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WHAT'S INSIDE

CAUSATION

Georgia-Pacific wins reversal of $11 million verdict in Texas

A Texas appeals court has reversed a multimillion-dollar verdict against Georgia-Pacific Corp., finding insufficient evidence that a man's exposure to the company's asbestos-containing joint compound caused his mesothelioma.

Georgia-Pacific Corp. v. Bostic et al., No. 05-08001390, 2010 WL 3369605 (Tex. App. Aug. 26, 2010).

The plaintiffs wrongly relied on the theory that "each and every exposure" to asbestos is a substantial contributing factor to developing mesothelioma, the Court of Appeals said.

The panel said that theory is legally insufficient to support a finding of causation.

SEE GEORGIA-PACIFIC, PAGE 4

PREEMPTION

John Crane asks Supreme Court to find railroad action preempted

A wrongful-death suit brought by the family of a railroad worker exposed to asbestos should have been preempted by federal law, John Crane Inc. tells the U.S. Supreme Court in a petition for *certiorari*.

John Crane Inc. v. Atwell, No. 10-272, petition filed (U.S. Aug. 23, 2010).

The company is seeking to overturn a $150,000 verdict a Pennsylvania jury returned against it, but John Crane says several thousand pending cases would be affected by resolution of the preemption question.

The family of Thomas Atwell sued several companies in the Philadelphia County Court of Common Pleas, alleging he was exposed to asbestos over the course of his 40 years working as a pipefitter for Norfolk Southern Railway.

Atwell died of cancer in 2006.

SEE JOHN CRANE, PAGE 4

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REUTERS/Bob Strong

The evidence was sufficient for the jury to find the decedent was exposed to the defendant's wire and cable on a regular basis and that the exposure substantially contributed to his mesothelioma, the Superior Court said.

CAUSATION

Frequency of exposure supports verdict against Ericsson

A Pennsylvania woman has shown that the regularity and frequency of her husband's occupational exposure to asbestos was sufficient to support a $1.1 million verdict against Ericsson Inc., a state appeals court has ruled.

Moore v. Ericsson Inc. et al., Nos. 2213 EDA 2009 and 2112 EDA 2009, 2010 WL 3609381 (Pa. Super. Ct. Sept. 17, 2010).

A three-judge panel of the Superior Court shot down the defendant's argument that the trial court made errors in its ruling.

Donnie and Judith Moore's suit in the Philadelphia County Court of Common Pleas alleged Donnie was exposed to asbestos while working for about 40 years as a laborer and electrician for Kingsport Press, a Tennessee printing company.

Donnie worked with asbestos-containing wire and cable made by two Ericsson-owned companies, the complaint said. He said in videotaped testimony that he cut and stripped the companies' cables, which created asbestos-containing dust.

Moore developed mesothelioma and died before trial.

The couple had sued 35 companies, and all but Ericsson settled before a verdict was reached.

A jury found against Ericsson and awarded $1 million in damages, and the court entered a $1.1 million verdict after including delay damages.

The Pennsylvania Supreme Court introduced delay damages in 1979 to encourage defendants to engage in meaningful settlement negotiations. It sets up a way to calculate interest on damages from the time of injury until actual payment.

Ericsson appealed.

The company argued that the trial judge should have granted it a directed verdict and should not have instructed the jury that the wire and cable were defective.

However, the Superior Court said a directed verdict was not warranted. The panel explained that Pennsylvania applies a "frequency, regularity and proximity" test to establish causation in asbestos cases.

The criteria come from Gregg v. V-J Auto Parts Co., 943 A.2d 216 (Pa. 2007), in which the Pennsylvania Supreme Court said the test does not establish an absolute threshold needed to support liability.

Instead, the high court said, the criteria distinguish a case in which there is a significant likelihood that a defendant's product caused injury from situations where there was only casual or minimum exposure.

In Donnie Moore's case, the Superior Court said, his work history and expert witness testimony was sufficient for the jury to find he was exposed to Ericsson's wire and cable on a regular basis and that this exposure substantially contributed to his mesothelioma.

The presence of asbestos in the wire and cable renders the products unsafe for their intended use because of the danger of inhaling asbestos fibers, the panel also said.

Finally, the trial judge rightly included an instruction that the products were defective, the panel said in affirming the trial court's judgment.

Related Court Document:
Opinion: 2010 WL 3609381

See Document Section C (P. 41) for the opinion.

Georgia-Pacific

CONTINUED FROM PAGE 1

The family of Timothy Bostic sued several companies in the Dallas County Court of Law.

The plaintiffs alleged Bostic was exposed to Georgia-Pacific's asbestos-containing products as a child while observing his father work on drywall projects and over the course of several years as an adult performing construction projects involving drywall.

They said he died from mesothelioma.

The case went to trial against Georgia-Pacific only, the other defendants having settled or been dismissed.

Bostic's father testified that he worked on one drywall project that included use of Georgia-Pacific's product during which Bostic may have been present.

The plaintiffs also introduced Bostic's work history sheets that related the use of Georgia-Pacific's joint compound but did not offer information on the time and intensity of exposure.

> The appeals court agreed with Georgia-Pacific that the plaintiffs relied on the "each and every exposure" theory of causation.

The work history sheets reported exposure to Georgia-Pacific asbestos fibers in the 1970s through Bostic's work as a self-employed carpenter.

Following a jury's determination that Georgia-Pacific was 75 percent liable for Bostic's injuries, the judge entered judgment awarding the family $6.7 million in compensatory damages and $4.8 million in punitive damages.

Georgia-Pacific appealed, arguing there was legally insufficient evidence that exposure to its joint compound caused Bostic's mesothelioma.

The Court of Appeals noted that the state Supreme Court has held that to prove causation in asbestos cases, "asbestos in the defendant's product [must be] a substantial factor in bringing about the plaintiff's injuries." *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007).

The panel agreed with Georgia-Pacific that the plaintiffs relied on the "each and every exposure" theory of causation.

The court said there is insufficient evidence that exposure to Georgia-Pacific's joint compound was a substantial factor in causing Bostic's mesothelioma.

The appeals court reversed the trial court's judgment and ordered that the plaintiffs take nothing on their claims against the defendant. WJ

Attorneys:
Plaintiffs: Denyse Ronan Clancy, Baron & Budd, Dallas

Defendant: Deborah G. Hankinson, Hankinson Levinger LLP, Dallas

Related Court Document:
Opinion: 2010 WL 3369605

See Document Section A (P. 17) for the opinion.

John Crane

CONTINUED FROM PAGE 1

At the time of trial, only John Crane remained as a defendant, the other parties having settled or been dismissed. The jury found John Crane liable for exposing Atwell to asbestos-containing products used in the manufacturing of locomotives.

Following the verdict, the defendant moved for nonsuit, arguing the plaintiffs' state-law-based claims were preempted by the Boiler Inspection Act, 49 U.S.C. § 20701.

The trial judge denied the motion, and the Pennsylvania Superior Court upheld the judgment on appeal (see *Asbestos LR*, Vol. 32, Iss. 6).

The appeals court found that recent amendments to the Federal Railroad Safety Act, 45 U.S.C. § 421, and the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(4), specifically reserve to the states the power to regulate health and safety matters.

The Pennsylvania Supreme Court declined to hear John Crane's appeal, and the company filed a petition for a writ of *certiorari* with the U.S. Supreme Court Aug. 23.

The company contends the Superior Court's ruling conflicts with the high court's decision in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926).

In *Napier*, the U.S. Supreme Court said Congress intended, in enacting the BIA, "to preempt the entire field of locomotive equipment and safety, including the design, construction and material of locomotives and their parts."

The defendant also contends the Superior Court's decision is contrary to an "avalanche" of state and federal law supporting preemption.

> The defendant argues the Superior Court's decision is contrary to an "avalanche" of state and federal law supporting preemption.

In support the company cites a West Virginia Supreme Court ruling, *In re West Virginia Asbestos Litigation*, 592 S.E.2d 818, 822 (W. Va. 2003).

Finally, John Crane tells the high court that the trial court's decision creates uncertainty in the law covering asbestos suits against locomotive equipment manufacturers.

The company points to a statement from the judge overseeing the federal asbestos multidistrict litigation cases who said there are "several thousand cases probably, whose fate will depend upon" what the Supreme Court decides on this issue. WJ

Attorney:
Petitioner: Michael A. Pollard, Baker & McKenzie, Chicago

Related Court Document:
Petition for *certiorari*: 2010 WL 3355815

See Document Section B (P. 30) for the petition.

La. woman sues over refinery release

A New Orleans woman is suing Chalmette Refining over a Sept. 6 incident in which spent catalyst allegedly was released after a power failure at the facility.

Raymond v. Chalmette Refining LLC et al., No. 10-9397, complaint filed (La. Dist. Ct., New Orleans Parish Sept. 8, 2010).

Audrey Raymond's suit, filed in the New Orleans Parish District Court, says Chalmette is responsible for the release of one ton of catalyst (a byproduct of the refining process) into the air, which caused a foul smell that resulted in personal injury and property damage.

The complaint also names the Louisiana Department of Environmental Quality as a defendant for failing to properly inspect, regulate and/or monitor the refinery regarding the maintenance and storage of hazardous, toxic and carcinogenic materials prior to Sept. 6.

According to the lawsuit, Raymond was walking in her neighborhood at 8 a.m. Sept. 6, when she noticed a fine white dust covering her home, yard and car. She also says she experienced a burning sensation in her nose and eyes and a sore throat.

The complaint says kaolin, a component of the catalyst, can be an irritant to the eyes and skin if inhaled or digested, according to material safety data sheets.

The catalyst contains titanium oxide, which the National Institute for Occupational Safety and Health identifies as "having a nuisance particulate-accumulation in the lungs," the suit says.

In addition, the suit says, St. Bernard Parish's fire chief advised residents to wash off the substance and to avoid any contact with the eyes and mouth.

Because of Chalmette's negligence, Raymond alleges she suffered and will continue to suffer burning eyes and skin, sore throat, headaches, emotional distress, anxiety and worry.

She also says she suffered property damage to her home from the infiltration of kaolin and titanium oxide into her ventilation system.

The complaint alleges negligence, gross negligence, wantonness, trespass, nuisance and strict liability against Chalmette.

Raymond is seeking unspecified compensatory and punitive damages. WJ

Attorneys:
Plaintiff: Gregory DiLeo and Jennifer Eagan, New Orleans; Jeffrey Berniard, New Orleans

Related Court Document:
Complaint: 2010 WL 3536732

New Medicare reporting requirements loom over defendants, insurers

New reporting requirements that burden mass-tort defendants and their insurers will apply to lawsuits that settle or reach judgment after Oct. 1 and involve plaintiffs who received Medicare assistance.

Two employees of a consulting firm that assists clients with reporting on payments say their clients are concerned by what they call "vague" directions from the Center for Medicare and Medicaid Services on how to conform to the new law.

Brad Drew and **Jim Tanella** of **Navigant Consulting** said the reporting requirements of the Medicare Secondary Payer Mandatory Reporting Act are set to begin Jan. 1, 2011.

Noting a provision that requires the reporting of settlements exceeding $5,000, Drew said insurers have been looking for clarification as to whether individual payments totaling less than that amount but that are part of an aggregate sum exceeding the threshold must be reported.

Parties also are concerned because of a rule that says no reporting is required in cases when the claimant was not exposed to asbestos after Dec. 5, 1980. The date is significant because before then, there was

no secondary payer rule under the Medicare program.

However, the date of exposure remains a complex question in asbestos litigation and, in some cases, there is no particular determination as to when the last exposure occurred.

Congress enacted the requirements as part of the Medicare Secondary Payer Mandatory Reporting Provision in Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007.

> The date of exposure remains a complex question in asbestos litigation and, in some cases, there is no particular determination as to when the last exposure occurred, a consulting firm reports.

Tanella said Congress found that officials had not been efficient in enforcing the law requiring reimbursement of Medicare payments, which put the responsibility on claimants to report settlement payments.

The new law calls for fines of $1,000 per day against insurers and defendants for each payment not reported.

PACE Claims Services, a division of Navigant, is in a position to help parties navigate the reporting requirements, Tanella said.

The company's proprietary database includes detailed claim information on more than 950,000 asbestos bodily injury claimants going back to the first filings in the 1970s.

PACE has helped many defendants and insurers in asbestos-related litigation to manage information on claims in an efficient way, he added.

The company's expertise in the formats and data requirements expected by CMS will enable PACE to help insurers and defendants comply with the new law, Tanella said.

For more information on the assistance PACE offers on complying with reporting requirements, visit www.paceclaims.com. WJ

VENUE

Suit against insurer does not belong in Orleans Parish, Louisiana high court says

Louisiana civil procedure law does not provide venue for a direct action in Orleans Parish when the alleged injury did not occur there and the defendants do not reside there, the state Supreme Court has ruled.

