.* Rather the Texas Supreme Court concluded that the *Lohrmann* test does not capture the emphasis found in Texas jurisprudence on causation as an essential predicate to liability. *Id.* However, the *Lohrmann* court agreed that Restatement Section 431 requires that the exposure be a "substantial factor" in causing the disease, which has long informed Texas' causation analysis. *Id.* (citing *Lohrmann* at 1162).

The Texas Supreme Court noted that, as set forth by Bernard D. Goldstein & Mary Sue Henifin, *Reference Guide on Toxicology*, in Federal Judicial Center, Reference Manual On Scientific Evidence 401, 403 (2d ed. 2000), "the dose makes the poison." *Id.* The Court defined "[d]ose" as the "'amount of chemical that enters the body,'" and as "'the single most important factor to consider in evaluating whether an alleged exposure caused a specific adverse effect.'" *Id.* at *5 (citing Eaton, *Scientific Judgment and Toxic Torts*, 12 J.L. & POL'Y at 11). Further, the Court noted that "epidemiological studies are without evidentiary significance if the injured person cannot show that 'the exposure or dose levels were comparable to or greater than those in

the studies.” *Id.* (citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 720-21 (Tex. 1997)).

The Supreme Court found that, despite Dr. Bukowski’s testimony that “every asbestos exposure contributes to asbestosis” and Dr. Castleman’s testimony that “despite the heat generated by braking, ‘some asbestos,’ in the form of respirable fibers, remained in the brake pads, and that brake mechanics could be exposed to those fibers when grinding the pads or blowing out the housings,” without more, this was insufficient to establish that the Borg-Warner brake pads were a “substantial factor” in causing Flores’ disease. *Id.* The Court held that “absent any evidence of dose, the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts were sufficient to cause asbestosis.” *Id.* at *6. Further, the Court found that Flores failed to introduce evidence regarding what percentage of that indeterminate amount may have originated in Borg-Warner products, the content of other brands of brake pads, or how much of his exposure came from grinding new pads as opposed to blowing out dust from old pads in the brake housing. *Id.* Therefore, the Court found that there was no evidence of the approximate quantum of Borg-Warner fibers to which Flores was exposed and whether that amount sufficiently contributed to the aggregate dose of asbestos that Flores inhaled, such that it could be considered a substantial factor in causing Flores’ asbestosis. *Id.* (citing *Union Pump v. Albritton*, 898 S.W.2d 773, 775 (Tex. 1995); also citing *Rutherford v. Owens-Illinois Inc.*, 16 Cal.4th 953, 67 Cal.Rptr.2d 16, 941 P.2d 1203, 1219 (Cal. 1997)). Although the Court conceded that the fact that Flores worked in a small room, grinding brake pads composed partially of embedded asbestos fibers, five to seven times per week over a four year period seemingly satisfying Lohrmann’s “frequency-regularity-proximity” test, without knowing that asbestos fibers were released in an amount sufficient to cause Flores’ asbestosis, the de minimis standard of *Lohrmann* or the causation standard of *Union Pump* could not be met. Thus, proof of mere frequency, regularity and proximity is not sufficient because it does not provide the quantitative information necessary to support causation under Texas law. *Id.*

The Texas Supreme Court then moved beyond *Lohrmann*, holding that, in order to meet this “substantial-factor causation” test, a plaintiff must produce specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease. *Id.* at *7. Because asbestos is “plentiful” in the ambient air and everyone is exposed to it, as acknowledged by Plaintiff’s expert, Dr. Bukowski, some exposure “threshold” must be demonstrated before a claimant can prove his asbestosis was caused by a particular product.” *Id.* “Because most chemically induced adverse health effects clearly demonstrate ‘thresholds,’ there must be reasonable evidence that the exposure was of sufficient magnitude to exceed the threshold before a likelihood of ‘causation’ can be inferred.” *Id.* (quoting *Eaton*, 12 J.L. & Pol’y at 39). Thus the plaintiff “must prove that the defendant’s product was a substantial factor in causing the alleged harm.” *Id.* (citing *Union Pump*, 898 S.W.2d at 775).

The Court further noted that proof of causation may differ depending on the product at issue (embedded asbestos versus friable asbestos which can become airborne), which in turn bears on the extent and intensity of the exposure to the asbestos, two factors central to causation. *Id.* at

*8 (citing *In re Ethyl Corp.*, 975 S.W.2d 660, 617 (Tex. 1998)). In *Flores*, although Dr. Castleman testified that brake mechanics could be exposed to “some” respirable fibers when grinding pads or blowing out housing, the Court found that, without more, Flores failed to establish the content of the dust to which he was exposed, including the approximate quantum of fibers to which he was exposed. *Id.*

Therefore, the Supreme Court held that, as set out by Lohrmann’s *de minimis* rule and as required by Texas substantial causation test, the evidence of causation in *Flores* was legally insufficient. *Id.* Because Plaintiffs failed to present evidence of the “dose” of asbestos fibers to which Mr. Flores was exposed, plaintiffs could not meet their burden of showing that the defendant’s product was a substantial factor in causation.