Trascher et al. v. Northrop Grumman Ship Systems Inc. et al., No. 2010-CC-1287, 2010 WL 3609367 (La. Sept. 17, 2010).

In so ruling, the high court reversed the Orleans Parish District Court's decision in a wrongful-death action.

The family of an Avondale Shipyard worker who died allegedly from an asbestos-related disease sued several companies and individuals in Orleans Parish. The plaintiffs said the exposure took place on the job in Jefferson Parish.

Defendant Commercial Union Insurance Co. filed an exception for improper venue. It said Orleans Parish was not the proper forum because the alleged injury did not occur there.

Commercial Union also contended the venue was improper because none of Avondale Industries' seven executive officers that were named as defendants and that the insurer represented resided in Orleans Parish.

The insurance company cited La. Rev. Stat. § 22:1269 in support of its motion. The statute says venue is proper in the parish where an injury occurred or where an action could be brought under the general rules of venue outlined in La. Civ. Code Ann. art. 42.

The defendant said proper venue would be in Jefferson Parish, the site of the exposure, or East Baton Rouge Parish, where Article 42 allows suits against insurers from diverse parishes.

The plaintiffs countered that because some of the defendants were from Orleans Parish, that venue was proper as to all defendants.

The District Court agreed and denied Commercial Union's motion. The state's Court of Appeal declined to hear the insurer's appeal, and the case went to the state Supreme Court.

The high court said Article 42 did not allow for any exceptions in this case.

Because Avondale's executive officers do not reside in Orleans Parish, and the plaintiff does not allege sufficient facts to reach a conclusion that any of the alleged exposure occurred outside Jefferson Parish, Orleans Parish is not the proper venue for an action against Commercial Union, the high court found.

While it reversed the trial court's ruling, the Supreme Court remanded the case to that court with instructions that the plaintiffs can amend their complaint to allege additional facts concerning the asbestos exposure.

The court noted such a change may affect the decision as to the proper venue. WJ

Related Court Document:
Opinion: 2010 WL 3609367

> Because some of the defendants were from Orleans Parish, that venue was proper as to all defendants, the plaintiffs said.

10th Circuit affirms dismissal of claims stemming from uranium facility

In a case of first impression applying New Mexico law, the 10th U.S. Circuit Court of Appeals has held that neighbors of a former uranium facility failed to show that their injuries would not have occurred but-for the defendant's actions.

Wilcox et al. v. Homestake Mining Co. et al., No. 08-2282, 2010 WL 3489771 (10th Cir. Sept. 8, 2010).

The 10th Circuit affirmed summary judgment for Barrick Mining Co. and Homestake Mining Co., the operators of the uranium mine. The appeals court found that the but-for test is applicable in toxic tort cases that involve multiple contributing causes.

The but-for test is satisfied if an expert testifies that an injury would not have occurred without an act or omission by the defendant.

The appeals panel declined to apply the more lenient substantial factor test proposed by the plaintiffs.

Residents who live in subdivisions near the former uranium milling facility in Cibola County, N.M., alleged that they suffered a variety of physical, emotional and financial injuries as a result of their exposure to radioactive and non-radioactive hazardous substances leaching into the groundwater from two of the mill's waste pipes.

The complaint, filed in the U.S. District Court for the District of New Mexico, asserted claims under the federal Price-Anderson Act, Pub. L. No. 85-256, which governs nuclear accidents, and a variety of state laws.

The plaintiffs argued that Homestake and Barrick never warned residents of the possible contamination and health risks from the hazardous substances leaching from the mill.

After the defendants moved for a case management order allowing the plaintiffs 120 days to produce expert affidavits to show causation, the court dismissed 25 of the original 28 plaintiffs' claims.

Although the three remaining plaintiffs submitted expert affidavits, the defense argued that the testimony did not state that "but for or without" the defendants' conduct, the plaintiffs would not have suffered the claimed adverse health problems.

One of the experts, Dr. Inder Chopra, testified that exposure to radiation from the mill was a contributing factor to plaintiff Darlene Cowart Serna's cancer, the companies noted. Showing such a contributing or substantial factor did not establish specific causation under New Mexico law, they argued.

There were many other possible causes of the plaintiffs' injuries, the defense said, including their lifestyles, family histories and other radiation exposure.

The companies cited *June v. Union Carbide Corp.*, 2007 WL 4224228 (D. Colo. 2007), a toxic-tort case involving similar facts as well as the same lawyers on both sides and the same plaintiffs' experts.

In that case the court found that the experts failed to establish causation under state law because it requires proof of but-for causation, not the substantial-factor test.

The District Court agreed with the defendants, rejecting the more lenient substantial-factor test as not applying in the state and finding that Chopra's affidavit failed to meet the but-for test.

The plaintiffs then appealed to the 10th Circuit, arguing that a lower standard for proving factual causation, the substantial-factor test, applies under New Mexico law.

In their brief, the companies say the plaintiffs fail to identify a single New Mexico case using a substantial-factor test for proving factual causation.

Additionally, the defendants say that since the plaintiffs failed to raise the substantial-factor argument in the lower court, the appeals court should not consider it.

The 10th Circuit ruled that the plaintiffs failed to present a sufficient showing of causation under New Mexico law to survive summary judgment

The appeals court said in New Mexico, a tort plaintiff must demonstrate the defendant's actions caused the injury. The 10th Circuit said that it found no basis in New Mexico law for creating an exception to but-for causation simply because the case involves toxic torts.

The appeals court rejected the plaintiffs' argument that the requirement to show but-for causation will cut off virtually all relief for toxic tort plaintiffs because a scientific expert will never be able to state that a plaintiff's injury would not have occurred were it not for exposure to the defendant's product.

"A toxic-tort plaintiff must demonstrate only to a reasonable degree of medical probability — not as a certainty — that exposure to a substance was a but-for cause of the injury or would have been a but-for cause in the absence of another sufficient cause," the 10th Circuit concluded. WJ

Attorneys:
Appellants: Larissa McCalla, Spence Law Firm, Jackson, Wyo.

Appellees: Daniel Dunn, Holme Roberts & Owen, Denver

REUTERS/Faleh Kheiber

U.S. soldiers guard central Baghdad in July 2003. The plaintiffs, Oregon National Guardsmen, claimed they were exposed to hexavalent chromium while guarding an Iraqi water treatment plant in mid-2003.

TOXIC TORTS (JURISDICTION)

Judge rejects second bid to toss guardsmen's carcinogen-exposure suit

A federal judge has denied a second motion to dismiss a lawsuit filed by Oregon National Guardsmen claiming they were exposed to a carcinogen while guarding a government contractor's worksite in Iraq.

Bixby et al. v. KBR Inc. et al., No. 3:09-cv-00632, 2010 WL 3418340 (D. Or. Aug. 30, 2010).

U.S. District Judge Paul Papak of the District of Oregon disagreed that the court lacked "subject matter jurisdiction" over the suit. He denied a previous motion in April to toss the suit for an alleged lack of "personal jurisdiction."

Nineteen members of the National Guard sued contractor KBR Inc., alleging they were injured by exposure to hexavalent chromium for several months in 2003 while guarding an Iraqi water treatment plant being restored by the company.

The men say KBR knew about the widespread contamination of the Qarmat Ali water plant in April 2003, immediately after the United States invaded Iraq, but failed to provide protective gear or to take any action to protect workers and soldiers assigned to the plant until that September.

The plaintiffs say they continue to suffer symptoms from their exposure to the chemical, ranging from nosebleeds to stomach and breathing problems, and will have to be closely monitored for the rest of their lives to detect any cancers known to be caused by hexavalent chromium, the most common of which is lung cancer.

The suit alleges negligence and fraud against KBR and its offshore affiliates, Overseas Administration Services Ltd. and Service Employees International Inc., incorporated in the Cayman Islands.

In his April ruling Judge Papak said the court had personal jurisdiction because the alleged wrongdoing was directed at National Guard soldiers from Oregon.

The defendants then filed a motion to dismiss for lack of subject matter jurisdiction based on the government contractor defense and the combat-activities exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(j).

GOVERNMENT CONTRACTOR DEFENSE

The defense shields contractors from liability arising from work performed for the government.

The defendants argued they provided services at Qarmat Ali as specified in their government contract.

But the plaintiffs countered the contractors deviated from the contract by failing to report the hexavalent chromium contamination.

Finding the defendants did not evaluate and report all environmental hazards to the Army Corps of Engineers as listed in the contract, Judge Papak ruled the contractors could not rely on the government contractor defense.

COMBAT-OPERATIONS EXCEPTION

The FTCA exception preserves the United States' sovereign immunity in connection with claims from military combatant activities during war.

Although the exception does not extend to private companies, the defendants argued that because they were working with the military on a common mission at Qarmat Ali during wartime, they are entitled to the same sovereign immunity.

Disagreeing, Judge Papak said the contractors' work at the water treatment plant was supporting the efforts to restore Iraqi oil-production capacity, which is a foreign-policy-related goal, not a combatant activity.

"The defendants' operations were more akin to restoring the battlefield to productive use after the battle has ended than to aiding warriors to 'swing the sword,'" the judge said, citing *Johnson v. United States*, 170 F. 2d 767 (9th Cir. 1948). WJ

Attorneys:
Plaintiffs: Amanda Halter, Doyle Raizner LLP, Houston

Defendants: Randall Jones, Serpe Jones Andrews Callender & Bell, Houston

Related Court Document:
Opinion: 2010 WL 3418340

R.J. Reynolds victorious in latest personal injury lawsuit

Unable to tie a smoker's addiction to the legal cause of his fatal lung cancer, a jury in Fort Lauderdale, Fla., has ruled in favor of R.J. Reynolds Tobacco Co.

Budnick v. R.J. Reynolds Tobacco Co., No. CACE07036734, verdict returned (Fla. Cir. Ct., 17th Jud. Cir., Broward County Aug. 26, 2010).

The verdict is the fourth to be rendered in favor of a tobacco company. To date, smokers and their families have won 23 cases.

The lawsuit stems from the one-time class action *Engle v. Liggett Group,* in which a Miami trial judge certified a nationwide class of people with smoking-related diseases and family members of deceased smokers, and a jury awarded damages of more than $145 billion.

Ultimately, the state high court ordered the class decertified. *Engle v. Liggett Group*, 945 So. 2d 1246 (Fla. 2006). However, it said class members could file individual suits and use jury findings that the defendants lied about the dangers and addictiveness of smoking.

R.J. Reynolds' attorney Kevin Boyce of Jones Day

This case involved Leonard Budnick, who died of lung cancer in 1996 at age 52. His son Jason then sued R.J. Reynolds in the Broward County 17th Judicial Circuit Court.

As reported by Courtroom View Network, the plaintiff's attorney, Steven J. Hammer, claimed Budnick smoked a pack of Camel cigarettes every day for 30 years.

He said Budnick was unsuccessful in his attempts to quit and continued smoking after being diagnosed with lung cancer and emphysema and placed on oxygen, according to CVN.

Hammer added that Budnick did not choose to die at such a young age, CVN reported.

"More likely than not he was addicted, and more likely than not that addiction led to his death from lung cancer," Hammer said.

R.J. Reynolds' attorney Kevin Boyce of Jones Day countered that Budnick enjoyed smoking and chose to smoke for 30 years, CVN said.

"Not everybody smokes because they are unable to stop, and Mr. Budnick is a prime example of this," Boyce said.

During closing arguments, Boyce told the jurors that to pin liability on R.J. Reynolds they had to determine Budnick was addicted to cigarettes and that his addiction was the legal cause of his death, CVN said.

Judge Jeffrey Streitfeld presided over the weeklong trial. WJ

Attorneys:
Plaintiff: Steven J. Hammer, Fort Lauderdale, Fla.

Defendant: Mark Seiden, Jones Day, New York; Kevin Boyce, Jones Day, Cleveland

Closing arguments

"Since any smoker can quit, and it's RJR's position that being able to quit means you're not addicted, well that means their position is that no smoker is ever addicted, if you follow that logic. But we know that's not the case."

-- Plaintiff's attorney Steven J. Hammer

"Did Mr. Budnick smoke because he wanted to, or did he smoke because he had to? It is our position that Mr. Budnick smoked because he wanted to."

-- R.J. Reynolds' attorney Kevin Boyce

The verdict is the fourth to be rendered in favor of a tobacco company in a post-*Engle* case.

The Deepwater Horizon oil spill and multidistrict litigation: What to expect, what remains unknown

By Brant C. Martin, Esq., and Jodie A. Slater, Esq.

The explosion of the Deepwater Horizon offshore drilling rig in the Gulf of Mexico April 20 killed 11 workers on the rig and caused crude oil to gush relentlessly into the Gulf. The spill continued through mid-July, threatening the way of life of tens of thousands of Americans.

To date, the explosion has spawned hundreds of lawsuits alleging personal injury and wrongful death, a commercial impact on businesses, environmental damage, and other claims. In addition, depending on whether the leak has been fixed adequately, more lawsuits can be expected in the future. In fact, the environmental and economic impact of the explosion and oil spill has resulted in a legal tidal wave that, without any coordination, will overwhelm the state and federal courts in Louisiana, Florida, Texas, Alabama, Mississippi and other affected states.

To mitigate the onslaught of litigation, the Judicial Panel on Multidistrict Litigation consolidated hundreds of federal court cases Aug. 10. Although this action does not consolidate state court cases, it would affect any state case properly removed to federal court.

The removal of a Deepwater Horizon state court case to federal court is likely when there is a question of diversity of citizenship, the amount in controversy falls within federal jurisdictional limits and certain federal laws that would provide a basis for federal question jurisdiction are alleged.

Based on a review of previous MDL proceedings, the consolidation decision is likely to affect the organization of the teams of both the plaintiffs and defense, as well as the pretrial procedures used to manage fact discovery, expert discovery and pretrial rulings.

ESTABLISHING THE DEEPWATER HORIZON MDL PROCEEDING

The basis for the court's ability to consolidate the Deepwater Horizon cases rests in the Multidistrict Litigation Act passed by Congress in 1968, codified at 28 U.S.C. § 1407. The act states that civil actions pending in different districts and involving one or more common questions of fact may be transferred to any district for coordinated or consolidated pretrial proceedings.[1]

Any transfer made under Section 1407(a) may only be authorized upon a determination that the transfer will "promote the just and efficient conduct" of the case and provide for "the convenience of parties and witnesses."[2] To this end, a judicial panel on MDL oversees the consolidation of related cases. The panel consists of seven circuit and district court judges, no two of whom are from the same circuit, who are designated by the chief justice of the U.S. Supreme Court.[3]

In response to four separate motions, the JPML met in Boise, Idaho, July 29 to consider the need to consolidate the lawsuits spawned by the Deepwater Horizon explosion. The panel transferred 77 actions to the Eastern District of Louisiana Aug. 10 in the action styled *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, No. 2:10-md-02179-CJB-SS. The transfer order noted the existence of more than 200 potential "tag-along" actions.

U.S. District Judge Carl J. Barbier, a New Orleans native appointed to the federal bench by President Clinton in 1998, was appointed to serve as the "transferee judge." Judge Barbier will preside over the consolidated actions for only the pretrial proceedings.

At the conclusion of the pretrial proceedings, the JPML will remand the transferred actions to the district from where the case was originally transferred, unless the action was terminated during the pretrial proceedings.[4] Under the terms outlined by the panel, the transferee judge (Judge Barbier) may only try cases that were originally filed in his district.[5]

Prior MDL proceedings may serve as a useful guide in predicting the handling of the hundreds of Deepwater Horizon MDL claims that have and will be filed against BP and others. However, the impact that the recently formed Gulf Coast compensation fund will have on the MDL may set a precedent for future MDL proceedings.

While the JPML's order does not consolidate state court cases, it would affect any state case that is properly removed to federal court.

CASE-MANAGEMENT STRUCTURE

Pretrial consolidation in an MDL requires a formal case-management structure be established early on in the litigation process. The Manual for Complex Litigation contemplates that case-management teams be formed early to promote efficiencies and to streamline communication by and between the parties and the court.

For example, in the Exxon Valdez oil-spill litigation, the presiding state and federal judges entered a combined case-management order structuring the plaintiffs' case-management team, which com-prised two co-lead counsel, a

The transferee judge, U.S. District Judge Carl Barbier, may only try cases originally filed in his district.

five-person executive committee, a treasurer, a discovery committee, a law committee and a plaintiffs' liaison counsel.[6]

Each arm of the case-management team has a specialized role to allow for coordination of logistical and substantive issues. In another example, U.S. District Judge Sam C. Pointer Jr. entered a designation of liaison counsel within two months after entering his initial case-management order in the product liability litigation concerning silicone gel breast implants.

Part of the reason for appointing a centralized liaison counsel was to simply ensure that all pleadings were distributed to all attorneys. It was the job of the national liaison counsel in the breast implant litigation to receive service of all pleadings, motions, briefs, orders and similar papers; to distribute them; and to perform other administrative functions as assigned from time to time.

The litigation stemming from the Gulf oil spill will require a similar case-management structure, and possibly even more sophisticated protocols, to manage the various grievances from plaintiffs from a number of states.

FACT DISCOVERY

Section 1407(a) of the MDL Act confers broad discretion on the transferee judge to design a pretrial program for all parties.[7] To manage the consolidated litigation efficiently, the transferee judge has the authority to place pretrial proceedings on separate discovery tracks based on common fact issues or discovery based on a single defendant.[8]

The transferee judge is further authorized to enter a discovery schedule that allows discovery unique to a particular party to proceed concurrently with common discovery.[9]

The BP spill has generated hundreds of lawsuits spanning numerous subject areas, such as the spectrum of commercial cases. Complaints have been filed, for instance, by fisheries, restaurants, hotels and other Gulf Coast businesses. In addition, there have been cases of personal injury, wrongful death, environmental damage and many other harms.

Although the MDL order does not specify the subject matter of the 77 cases that are subject to its jurisdiction or the subject matter of the some 200 "tag-along" cases, the order does specifically state that personal injury cases can be consolidated into the MDL.

Therefore, it is likely that all the cases, regardless of subject matter, will be consolidated into the MDL. However, it may be necessary to accommodate the differing discovery needs of personal injury and commercial plaintiffs by allowing separate discovery.

Judge Barbier is empowered to invoke procedures to make discovery that has already been completed in any action in the MDL applicable to other actions.[10] As a result, the "tag-along" actions, despite the timing of their transfer to the MDL, may be bound by common discovery already completed that is relevant to their claims.

To facilitate the discovery process, a case-management team will often designate a committee to focus on developing a joint discovery plan while coordinating the timing of document production and depositions. The management teams of both the plaintiffs and defendants are likely to set up a document repository for sharing common data among their allies and for managing the influx of data from opposing parties. At this stage, BP and the other defendants are probably focusing on data preservation and gathering, whereas the plaintiffs' team will approach the issue of document collection and storage.

Given the volume of discovery requests, responses, document production and deposition testimony, numerous discovery disputes are inevitable. To assist with resolving these disputes, Judge Barbier is likely to appoint a discovery master, as the transferee judge did in the Exxon Valdez litigation, to assist the court with adjudicating discovery disputes.

EXPERT DISCOVERY

To illustrate the expert discovery process in an MDL setting, *In re Phenylpropanolamine (PPA) Products Liability Litigation* serves as an instructive example. In the PPA MDL, the court worked with the parties for more than a year to refine the expert discovery process and ultimately chose to divide discovery into two phases: generic causation discovery to take place in the MDL, and case-specific expert discovery to occur after remand to the transferor court.[11]

The court then modified its scheduling order to provide for a two-week "opt-in" period after the plaintiffs' initial disclosures regarding general causation experts.[12] The opt-in period gave plaintiffs in individual cases the opportunity to review the Rule 26 disclosures of the plaintiffs' case-management team and to decide whether to use the collectively disclosed experts in their individual cases.[13] Under certain conditions, even those plaintiffs who adopted the designations of the case-management team were able to designate different experts to testify at trial, should they so choose.[14]

The court in the Deepwater Horizon MDL, like the court in the PPA MDL, should entertain expert discovery proposals and devise a discovery process to preserve the delicate balance between efficiently managing complex litigation and preserving individualized justice. After completion of pretrial discovery, resolution of scientific issues will be reserved for the transferor judge in individual proceedings, as set forth in *Lexecon Inc. v. Milberg Weiss Bershad Hayes & Lerach*, 523 U.S. 26 (1998).

CONSISTENCY OF PRETRIAL RULINGS

By way of example, the *In re Silica Products Liability Litigation* offers insight into the variety of legal issues that the Deepwater Horizon MDL court will address on a global level in order to ensure pretrial ruling consistency. The MDL allows for the transferee judge to issue global rulings on pretrial issues as varied as jurisdiction and experts, sometimes over the objections of parties wishing to have the issues examined separately.

For example, in the *Silica Products* MDL, a number of remand motions were pending when the cases were initially transferred

to the Southern District of Texas, and more remand motions were filed *after* transfer to the MDL. Recognizing that the authority for consolidating cases does not expand the jurisdiction of either the transferor or transferee courts, the court addressed the basic tenets of jurisdictional issues, each in turn, considering the amount in controversy, complete diversity and improper joinder of each case.

The court addressed the defendants' burden globally. The court refused to consider separately the claims of each individual plaintiff against each individual defendant for purposes of determining jurisdiction, as urged by the defendants. Instead, the court reviewed the Mississippi Rules of Civil Procedure for compliance by all the plaintiffs collectively and concluded it lacked subject matter jurisdiction over a majority of the plaintiffs because the cases were not properly removed to federal court.[15] Those cases were remanded to the transferor courts as a whole, and the properly removed and/or filed federal court cases remained in the MDL.

The court also addressed the admissibility of certain expert testimony on a global level, as the court in the Deepwater Horizon MDL will probably do. Consolidation will also allow for consistent class-action determinations in the Deepwater Horizon MDL.

INTERSECTION WITH BP COMPENSATION FUND

Further complicating the Deepwater Horizon MDL proceedings is the announcement of the formation of the BP Gulf Coast Claims Facility.

Announced in June, the claims facility is the result of negotiations between the White House and representatives of BP. The GCCF is a $20 billion compensation fund for Gulf oil-spill victims, funded at a rate of $5 billion per year over four years by BP and secured by collateral of $20 billion of BP's assets.

President Obama appointed Kenneth R. Feinberg of the mediation firm Feinberg Rosen LLP to oversee the claims facility. Calling on his experience as the special master for the $7 billion Sept. 11 victim compensation fund, Feinberg will distribute the $20 billion fund to compensate individuals and businesses for losses suffered because of the Deepwater Horizon oil spill.

Although the compensation fund formulated by President Obama and BP Chairman Carl-Henri Svanberg is unprecedented, it has received criticism for being underfunded. Critics also warn the fund will unfairly force desperate claimants to choose an upfront, lump-sum payment in exchange for a full and final release of claims against BP. Many of the claimants do not have the resources to weather a lengthy MDL pretrial proceeding, only to await trial upon remand from the MDL.

> The Deepwater Horizon explosion has generated hundreds of lawsuits spanning numerous subject areas, such as the spectrum of commercial cases.

The impact of the GCCF on the Deepwater Horizon MDL has yet to be determined. The claims facility, with its unprecedented size and origin, has only just been formed. It is anticipated that many claimants will accept payments from the claims facility, dismiss their lawsuits or never bring them at all, thus reducing the size and scope of the MDL. Nevertheless, without more information about the nascent fund's rules and procedures, predicting its impact on the Deepwater Horizon MDL proves difficult.

Observers must sit on the sidelines to watch and wait for more insight into the interplay between the fund and the MDL. This is especially true for environmental claims, which some are likely to deem not compensable by any lump sum. In all likelihood, environmentalists will expect more equitable remedies, requesting injunctive relief, monitoring and other court-ordered supervision, among other legal remedies.

Although early reports indicate that leftover money from the fund will be used for environmental cleanup, it is simply too early to determine the effect this will have on the MDL.

CONCLUSION

Although the establishment of the GCCF may lessen the size and scope of the MDL, no one should be led to believe it will eliminate all the litigation.

Parties will not be required to accept payments from the fund and may proceed in the consolidated arena of the federal MDL. This is especially true in the case of environmental claims, many of which are not brought for the purposes of securing direct monetary relief.

As the Deepwater Horizon MDL works through the court system, its structure is likely to evolve into a compendium of committees, fashioned after the MDLs of the past. Similarly, many of the techniques and discovery plans will be borrowed from MDLs that predated the spill. Given the complex nature and sheer number of claims, the court may find it necessary to create new procedures to better manage and expedite the handling of the MDL.

In short, the legal impact of the Deepwater Horizon MDL is far-reaching and will have a shelf life that is far longer than the media attention focused on the Gulf oil spill. Attorneys can expect new case law and MDL procedures to result as the ultimate legacy of the Deepwater Horizon. WJ

NOTES

[1] *See* 28 U.S.C. § 1407(a).

[2] *Id.*

[3] *Id.* § 1407(d).

[4] *Id.* § 1407(a).

[5] *See Lexecon Inc. v. Milberg Weiss Bershad Hayes & Lerach*, 523 U.S. 26 (1998).

[6] *See* N. Robert Stoll: *Litigating and Managing a Mass Disaster Case: An Oregon Plaintiff Lawyer's Experience in the Exxon Valdez Oil Spill Litigation,* 50 Or. St. B. Bull. 14 ,*16 (1995).

[7] *See* 28 U.S.C. 1407(a); *see also In re Bear Stearns Cos. Sec., Derivative & Employee Ret. Income Sec. Act (ERISA) Litig.*, 572 F. Supp. 2d 1377 (J.P.M.L. 2008); *In re Janus Mut. Funds Inv. Litig.*, 310 F. Supp. 2d 1359 (J.P.M.L. 2004); *Acuna v. Brown & Root Inc.*, 200 F.3d 335 (5th Cir. 2000); *In re Equity Funding Corp. of Am. Sec. Litig.*, 375 F. Supp. 1378 (J.P.M.L. 1974).

[8] *See In re Multi-Piece Rim Prods. Liab. Litig.*, 464 F. Supp. 969 (J.P.M.L. 1979).

[9] *Id.*

[10] *In re Aircraft Accident at Barrow, Alaska, on Oct. 13, 1978,* 474 F. Supp. 996. (J.P.M.L. 1979).

[11] Barbara J. Rothstein, Francis E. McGovern & Sarah Jael Dion, *A Model Mass Tort: The PPA Experience,* 54 Drake L. Rev. 621, 628 (2005-06).

[12] *Id.*

[13] *Id.*

[14] *Id.* 629-30.

[15] *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

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PA HOSPITAL SPONSORS CONFERENCE FOR MESO PATIENTS

The Abramson Cancer Center of Penn Medicine in Philadelphia will host an educational conference for people with mesothelioma and those at risk for the condition. The Oct. 22 daylong conference will feature a faculty composed of six medical doctors who will present on the latest advances in mesothelioma, treatment options and innovative surgical techniques. Penn Medicine says it supports a mesothelioma and pleural-disease program that involves a "multidisciplinary effort providing outstanding diagnosis, treatment and research to patients with pleural cancers." For more information about the conference, visit www.oncolink.org/conference/mesothelioma.

SOLDIERS' SUITS OVER TOXIC EMISSIONS CAN GO FORWARD

A federal judge overseeing the KBR burn pit multidistrict litigation has rejected a motion to dismiss by military contractors Halliburton Co. and KBR Inc. in the consolidated cases brought by soldiers who served Iraq and Afghanistan. The plaintiffs say they suffered injuries from exposure to contaminated water and toxic emissions from burn pits. The order by U.S. District Judge Roger Titus of the District of Maryland affects 43 lawsuits filed in 42 states that were coordinated for pretrial proceedings. The judge noted that subjecting government contractors operating in war zones to private civil suits under state tort law requires the exercise of caution by the judiciary. However, Judge Titus said there is a legitimate concern that the judiciary could prematurely "close courtroom doors to soldiers and civilians" injured "by hired hands" acting contrary to military-defined procedures. Therefore, the judge said he would allow limited discovery so the plaintiffs could make their case.

In re KBR Inc. Burn Pit Litigation, No. 09-2083 (D. Md. Sept. 8, 2010).

GLAXOSMITHKLINE SETTLES SOME DENTURE CREAM SUITS

GlaxoSmithKline, maker of Super Poligrip denture cream, has agreed to settle lawsuits filed by clients of a New York law firm over alleged zinc poisoning. Chaffin Luhana LLP's July 28 filing did not disclose the settlement's monetary value. The suits are part of multidistrict-litigation in Miami federal court alleging that users of Super Poligrip and Proctor & Gamble's Fixodent may absorb high levels of zinc that can cause neurological problems. The companies allegedly failed to warn consumers. The suits seek medical monitoring and treatment of any zinc poisoning side effects.

In re Denture Cream Products Liability Litigation, No. 09-2051 (S.D. Fla. July 28, 2010).

CASE AND DOCUMENT INDEX

AD PAGE

GEORGIA-PACIFIC

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas,
Dallas.
GEORGIA-PACIFIC CORPORATION, Appellant
v.
Susan Elaine BOSTIC, Individually and as Personal Representative of the Heirs and Estate of Timothy Shawn Bostic, Deceased; Helen Donnahoe; and Kyle Anthony Bostic, Appellees.
No. 05-08-01390-CV.

Aug. 26, 2010.

Background: Drywall worker's family brought wrongful death, negligence, and strict products liability actions against drywall joint compound manufacturer alleging worker's death was cause by asbestos. After a second jury trial, the County Court at Law No. 1, Dallas County, D'Metria Benson, J., entered judgment for family. Manufacturer appealed.

Holdings: The Court of Appeals, Fillmore, J., held that:
(1) evidence existed that worker was exposed to asbestos-containing joint compound made by manufacturer, but
(2) evidence was legally insufficient to establish substantial-factor causation.

Reversed and rendered.

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West Headnotes

[1] Appeal and Error 30 1001(3)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1001 Sufficiency of Evidence in Support
30k1001(3) k. Total Failure of Proof. Most Cited Cases
When an appellant attacks the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof, it must demonstrate that no evidence supports the finding.

[2] Evidence 157 597

157 Evidence
157XIV Weight and Sufficiency
157k597 k. Sufficiency to Support Verdict or Finding. Most Cited Cases
The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.

[3] Appeal and Error 30 930(1)

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions

30k930 Verdict
30k930(1) k. In General. Most Cited Cases
On a legal sufficiency challenge, appellate court reviews the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not.

[4] Products Liability 313A 201

313A Products Liability
313AIII Particular Products
313Ak201 k. Asbestos. Most Cited Cases

Products Liability 313A 380

313A Products Liability
313AIV Actions
313AIV(C) Evidence
313AIV(C)4 Weight and Sufficiency of Evidence
313Ak380 k. In General. Most Cited Cases
Evidence existed that drywall worker was exposed to asbestos-containing joint compound made by manufacturer, supporting family's wrongful death claims against manufacturer following worker's contraction of mesothelioma; worker and his father testified that worker used manufacturer's joint compound from the age of five, worker's work history sheets asserted exposure to asbestos fibers from manufacturer's joint compound as a result of household exposure to father's clothing, father testified he used manufacturer's joint compound 98% of the time that he did drywall work, and father identified one specific project where manufacturer's joint compound was used.

[5] Negligence 272 404

272 Negligence
272XIII Proximate Cause
272k404 k. Dangerous Instrumentalities and Substances. Most Cited Cases

Products Liability 313A 147

313A Products Liability
313AII Elements and Concepts
313Ak146 Proximate Cause
313Ak147 k. In General. Most Cited Cases

Products Liability 313A 217

313A Products Liability
313AIII Particular Products
313Ak217 k. Chemicals in General. Most Cited Cases
In a toxic tort case, the plaintiff must show both general and specific causation.

[6] Negligence 272 404

272 Negligence
272XIII Proximate Cause
272k404 k. Dangerous Instrumentalities and Substances. Most Cited Cases

Products Liability 313A 147

313A Products Liability

313AII Elements and Concepts
313Ak146 Proximate Cause
313Ak147 k. In General. Most Cited Cases

Products Liability 313A 217

313A Products Liability
313AIII Particular Products
313Ak217 k. Chemicals in General. Most Cited Cases
In toxic tort context, "general causation" is whether a substance is capable of causing a particular injury or condition in the general population, while "specific causation" is whether a substance caused a particular individual's injury.

[7] Products Liability 313A 147

313A Products Liability
313AII Elements and Concepts
313Ak146 Proximate Cause
313Ak147 k. In General. Most Cited Cases

Products Liability 313A 149

313A Products Liability
313AII Elements and Concepts
313Ak146 Proximate Cause
313Ak149 k. Warnings or Instructions. Most Cited Cases
In products liability case, causation is an essential element of a claim for negligence and product marketing defect.

[8] Products Liability 313A 147

313A Products Liability
313AII Elements and Concepts
313Ak146 Proximate Cause
313Ak147 k. In General. Most Cited Cases

Products Liability 313A 217

313A Products Liability
313AIII Particular Products
313Ak217 k. Chemicals in General. Most Cited Cases
In products liability toxic tort case, proximate cause is an element of a negligence claim, while producing cause is an element of a strict liability claim.

[9] Negligence 272 404

272 Negligence
272XIII Proximate Cause
272k404 k. Dangerous Instrumentalities and Substances. Most Cited Cases

Products Liability 313A 147

313A Products Liability
313AII Elements and Concepts
313Ak146 Proximate Cause
313Ak147 k. In General. Most Cited Cases

Products Liability 313A 217

313A Products Liability
313AIII Particular Products
313Ak217 k. Chemicals in General. Most Cited Cases
In toxic tort case, both producing and proximate cause contain the cause-in-fact element, which requires that the defendant's act be a substantial factor in bringing about the injury and without which the harm would not have occurred.

[10] Negligence 272 380

272 Negligence
272XIII Proximate Cause
272k374 Requisites, Definitions and Distinctions
272k380 k. Substantial Factor. Most Cited Cases
To establish substantial-factor causation, a plaintiff must prove that the defendant's conduct was a cause-in-fact of the harm.

[11] Products Liability 313A 147

313A Products Liability
313AII Elements and Concepts
313Ak146 Proximate Cause
313Ak147 k. In General. Most Cited Cases

Products Liability 313A 201

313A Products Liability
313AIII Particular Products
313Ak201 k. Asbestos. Most Cited Cases
In asbestos cases, court must determine whether the asbestos in the defendant's product was a substantial factor in bringing about the plaintiff's injuries and without which the injuries would not have occurred.

[12] Evidence 157 571(9)

157 Evidence
157XII Opinion Evidence
157XII(F) Effect of Opinion Evidence
157k569 Testimony of Experts
157k571 Nature of Subject
157k571(9) k. Cause and Effect. Most Cited Cases

Products Liability 313A 201

313A Products Liability
313AIII Particular Products
313Ak201 k. Asbestos. Most Cited Cases

Products Liability 313A 390

313A Products Liability
313AIV Actions
313AIV(C) Evidence
313AIV(C)4 Weight and Sufficiency of Evidence
313Ak389 Proximate Cause
313Ak390 k. In General. Most Cited Cases

Evidence was legally insufficient to establish substantial-factor causation necessary for maintaining negligence and product liability action against joint compound manufacturer regarding drywall worker's alleged asbestos exposure; plaintiffs' sole expert testified that he could not opine that worker would not have developed mesothelioma absent exposure to manufacturer's asbestos-containing joint compound, work history sheets did not tell the time or intensity of worker's exposure, and plaintiff's expert testimony did not establish an exposure level or dose to quantify worker's exposure to asbestos fibers from manufacturer's joint compound.

[13] Products Liability 313A 147

313A Products Liability
313AII Elements and Concepts
313Ak146 Proximate Cause
313Ak147 k. In General. Most Cited Cases

Products Liability 313A 201

313A Products Liability
313AIII Particular Products
313Ak201 k. Asbestos. Most Cited Cases

Each-and-every-exposure theory of causation was insufficient to establish substantial-factor causation in negligence and product liability action arising out of drywall worker's contraction of mesothelioma allegedly due to exposure to manufacturer's joint compound; plaintiff was instead required to prove that manufacturer's product was a substantial factor in causing the alleged harm. Deborah G. Hankinson, Hankinson Levinger LLP, Dallas, TX, for Appellant.

Denyse Ronan Clancy, Dallas, TX, for Appellees.

Before Justices BRIDGES, FITZGERALD, and FILLMORE.

OPINION

Opinion By Justice FILLMORE.

***1** Appellant Georgia-Pacific Corporation appeals the final judgment of the trial court in favor of appellees Susan Elaine Bostic, Individually and as Personal Representative of the Heirs and Estate of Timothy Shawn Bostic, Deceased, Helen Donnahoe, and Kyle Anthony Bostic. In three issues, Georgia-Pacific contends (1) there is legally insufficient evidence that Georgia-Pacific's joint compound caused Timothy Bostic's mesothelioma, (2) there is no evidence to support the jury's finding of gross negligence against Georgia-Pacific, and (3) the trial court abused its discretion by denying Georgia-Pacific's motion for mistrial and by vacating the order granting Georgia-Pacific a new trial.

Concluding there is legally insufficient evidence of causation, we reverse the trial court's judgment and render judgment that appellees take nothing on their claims against Georgia-Pacific.

PROCEDURAL BACKGROUND

In February 2003, Timothy Bostic's wife, son, father, and mother brought wrongful death claims and a survival action against Georgia-Pacific and numerous other entities alleging Timothy's death was caused by exposure to asbestos. At the time of trial, Georgia-Pacific was the sole remaining defendant, the other named defendants having settled or been dismissed. Appellees alleged Georgia-Pacific was negligent, strictly liable for a product marketing defect, and grossly negligent.

In 2005, Judge Sally Montgomery presided over the trial of this lawsuit in Dallas County Court at Law No. 3. After the jury verdict awarding appellees actual and punitive damages, Judge Montgomery ordered appellees to either elect a new trial on all issues or agree to remit a misallocated award of future lost wages and the award of punitive damages. Appellees elected a new trial. The lawsuit was tried for the second time before a jury in 2006.[FN1] The jury returned a verdict in favor of appellees, finding Georgia-Pacific seventy-five percent liable and Knox Glass, Inc., a non-party former employer of Timothy, twenty-five percent liable for Timothy's death. The jury awarded $7,554,907 in compensatory damages and $6,038,910 in punitive damages.

Georgia-Pacific filed a motion to recuse Judge Montgomery. Judge M. Kent Sims granted the motion to recuse, and the lawsuit was transferred to Judge Russell H. Roden, Dallas County Court at Law No. 1. In December 2006, the trial court granted Georgia-Pacific's motion for mistrial and ordered a new trial.

In January 2007, Judge D'Metria Benson became the presiding judge of Dallas County Court at Law No. 1. In February 2008, appellees filed a motion to vacate Judge Roden's order granting a new trial and for entry of judgment. In July 2008, Judge Benson granted appellees' motion to vacate the order for new trial and signed a judgment based on the jury's June 2006 verdict. In October 2008, Judge Benson signed the amended final judgment awarding appellees $6,784,135.32 in compensatory damages and $4,831,128.00 in punitive damages. Georgia-Pacific appealed.

LEGAL SUFFICIENCY OF THE EVIDENCE

***2** In its first issue, Georgia-Pacific asserts there is legally insufficient evidence that Georgia-Pacific asbestos-containing joint compound [FN2] caused Timothy's mesothelioma, a form of cancer usually linked to asbestos exposure. Georgia-Pacific asserts there is no evidence Timothy was exposed to Georgia-Pacific asbestos-containing joint compound, and even if there was evidence of exposure, there is no evidence of dose. Further, Georgia-Pacific asserts that even if there was evidence of exposure and dose, the record contains no epidemiological studies showing that persons similar to Timothy with exposure to asbestos-containing joint compound had an increased risk of developing mesothelioma. Georgia-Pacific also asserts that appellees' experts' theory that "each and every exposure" to asbestos caused Timothy's mesothelioma was rejected by the Texas Supreme Court in *Borg-Warner Corp. v. Flores,* 232 S.W.3d 765 (Tex.2007).[FN3] Georgia-Pacific asserts that for each of these reasons, appellees' negligence and defective marketing claims against Georgia-Pacific fail as a matter of law.

[1][2][3] When, as here, an appellant attacks the legal sufficiency of an adverse finding on an issue on which it did not have the burden of proof, it must demonstrate that no evidence supports the finding. *Croucher v. Croucher,* 660 S.W.2d 55, 58 (Tex.1983). "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Del Lago Partners, Inc. v. Smith,* 307 S.W.3d 762, 770 (Tex.2010) (quoting *City of Keller v. Wilson,* 168 S.W.3d 802, 827 (Tex.2005)). We review the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Del Lago Partners,* 307 S.W.3d at 770.

Asbestos Exposure

[4] In 2002, Timothy was diagnosed with mesothelioma at the age of forty. He died in 2003. Appellees claim Timothy's mesothelioma was caused by his exposure to asbestos-containing joint compound manufactured by Georgia-Pacific. Georgia-Pacific acknowledged there is some evidence that Timothy used or was present during the use of joint compound between 1967 and 1977, but contends there is no evidence of exposure to Georgia-Pacific asbestos-containing joint compound. *See Gaulding v. Celotex Corp.,* 772 S.W.2d 66, 68 (Tex.1989) (fundamental principle of products liability law is plaintiff must prove defendant supplied product which caused injury).

Georgia-Pacific manufactured and sold joint compound products that included chrysotile asbestos [FN4] fibers from the time it acquired Bestwall Gypsum Company in 1965 until 1977, when Georgia-Pacific ceased marketing asbestos-containing joint compound. Those Georgia-Pacific joint compounds were offered in a dry mix formula and a pre-mixed formula.[FN5] The parties do not dispute that any exposure of Timothy to a Georgia-Pacific asbestos-containing joint compound would have occurred between 1967 and 1977. Evidence regarding Timothy's work with or around Georgia-Pacific asbestos-containing joint compound in this ten-year period came from Timothy's and Harold Bostic's deposition testimony read and played by videotape at trial and Timothy's work history sheets.

***3** Timothy testified he had been around drywall work his entire life, and he recalled that before the age of ten, he observed his father performing drywall work. He stated he mixed and sanded joint compound from the age of five. He testified he recalled at a young age helping his father "mud the holes" with joint compound. While he did not provide any more specifics of drywall work he performed with his father before 1977, he believed he used and was exposed to Georgia-Pacific joint compound before he graduated from high school in 1980. Timothy's work history sheets also indicate he worked with and around other brands of asbestos-containing joint compounds.

Timothy's work history sheets also assert exposure to asbestos fibers from Georgia-Pacific joint compound as a result of household exposure to Harold's clothing. This alleged exposure would have occurred prior to his parents' divorce in 1972, when he was ten years old, and thereafter when he stayed with his father on weekends, holidays, and at times in the summer.

Harold testified he used Georgia-Pacific joint compound ninety-eight percent of the time that he did drywall work. He testified he tried one or two other brands of joint compound, but he always returned to Georgia-Pacific's product. With one exception listed below, Harold said he could not positively associate Georgia-Pacific's product with any specific drywall job. He stated he knew he had used Georgia-Pacific's product on several jobs, but he could not recall exactly where. Harold testified that Timothy began to accompany him on remodeling jobs in 1967 when Timothy was the age of five. Timothy helped mix joint compound, applied and sanded joint compound to the height Timothy could reach, and breathed in the dust from sanded joint compound.

According to his testimony, Harold worked part-time on only one remodeling or construction job at a time for a family member or friend. Each project took a lengthy period of time to complete. Although he testified there was no doubt in his mind that he and Timothy used Georgia-Pacific joint compound "many, many times" between 1967 and 1977, he identified and described work performed on eight remodeling projects for the relevant period. Harold identified only one specific project where Georgia-Pacific joint compound was used, and he could not recall whether Timothy performed drywall work or was present during drywall work on that project. Only three projects were identified in which Harold and Timothy may have performed drywall work together or Timothy may have been present when Harold performed drywall work. Following is a summary chronology of the remodeling or construction jobs Harold recalled for this relevant period:

• In the house he lived in with his wife and Timothy, Harold performed drywall work while remodeling a utility room. Timothy was four or five years of age at the time and may have played in the joint compound "mud" or sanded drywall to the height he could reach.

***4** • During the course of a three-month project, Harold built a ten foot by ten foot bathroom and dressing room in his brother's house. Harold performed drywall work as part of the project. He could not recall the brand of joint compound he utilized. Timothy performed sewer work on this project. Timothy was six or seven years of age.

• Harold remodeled the interior of his sister's service station. The project lasted a year in 1968 or 1970. Harold performed drywall work on an eight foot by seven foot room and the ceiling of the room. Timothy was between the ages of six and eight.

• Harold built living quarters in a friend's garage and car dealership. This year-long project included drywall work. He has no memory of Timothy working with drywall on this project.

• In connection with the construction of the interior of a friend's prefabricated home, Harold performed drywall work. The construction project took a year to complete. Harold recalled utilizing Georgia-Pacific joint compound, but he did not recall whether Timothy performed drywall work or whether Timothy was present when Harold performed drywall work. Timothy dug the septic tank on this project. Timothy was between the ages of ten and twelve.

• In finishing a room in his sister's newer home, Harold could not recall utilizing drywall. Timothy was eleven or twelve years of age.

• During a year-long construction project, Harold performed drywall work in his sister's five hundred square foot older home.

• In building partitions in his mother's home, Harold recalled that he may have patched some cracks, but he did not perform drywall work and he could not recall using joint compound. Timothy was thirteen or fourteen years of age.

Evidence at trial substantiated Timothy was exposed to asbestos other than through use of or presence during the use of Georgia-Pacific asbestos-containing joint compound. In addition to Georgia-Pacific joint compound, the evidence established and appellees acknowledge that Timothy was exposed to numerous asbestos products and asbestos-containing products, both occupationally and through household and bystander exposure.

Timothy was exposed to asbestos utilized at Knox Glass. Harold was employed as a welder at Knox Glass from around 1960 until the plant closed in 1984. Asbestos and asbestos-containing products were used throughout the glass container factory, particularly to insulate against heat. Harold was exposed to asbestos fibers, which were inadvertently brought home on his clothing, thereby exposing Timothy. These household exposures to asbestos occurred consistently from Timothy's birth until his parents were divorced when he was ten years old, from time spent with Harold on weekends, holidays, and in the summers between the ages of ten and fifteen, and from the ages of fifteen to eighteen when Timothy lived with Harold.

Timothy was further exposed to asbestos utilized at Knox Glass in connection with his janitorial and mechanical work at Knox Glass in the summer months of 1980 through 1982.[FN6] He worked in both the hot end of the plant, where glass bottles were manufactured

and where asbestos was more likely prevalent, and in the cold end of the plant.[FN7] The evidence indicated that asbestos or asbestos-containing items in the work environment at Knox Glass included refractory cements, fireproofing, asbestos cloth, pumps, packing (braided rope made from asbestos), valves, furnaces, blow heads, gaskets, and firebrick mortar. Timothy's work responsibilities included cutting raw asbestos cloth, sweeping up asbestos-containing dust, cleaning up after asbestos pipe coverings were repaired, removing flaking asbestos from machines and replacing it with asbestos he cut, and wearing asbestos gloves or mittens.

***5** Timothy also had occupational exposure to asbestos during 1977 and 1978, when he worked for approximately six months as a welder's assistant for Palestine Contractors. There he was exposed to asbestos while removing gaskets and asbestos pipe insulation three to four times each week.

Timothy was also exposed to asbestos fibers as a result of mechanical work Harold performed on automobiles, including brake work. Timothy was exposed in the household to asbestos fibers on Harold's clothing and as a bystander and assistant to his father with respect to the automotive repairs. In addition, when he was older, Timothy performed mechanical work on vehicles resulting in exposure to a number of asbestos-containing products, including clutches, brake pads and linings, friction products, and gaskets. He testified that he performed approximately four brake jobs a year and fewer than ten clutch jobs in his lifetime. Timothy identified a number of manufacturers of asbestos-containing products he was exposed to in connection with the mechanical work he performed.

After his graduation from high school, Timothy began remodeling homes on his own. According to the evidence, he was exposed to a number of asbestos-containing products in his remodeling work, including roofing shingles, floor tiles, and ceiling tiles. Timothy identified several manufacturers and marketers of asbestos-containing products he utilized in addition to Georgia-Pacific joint compounds. It is not disputed that Timothy used Georgia-Pacific products after his graduation from high school in 1980. However, these uses occurred after Georgia-Pacific joint compounds no longer contained asbestos.

Albeit limited, the record contains evidence through the lay testimony of Timothy and Harold, and Timothy's work history sheets, of Timothy's use or presence during the use of Georgia-Pacific's asbestos-containing joint compound. On this record, we disagree with Georgia-Pacific's argument that there is no evidence Timothy was exposed to Georgia-Pacific asbestos-containing joint compound.

Substantial-Factor Causation

[5][6] Georgia-Pacific next contends there is legally insufficient evidence of causation, an essential element of appellees' negligence and strict liability defective marketing claims. In a toxic tort case, the plaintiff must show both general and specific causation. *See Merrell Dow Pharm., Inc. v. Havner,* 953 S.W.2d 706, 714-15, 720 (Tex.1997). "General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury." *Havner,* 953 S.W.2d at 714; *see also Georgia-Pacific Corp. v. Stephens,* 239 S.W.3d 304, 308-09 (Tex.App.-Houston [1st Dist.] 2007, pet. denied). For purposes of this appeal, Georgia-Pacific is not challenging the legal sufficiency of the evidence of general causation that inhalation of chrysotile asbestos fibers can cause mesothelioma. Instead, Georgia-Pacific challenges the legal sufficiency of the evidence as to specific causation, that is whether Georgia-Pacific asbestos-containing joint compound was, in fact, a cause of Timothy's mesothelioma.

Causation

***6** Georgia-Pacific contends that appellees failed to introduce evidence sufficient to satisfy the "substantial factor" standard of causation set forth in *Flores,* because appellees produced no evidence of cause-in-fact. In the context of an asbestos case, the Texas Supreme Court explained that "asbestos in the defendant's product [must be] a substantial factor in bringing about the plaintiff's injuries." *Flores,* 232 S.W.3d at 770. The *Flores* court agreed that the "frequency, regularity, and proximity" test for exposure to asbestos set out in *Lohrmann v. Pittsburgh Corning Corp.,* 782 F.2d 1156 (4th Cir.1986), is appropriate. *Flores,* 232 S.W.3d at 769; *see also Lohrmann,* 782 F.2d at 1162-63 (to support reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to specific product on regular basis over extended period of time in proximity to where plaintiff actually worked). The supreme court stated, however, that the terms "frequency," "regularity," and "proximity" do not "capture the emphasis [Texas] jurisprudence has placed on causation as an essential predicate to liability," and agreed with *Lohrmann*'s analysis that the asbestos exposure must be a substantial factor in causing the asbestos-related disease. *Flores,* 232 S.W.3d at 769; *see also Lohrmann,* 782 F.2d at 1162.

[7][8][9] Causation is an essential element of appellees' claims for negligence and product marketing defect. Proximate cause is an element of a negligence claim, while producing cause is an element of a strict liability claim. *Gen. Motors Corp. v. Saenz,* 873 S.W.2d

353, 357 (Tex.1993). "Both producing and proximate cause contain the cause-in-fact element, which requires that the defendant's act be a 'substantial factor in bringing about the injury and without which the harm would not have occurred.' " *Metro Allied Ins. Agency, Inc. v. Lin,* 304 S.W.3d 830, 835 (Tex.2009) (quoting *Doe v. Boys Clubs of Greater Dallas, Inc.,* 907 S.W.2d 472, 481 (Tex.1995)); *see also Flores,* 232 S.W.3d at 770 (quoting RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965)) ("substantial" used to denote the fact that the defendant's conduct has such an effect in producing harm as to lead reasonable men to regard it as a cause); *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.,* 896 S.W.2d 156, 161 (Tex.1995); *Patino v. Complete Tire, Inc.,* 158 S.W.3d 655, 661 (Tex.App.-Dallas 2005, pet. denied).

Appellees assert that *Flores* does not require "but-for" causation in proving specific causation and that *Flores* requires only that appellees prove Timothy's exposure to Georgia-Pacific asbestos-containing joint compound was a "substantial factor" in contributing to his risk of mesothelioma. We disagree. The Texas Supreme Court "[has] recognized that '[c]ommon to both proximate and producing cause is causation in fact, including the requirement that the defendant's conduct or product be a substantial factor in bringing about the plaintiff's injuries.' " *Flores,* 232 S.W.3d at 770 (quoting *Union Pump Co. v. Allbritton,* 898 S.W.2d 773, 775 (Tex.1995)); *see also Ford Motor Co. v. Ledesma,* 242 S.W.3d 32, 46 (Tex.2007).

***7** [10][11] Thus, to establish substantial-factor causation, a plaintiff must prove that the defendant's conduct was a cause-in-fact of the harm. *See Flores,* 232 S.W.3d at 770. "In asbestos cases, then, we must determine whether the asbestos in the defendant's product was a substantial factor in bringing about the plaintiff's injuries" and without which the injuries would not have occurred. *Id.; see also Stephens,* 239 S.W.3d at 308-09.

[12] Appellees acknowledged in their brief and at oral submission that their only expert who opined on specific causation of Timothy's mesothelioma was pathologist Samuel Hammar, M.D. However, Dr. Hammar testified he could not opine that Timothy would not have developed mesothelioma absent exposure to Georgia-Pacific asbestos-containing joint compound. Because a plaintiff must prove that the defendant's conduct was a cause-in-fact of the harm, appellees' evidence is insufficient to satisfy the required substantial-factor causation element for maintaining this negligence and product liability suit. *See Flores, 232* S.W.3d at 770.

"Each and Every Exposure" Theory of Causation

[13] Georgia-Pacific argues that appellees further failed to establish substantial-factor causation because they improperly based their showing of causation on the opinion of their only specific causation expert that each and every exposure to asbestos caused or contributed to cause Timothy's mesothelioma. Georgia-Pacific contends the law set forth in *Flores* and *Stephens* rejects the theory that each and every exposure to asbestos contributes to the development of mesothelioma. *See Flores,* 232 S.W.3d at 773; *Stephens,* 239 S.W.3d at 311, 314-15, 321 (in *Flores,* Texas Supreme Court rejected "any exposure" test for specific causation and adopted substantial-factor causation standard). Therefore, Georgia-Pacific asserts there is no evidence of the essential element of causation to support appellees' negligence or defective marketing claims against Georgia-Pacific.

Quoting from the underlying court of appeals decision, the *Flores* court expressly rejected the "each and every exposure" theory of liability:

> [Plaintiff's expert] acknowledged that asbestos is "plentiful" in the ambient air and that "everyone" is exposed to it. If a single fiber could cause asbestosis, however, "everyone" would be susceptible. No one suggests this is the case.... In analyzing the legal sufficiency of Flores's negligence claim, then, the court of appeals erred in holding that "[i]n the context of asbestos-related claims, if there is sufficient evidence that the defendant supplied *any* of the asbestos to which a plaintiff was exposed, then the plaintiff has met the burden of proof."

Flores, 232 S.W.3d at 773 (emphasis in original). Instead, as discussed previously in this opinion, the Texas Supreme Court requires the plaintiff to prove "that the defendant's product was a substantial factor in causing the alleged harm." *Id.*

***8** In *Stephens,* Dr. Hammar, appellees' specific causation expert here, "express[ed] an opinion that each and every exposure that an individual has in a bystander occupational setting causes their mesothelioma." *Stephens,* 239 S.W.3d at 315. Dr. Hammar testified that any exposure the deceased commercial painter had throughout the time he worked was causative of his mesothelioma. *Id.* at 320. The plaintiffs in *Stephens* also relied on the testimony of Jerry Lauderdale, an industrial hygienist. *Id.* at 314. Lauderdale testified that asbestos-related diseases are based on cumulative exposures and that there is no way to isolate a particular exposure that caused development of the disease. *Id.* at 315. It was Lauderdale's opinion "that every exposure does contribute to the development

of-potential to develop mesothelioma." *Id.* The court noted that the experts failed to show that "the 'any exposure' theory is generally accepted in the scientific community-that any exposure to a product that contains asbestos results in a statistically significant increase in the risk of developing mesothelioma." *Id.* at 320-21. Consistent with *Flores,* the "each and every exposure" theory was rejected in *Stephens. Id.* at 314-15, 320-21.

In this case, appellees' specific causation expert, Dr. Hammar, testified that asbestos-related diseases are dose-related diseases, meaning that asbestos exposures comprising the cumulative dose, at least to the point of the first cancer cell's development, are all causative or potentially causative of the disease. He opined, to a reasonable degree of medical probability, that each and every exposure to asbestos would be a significant contributing, or at least a potentially contributing, factor to the development of mesothelioma. Dr. Hammar agreed that each and every exposure Timothy had to asbestos was significant and a contributing factor in the development of his mesothelioma. These exposures would include Timothy's use of or exposure to asbestos during his employment at Knox Glass, his bystander exposure, and his household exposure to asbestos fibers Harold inadvertently brought home on his clothing from Knox Glass and from his part-time mechanical and construction work.

At oral submission, appellees stated that while not experts on the specific cause of Timothy's disease, their other experts at trial supported Dr. Hammar's testimony. Appellees' experts at trial on general causation, Arnold R. Brody, Ph.D., an experimental pathologist with a doctorate in cell biology, and Richard Lemen, Ph.D., an epidemiologist, espoused the "each and every exposure" theory. Dr. Brody testified that each and every asbestos fiber a person inhales is considered a cause of or a substantial contributing factor to mesothelioma. Dr. Lemen testified that with each and every exposure to asbestos, and each and every inhalation of asbestos fibers, the fibers add to the total body burden of exposure and contribute to the development of mesothelioma.

***9** In their effort to demonstrate evidence of substantial-factor causation, appellees also refer to the testimony of Richard Kronenberg, M.D., a witness called to testify by Georgia-Pacific. Dr. Kronenberg testified that asbestos diseases result from a total accumulated exposure over a lifetime. He stated that each and every exposure would be a significant contributing factor to an asbestos disease, and that all the exposures throughout Timothy's life working with any sort of asbestos-containing products contributed to the development of his disease.

The Texas Supreme Court has determined that an "each and every exposure" theory is legally insufficient to support a finding of causation. *Flores,* 232 S.W.3d at 773. We agree with Georgia-Pacific's assertion that appellees did not establish substantial-factor causation to the extent they improperly based their showing of specific causation on their expert's testimony and the testimony of Dr. Kronenberg that each and every exposure to asbestos caused or contributed to cause Timothy's mesothelioma.

Frequency, Proximity, and Regularity of Exposure

Appellees contend that Georgia-Pacific misstates the facts in asserting the appellees' expert relied on the "each and every exposure" theory in support of substantial-factor causation. Instead, appellees assert that in accordance with the substantial-factor causation standard, they presented "substantial evidence of Timothy's ten years of frequent, proximate, and regular exposure to Georgia-Pacific asbestos joint compound...."

Appellees contend that Timothy "used Georgia-Pacific asbestos joint compound 'many times' over ten years." Appellees assert that "[t]aking into account the frequency, proximity, and regularity of Timothy's exposure to Georgia-Pacific's joint compound," Dr. Hammar testified that Timothy's exposure to Georgia-Pacific asbestos joint compound would have been sufficient in and of itself to cause his mesothelioma.

It was Dr. Hammar's understanding that from an early age with his father, and then as he grew older, Timothy "did a fair amount of work with the drywall work" and he testified Timothy was exposed to asbestos during mixing, sanding, and cleaning up of drywall materials. Dr. Hammar testified he had reviewed Timothy's work history sheets "which chronicled Timothy's work history and what he had actually done during his life." But he acknowledged that work history sheets do not tell "the time of exposure and the intensity of the exposure the individual had." Further, he had not reviewed the deposition testimony of Timothy or Harold, although he acknowledged that deposition testimony provides more details of the nature and amount of exposure than work history sheets.

As is detailed above, the record does not contain "substantial" evidence of Timothy's frequent use of or exposure to Georgia-Pacific joint compound for the period 1967 to 1977 and does not establish Timothy's use of the joint compound "many times" over that period.[FN8] In fact, the evidence regarding Timothy's exposure to asbestos-containing joint compound and the number of times it

occurred during the period 1967 to 1977 belies an assertion of exposure occurring "many times" and belies the information contained in Timothy's work history sheets reviewed by Dr. Hammar.[FN9]

***10** We disagree with appellees' contention that Georgia-Pacific is incorrect in arguing appellees relied on the "each and every exposure" theory to support substantial-factor causation. We also disagree with appellees' contention that, instead, they presented "substantial evidence of Timothy's ten years of frequent, proximate, and regular exposure to Georgia-Pacific asbestos joint compound" to establish substantial-factor causation. *See Jackson v. Anchor Packing Co.,* 994 F.2d 1295, 1308 (8th Cir.1993) (although worker testified he worked with gaskets and packets "many times" during years as mechanic, no evidence in record that he used gaskets many times and cannot tell whether he used products "for two jobs or two hundred jobs"); *Lohrmann,* 782 F.2d at 1163 (ten to fifteen occasions of exposure to asbestos-containing pipe covering lasting between one and eighteen hours duration insufficient to satisfy frequency-regularity-proximity test). On this record, there is insufficient evidence of Timothy's frequent and regular exposure to Georgia-Pacific's asbestos-containing joint compound during the relevant time period.

Quantitative Evidence that Exposure Increased Risk of Developing Mesothelioma

Georgia-Pacific also contends that appellees failed to establish substantial-factor causation because there is no evidence of the quantitative exposure (dose) of asbestos fibers from Georgia-Pacific asbestos-containing joint compound to which Timothy was exposed, and because appellees failed to present evidence of the minimum exposure level leading to an increased risk of development of mesothelioma.

As set forth in *Flores, Stephens,* and *Smith,* the "each and every exposure" theory and the theory that there is no level of asbestos exposure below which the potential to develop mesothelioma is not present have been rejected. *See Flores,* 232 S.W.3d at 769-70, 773; *Smith v. Kelly-Moore Paint Co.,* 307 S.W.3d 829, 837 n. 9, 839 (Tex.App.-Fort Worth, 2010, no pet.); *Stephens,* 239 S.W.3d at 311, 314-15. In order to prove substantial factor causation, a plaintiff must not only show frequency, regularity, and proximity of exposure to the product, the plaintiff must also show reasonable quantitative evidence that the exposure increased the risk of developing the asbestos-related injury. *Flores,* 232 S.W.3d at 769-72; *Smith,* 307 S.W.3d at 833; *Stephens,* 239 S.W.3d at 312. "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." *Flores,* 232 S.W.3d at 773 (quoting David L. Eaton, *Scientific Judgment and Toxic Torts-A Primer in Toxicology for Judges and Lawyers,* 12 J.L. & POL'Y 5, 39 (2003)).

Flores mandates that a showing of substantial-factor causation include quantitative evidence that Timothy's exposure to asbestos increased his risk of developing an asbestos-related injury. *See Flores,* 232 S.W.3d at 772. Thus, the evidence had to not only show Timothy's exposure to Georgia-Pacific asbestos-containing product on a frequent and regular basis, but also that the exposure was in sufficient amounts to increase his risk of developing mesothelioma. *Id.* at 769-70.

***11** Appellees contend their specific causation expert, Dr. Hammar, "analyzed the mathematical threshold of asbestos exposure leading to a multiple increased risk of mesothelioma, and testified that Timothy's ten year exposure to Georgia-Pacific asbestos joint compound would have been enough in and of itself to cause his mesothelioma." They state Dr. Hammar considered the threshold for increased risk of developing mesothelioma to be 0.1 fiber cc,[FN10] and considered the frequency, regularity, and fiber concentration of Timothy's ten years of exposure to Georgia-Pacific asbestos-containing joint compound, and testified, within a reasonable degree of medical certainty, that these exposures were sufficient, in and of themselves, to have caused Timothy's mesothelioma.

Dr. Hammar testified he does not know of any safe level of exposure to asbestos under which disease does not occur. He opined that exposure to friable [FN11] asbestos fibers above background levels had the potential to contribute to the development of Timothy's mesothelioma. It is his opinion that every exposure above .1 fiber cc contributes to the development of mesothelioma. He stated that information published in the Federal Register shows that at .1 fiber cc, statistically there are seven cases of mesothelioma per year.

These dosage opinions are consistent with Dr. Hammar's opinions in *Stephens.* There he "opined that the level of exposure it takes to cause mesothelioma 'could be any level above what is considered to be background, which, from my definition, would be anything greater than .1 fiber cc years.' In sum, he stated: 'I'm going to express an opinion that each and every exposure that an individual has in a bystander occupational setting causes their mesothelioma.' " *Stephens,* 239 S.W.3d at 315. He stated "that mesothelioma is a dose-responsive disease, and that a threshold exists 'above which you may be at risk, below which you may not be at risk' for developing the disease." *Id.*

In *Stephens,* there was no quantitative evidence of the plaintiff's exposure to Georgia-Pacific asbestos-containing joint compound, the product also at issue there. *Id.* at 321. Although the literature and scientific studies the experts relied upon supported a reasonable inference that exposure to chrysotile asbestos can increase a worker's risk of developing mesothelioma, none of those studies undertook the task of linking the minimum exposure level (or dosage) of joint compound with a statistically significant increased risk of developing of the disease. *Id.* Thus, the court held that the opinions offered by the plaintiffs' experts, including Dr. Hammar, lacked the factual and scientific foundation required by *Flores* and were legally insufficient proof of substantial-factor causation necessary to support the jury's verdict. *Stephens,* 239 S.W.3d at 321.

According to John Maddox, M.D., the plaintiffs' expert regarding specific causation in *Smith,* "[b]ecause asbestos dust is so strongly associated with mesothelioma, proof of significant exposure to asbestos dust is proof of specific causation." *Smith,* 307 S.W.3d at 837. "Dr. Maddox opined that it is generally accepted in the scientific community that there is no minimum level of exposure to asbestos 'above background levels' below which adverse effects do not occur." *Id.* After discussing the scientific literature relied upon by Dr. Maddox, the court held that the plaintiffs' evidence "ultimately suffers the same defect as the plaintiff's in *Stephens* " and that under *Flores,* Dr. Maddox's opinion is insufficient as to specific causation. *Id.* at 839.

***12** Here, appellees endeavor to rely on material practice simulation studies performed by their general causation expert, William Longo, Ph.D., a material scientist. Dr. Longo's simulation studies were intended to determine the amounts of asbestos fibers released during mixing, sanding, and sweeping Georgia-Pacific's (or its predecessor Bestwall's) asbestos-containing joint compound in a controlled environment. However, Dr. Longo admitted his studies could not establish an exposure level or dose for Timothy, particularly because of the many variables in the circumstances of a given work activity and location of the activity. Thus, Dr. Longo's testimony regarding the results of his material practice simulation studies do not quantify Timothy's exposure to asbestos fibers from Georgia-Pacific asbestos-containing joint compound.

On this record, appellees' evidence is insufficient to provide quantitative evidence of Timothy's exposure to asbestos fibers from Georgia-Pacific's asbestos-containing joint compound or to establish Timothy's exposure was in amounts sufficient to increase his risk of developing mesothelioma. Therefore, appellees' evidence is legally insufficient to establish substantial-factor causation mandated by *Flores.*

For the reasons discussed above, appellees' claims of negligence and product liability require proof of substantial-factor causation. *See Flores,* 232 S.W.3d at 774. We conclude that the evidence presented at trial is legally insufficient proof of substantial-factor causation necessary to support the jury's negligence and strict liability marketing defect verdicts against Georgia-Pacific. We sustain Georgia-Pacific's first issue.

APPELLANT'S SECOND AND THIRD ISSUES

In its second issue, Georgia-Pacific asserts that there was no clear and convincing evidence to support the jury's finding of Georgia-Pacific's gross negligence. Our disposition of Georgia-Pacific's first issue necessarily disposes of appellees' gross negligence claim against Georgia-Pacific. *See Transp. Ins. Co. v. Moriel,* 879 S.W.2d 10, 23 (Tex.1994).

Georgia-Pacific contends in its third issue that the trial court erred in denying its motion for mistrial and in vacating the order granting a new trial, warranting a remand of this case to the trial court. Our disposition of Georgia-Pacific's first issue makes it unnecessary to address Georgia-Pacific's third issue. *See* Tex.R.App. P. 47.1.

CONCLUSION

There is legally insufficient evidence of causation to support the verdict against Georgia-Pacific. We reverse the trial court's judgment and render judgment that appellees take nothing on their claims against Georgia-Pacific.

FN1. Harold Bostic, Timothy's father, died while the case was being retried.

FN2. Joint compound, sometimes called "drywall mud," is used to connect and smooth the seams of adjoining pieces of drywall, also called sheetrock, and to cover nail heads on sheets of drywall. Joint compound is spread in a thin coat and then smoothed. After it dries, uneven areas are further smoothed by sanding. This process is sometimes carried out multiple times in further refining the surface.

FN3. Prior to the 2008 final judgment in this case, the Texas Supreme Court issued its *Flores* opinion on toxic tort law in asbestos cases, including specific causation. Like the instant appeal, in *Georgia-Pacific Corp. v. Stephens,* 239 S.W.3d 304 (Tex.App.-Houston [1st Dist.] 2007, pet. denied), issued after *Flores,* the asbestos trial occurred before the *Flores* decision, but the appellate court was bound by *Flores. Stephens,* 239 S.W.3d at 321; *see also Smith v. Kelly-Moore Paint Co.,* 307 S.W.3d 829, 834 (Tex.App.-Fort Worth 2010, no pet.) (appellate court bound by *Flores* as supreme court precedent); *Lubbock Cnty. v. Trammel's Lubbock Bail Bonds,* 80 S.W.3d 580, 585 (Tex.2002) (once supreme court announces proposition of law, that proposition is binding precedent and may not be modified or abrogated by court of appeals).

FN4. Chrysotile is the most abundant type of asbestos fiber and is a serpentine fiber consisting of "pliable curly fibrils which resemble scrolled tubes." *Flores,* 232 S.W.3d at 766 n. 4 (citing Lee S. Siegel, Note, *As the Asbestos Crumbles: A Look at New Evidentiary Issues in Asbestos Related Property Damage Litigation,* 20 HOFSTRA L.REV. 1139, 1149 (1992)); *Smith,* 307 S.W.3d at 832 n. 3. The remaining commercial types of asbestos fibers are amphiboles, which include amosite and crocidolite. *Smith,* 307 S.W.3d at 832, 837; *Bartel v. John Crane, Inc.,* 316 F.Supp.2d 603, 606 (N.D.Ohio 2004), *aff'd,* 424 F.3d 488 (6th Cir.2005).

FN5. Dust containing asbestos fibers could be released by sanding or sweeping either formula and by mixing the dry formula.

FN6. In 1988, Timothy and Harold underwent testing to determine whether they had contracted an asbestos-related disease as a result of working at Knox Glass. A bronchial alveolar lavage (BAL) was performed on each of them to determine what type of fiber exposures had occurred. Two chrysotile and two amosite asbestos fibers were found in Timothy's BAL. There were additional fibers that were not asbestos that could not be identified. Three amosite asbestos fibers were found in Harold Bostic's BAL.

FN7. Timothy testified he worked summer months at Knox Glass in 1980, 1981, and 1982. Appellees seek to narrow the time period of exposure to asbestos and asbestos-containing products to three months by asserting that to be the cumulative amount of time Timothy worked in the hot end of the plant.

FN8. Appellees further assert that Timothy's exposure to Georgia-Pacific asbestos-containing joint compound "was far greater than any other asbestos exposure." This is apparently based on appellees "quantifying the ratio of [Timothy's] exposure to Georgia-Pacific asbestos joint compound as compared to his other exposures," which according to appellees was "ten years of Georgia-Pacific asbestos joint compound versus three months of exposure at Knox-Glass [sic], six months at Palestine Contractors, potential household exposure, and sporadic brake work." Without endorsing this methodology, we conclude this argument is inapposite to the "frequency, proximity, and regularity" test associated with substantial-factor causation.

FN9. According to Timothy's work history sheets, for a period of over thirty years from the early 1970s, Timothy was exposed to asbestos fibers from Georgia-Pacific joint compounds through his work with or around them as a self-employed carpenter with a workweek of over forty hours, at various residences with Harold as a coworker, and through household exposure resulting from Harold's work as a carpenter.

FN10. "Asbestos exposure is generally measured in fibers per cubic centimeter (fibers/cc) on an eight hour weighted average. This is calculated by taking the amount of time an individual is exposed to asbestos and mathematically calculating a time weighted average over an eight hour day.... In all urban environments, there is a level of asbestos in the ambient air. This level, often called the background level, varies from location to location and ranges from .000001 to .01 fiber/cc." *Bartel,* 316 F.Supp.2d at 607.

FN11. " 'Friable' refers to breathable asbestos." *See Flores,* 232 S.W.3d at 767 n. 6.

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JOHN CRANE INC.

Supreme Court of the United States.
JOHN CRANE INC., Petitioner,
v.
Thomas F. ATWELL, Jr., Executor of the Estate of Thomas F. Atwell, Deceased, Respondent.
No. 10-272.
August 23, 2010.

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

Petition for a Writ of Certiorari

William Smith, William R. Adams, Dickie, McCamey & Chilcote, Public Ledger Building, Suite 901, 150 South Independence Mall, West, Philadelphia, PA 19106.Daniel J. O'Connell, Mark I. Tivin, Thomas J. Burns, O'Connell, Tivin, Miller & Burns, 135 S. LaSalle Street, Suite 2300, Chicago, IL 60603, (312) 256-8800.Michael A. Pollard, Counsel of Record, Kathleen T. Sanderson, Baker & McKenzie LLP, One Prudential Plaza, 130 East Randolph Drive, Chicago, IL 60601, (312) 861-2786, Michael.Pollard@bakermckenzie.com, Counsel for Petitioner.

QUESTION PRESENTED

Whether, contrary to the ruling below, but in conformity with this Court's holding in *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926), and with an "avalanche" of decisions from both federal and state reviewing courts, the Boiler Inspection Act, 49 U.S.C. §§ 20701-20703 (2006), impliedly preempts the field of locomotive equipment, and thereby bars Respondent's state law claim?

***II** PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

This action was initially brought by Thomas F. Atwell (hereinafter "Mr. Atwell"). His son, Respondent Thomas F. Atwell, Jr., was substituted as plaintiff in his role as executor of his father's estate after his father passed away. Although Respondent originally filed the underlying asbestos case against seventy-two (72) defendants, including Petitioner, John Crane Inc. ("JCI"), only JCI remained a party defendant at the time of the trial. All other initially named defendants had either settled with Respondent or had otherwise been dismissed prior to trial.

JCI is wholly owned by John Crane Group, Ltd. (UK). John Crane Group, Ltd. (UK) is itself wholly owned by Smiths Group International Holdings, Ltd. Smiths Group International Holdings, Ltd. is wholly owned by Smiths Group plc. Smiths Group plc is traded on the London Stock Exchange. This disclosure is made pursuant to Rule 29.6.

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Cases

***1** OPINIONS BELOW

On October 10, 2007, JCI initially filed a Motion to Dismiss Based Upon Federal Boiler Inspection Act, (hereinafter "Motion to Dismiss"). On December 3, 2007, the Honorable Allan L. Tereshko, in his role at the time as Coordinating Judge for the Philadelphia County Court of Common Pleas' Complex Litigation Center, denied JCI's Motion to Dismiss. (App. 25a-29a).

On April 9, 2008, during trial, JCI, citing additional newly decided case authorities, filed a Motion for Non-Suit Based Upon Federal Boiler Inspection Act, (hereinafter "Motion for Non-Suit"), requesting reconsideration of the denial of its Motion to Dismiss. The motion was denied. JCI renewed its Motion for Non-Suit during the trial after Respondent rested, and again at the close of all the evidence. These motions were denied orally.

After the jury returned a verdict in favor of Respondent and against JCI, JCI filed a Motion for Post-Trial Relief, and again asserted the argument that Respondent's state law claims were impliedly preempted by federal law. On September 9, 2008, the trial court issued an Order and Opinion denying JCI's Motion for Post-Trial Relief. (App. 15a - 24a).

On appeal, a panel of the Pennsylvania Superior Court issued an opinion, (App. 1a - 14a), affirming the ruling of the trial court. The panel concluded, *inter alia*, that "state tort law, especially in strict liability cases, occupies one of the interstices not covered by Congressional command." (App. 12a). Nonetheless, the ***2** Superior Court panel "strongly recommended" that the Pennsylvania Supreme Court accept the case for review, stating that "[t]he decision as to whether the legal rights and remedies related to railroad workshops are or are not preempted resides more appropriately in our Supreme Court to whose attention we strongly recommend it." (App. 14a, n. 9).

On May 24, 2010, the Pennsylvania Supreme Court denied JCI's Petition for Allowance of Appeal. (App. 30a). This Petition follows.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the Superior Court of Pennsylvania dated December 17, 2009. (App. 1a - 14a); *Atwell v. John Crane, Inc.,* 986 A.2d 888 (Pa. Super. Ct. 2009). Thereafter, JCI timely filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania denied discretionary review on May 24, 2010. (App. 30a); *Atwell v. John Crane, Inc.,* 996 A.2d 490 (Pa. 2010). This Court has jurisdiction under 28 U.S.C. § 1257 (2006).

STATUTES INVOLVED

This Petition presents the question of implied field pre-emption arising from Congress's enactment of the Boiler Inspection Act, (hereinafter "BIA"), currently codified at 49 U.S.C. §§ 20701-20703 (2006).

The Supremacy Clause of the Constitution provides in relevant part: "[T]he Laws of the United States ... shall be the supreme Law of the Land ... any Thing in ***3** the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The relevant provision from the BIA is as follows:

49 U.S.C. § 20701 - "Requirements for Use":
A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances -
(1) are in proper condition and safe to operate without unnecessary danger of personal injury;
(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
(3) can withstand every test prescribed by the Secretary under this chapter.

***4** STATEMENT OF THE CASE

A. Form of Action And Procedural History

On May 10, 2004, Respondent filed this asbestos liability lawsuit against seventy-two (72) defendants, including JCI, for personal injuries that Mr. Atwell sustained as a result of his alleged exposure to asbestos. Mr. Atwell had worked as a pipe fitter from 1951 until 1980 as an employee of Southern Railway, and from 1980 until the date the complaint was filed as an employee of the Norfolk

Southern Railroad. Mr. Atwell passed away on July 23, 2006. Thomas F. Atwell, Jr. was substituted as plaintiff in his role as executor of the estate. At the time of trial, JCI was the only remaining defendant, as all other defendants had either settled or had been dismissed.

JCI initially raised the federal question at issue in this Petition in its Motion to Dismiss Based Upon Federal Boiler Inspection Act, (hereinafter "Motion to Dismiss"), that was filed on October 10, 2007. In its Motion to Dismiss, JCI argued that "Mr. Atwell's exposure to [JCI] products comes exclusively from his work in locomotives at the Southern Railway and Norfolk Southern Railway, accordingly, as overwhelmingly demonstrated by the case law, his state law claims are precluded by the Federal Boiler Inspection Act." Under federal law, Respondent's exclusive recourse would be an action under the Federal Employee's Liability Act (hereinafter "FELA"), 45 U.S.C. §§ 51-60 (2006), against his employers. The Honorable Allan L. Tereshko, in his role at the time as Coordinating Judge for the Philadelphia County Court of Common Pleas' Complex Litigation Center, denied JCI's Motion to Dismiss. (App. 25a - 29a).

***5** On April 9, 2008, at the close of Respondent's case-in-chief at trial, JCI filed a written Motion for Non-Suit Based Upon Federal Boiler Inspection Act, (hereinafter "Motion for Non-Suit"), predicated upon the issuance of three then recent decisions "identifying a Federal intention to occupy the field of common law tort claims against carriers, locomotive manufacturers, and locomotive component part manufacturers." The purpose of the Motion for Non-Suit was to allow the trial court to reconsider its earlier denial of the Motion to Dismiss. The trial court orally denied the Motion for Non-Suit. JCI renewed the Motion for Non-Suit at the close of all of the evidence, which the trial judge again orally denied.

At the conclusion of trial, the jury returned a verdict in favor of the Respondent in the amount of $150,000 and against three entities - JCI, and two other companies, A.W. Chesterton, Inc., and Garlock, Inc., that remained defendants in the case pursuant to JCI's cross-claims.

Following the jury's verdict, JCI filed a Motion for Post-Trial Relief. JCI sought, among other forms of relief, "entry of judgment in its favor pursuant to the overwhelming majority of state and lower federal court decisions holding firm to the principle set forth by the U.S. Supreme Court in *Napier v. Atlantic Coast Line R.R.,* 272 U.S. 605 (1926) that the Boiler Inspection Act preempts state tort actions." On September 9, 2008, the trial court issued an Order and Opinion denying JCI's Motion for Post-Trial Relief. (App. 15a - 24a).

***6** JCI appealed. On December 17, 2009, a panel of the Pennsylvania Superior Court issued an opinion affirming in all respects the trial court's ruling on the federal law issue. (App. 1a - 14a). The Superior Court affirmed the trial court's rulings on the federal preemption issue, concluding that "state tort law, especially in strict liability asbestos cases, occupies one of the interstices not covered by Congressional command." (App. 12a). Nevertheless, the Superior Court strongly suggested that the Pennsylvania Supreme Court accept the case. In this regard, the Superior Court stated as follows: "[t]he decision as to whether the legal rights and remedies related to railroad workshops are or are not preempted resides more appropriately in our Supreme Court to whose attention we strongly recommend it." (App. 14a, n.9).

The Pennsylvania Supreme Court, however, denied discretionary review. (App. 30a).

B. Facts Necessary To Disposition Of Case

Mr. Atwell began working for the Southern Railway in 1951. In his first six months on the job, he worked as an electrician. He then became a pipe fitter. In total, he worked for forty (40) years in the railroad industry, first at the Southern Railway and then at Norfolk Southern Railroad. As a pipe fitter for almost forty years, Mr. Atwell removed, installed and repaired all pipes on the locomotive engines and "all shop things."

Mr. Atwell's job duties brought him into contact with asbestos-containing gaskets, packing and pipe wrap on the locomotives. Additionally, he worked near other ***7** tradesmen, such as machinists, who removed, installed and repaired asbestos-containing train brakes on the locomotives.

The packing was used to stop leaks on water and steam valves on the locomotive engines. It made dust when it was cut and "hit" into valves. Mr. Atwell testified that he breathed the dust. Gaskets were used on water pumps, air compressors and oil pumps on the locomotives. When gaskets were cut to fit, they made dust that he breathed. The packing and gaskets were made by A. W. Chesterton, Inc., Garlock, Inc., and JCI. The pipe wrap inside the locomotives created dust when it was chiseled or struck with a hammer making a

fine dust that he breathed. Further, the machinists also created asbestos dust that he breathed. The brake shoes on the locomotives would be ground and sometimes hit into place, which released asbestos dust that Mr. Atwell inhaled.

ARGUMENT: REASONS FOR GRANTING THE PETITION

This Court should grant discretionary review of the Superior Court of Pennsylvania's decision for any one of three reasons. First, pursuant to Rule 10(c) of this Court, the Superior Court has decided an important federal question in a way that conflicts with a relevant decision of this Court. Specifically, the Superior Court's conclusion that Respondent's state law tort claims are not preempted by the BIA directly conflicts with the holding of this Court in *Napier v. Atlantic Coast Line R.R. Co.,* 272 U.S. 605 (1926). In *Napier*, this Court ***8** unanimously held that Congress intended, through its enactment of the BIA, and more specifically, its amendments, to preempt the entire field of locomotive equipment and safety, including the design, construction and material of locomotives and their parts. 272 U.S. at 611-613 (1926). Further, in 1983, this Court impliedly affirmed that *Napier* remains viable, notwithstanding the subsequent enactment of the Federal Railroad Safety Act of 1970 ("FRSA"), Pub. L. No. 91-458, title II, 84 Stat. 971 (1970) (codified as amended in scattered sections of 49 U.S.C.), by summarily affirming the district court's opinion in *Consol. Rail Corp. v. Pa. Pub. Util. Comm'n,* 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983).

Second, pursuant to Rule 10(b) of this Court, the Superior Court's decision, which was allowed to stand by virtue of the Pennsylvania Supreme Court's denial of discretionary review, conflicts with a consistent body of case law from other courts of review. The Superior Court's holding is contrary to what one state court of last resort has described as an "avalanche" of state and federal authority supporting implied federal preemption of state law claims. *In re West Virginia Asbestos Litig.,* 592 S.E.2d 818, 822 (W. Va. 2003), *cert. denied sub nom. Abbott v. A-Best Prods. Co.,* 549 U.S. 823 (2006). The conflict between the Superior Court's decision below and the "avalanche" of contrary authority on this important issue of federal law warrants review by this Court.

***9** Lastly, given the uncertainty in the law created by the Superior Court's decision, asbestos liability lawsuits against locomotive equipment manufacturers, especially in Pennsylvania, have begun to be deferred. Indeed, as recently as August 12, 2010, U.S. District Judge Eduardo C. Robreno, who has been assigned by the panel on Multi-District Litigation ("MDL"), to administer the asbestos liability MDL cases, (MDL Docket No. 875), deferred ruling on summary judgment motions raising the issue advanced here. Order, *Perry v. A.W. Chesterton, Inc.,* No. 95-1996 (E.D. Pa. Aug. 12, 2010), ECF No. 218. In choosing to defer ruling, Judge Robreno stated on the record that "[t]here are several thousand cases probably, whose fate will depend upon what the Third Circuit or the United States Supreme Court decides on this issue." Hr'g Tr. at 32:8-11, *Perry v. A.W. Chesterton, Inc.,* No. 95-1996 (E.D. Pa. July 20, 2010). Given that the question of federal law incorrectly decided by the Superior Court affects thousands of other pending cases, this Court should review the question presented herein at this time.

I. THE SUPERIOR COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *NAPIER*

Article VI of the U.S. Constitution provides that federal law "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Generally, three types of preemption exist: (1) express preemption, where federal law includes a specific provision preempting state law; (2) field preemption, where the U.S. Congress occupies an entire field of ***10** regulation with comprehensive legislation, thereby implicitly expressing an intention to exclude state law; and (3) conflict preemption, where state, law that conflicts with the federal law is preempted. *English v. Gen. Electric Co.,* 496 U.S. 72, 78-79 (1990).

The United States Congress, or by delegation, federal agencies, have exercised authority over the railroads even before the first transcontinental railroad was completed. *See Union v. Long Island R.R. Co.,* 455 U.S. 678, 687-88 (1982) (discussing history of federal regulation of the railroads). In 1911, Congress passed the original version of the BIA. Act of Feb. 17, 1911, Pub. L. No. 61-383, ch. 103, § 2, 36 Stat. 913 (current version at 49 U.S.C. §§ 20701-20703 (2006)). The BIA was enacted for the purpose of protecting "employees and others by requiring the use of safe equipment." *Urie v. Thompson,* 337 U.S. 163, 182, at n. 20 (1949). As originally enacted, the BIA applied only to the boiler of the locomotive, but, in 1915, the act was amended to cover "the entire locomotive and tender and all parts and appurtenances," Act of Mar. 4, 1915, Pub. L. No. 63-318, ch. 169, § 1, 38 Stat. 1192 (current version at 49 U.S.C. §§ 20701-20703 (2006)). The statute then became known as the Locomotive Inspection Act. Finally, the BIA was recodified, without substantive change, in 1994. Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 (codified as amended in scattered sections of 49 U.S.C.). However, because the statute has historically been known as the BIA, and because that term was used throughout the briefs and opinions of the state courts, to avoid confusion and promote consistency, it has been referenced as the BIA throughout this Petition.

***11** In its current form, the BIA states that:
"a railroad may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances (1) are in proper condition and safe to operate without unnecessary danger of personal injury; (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation ...; and (3) can withstand every test prescribed by the Secretary under this chapter."

49 U.S.C. § 20701. The language of the statute leaves no doubt that Congress intended to insure the safe operation of locomotives and their appurtenances, and the prevention of employee injuries, by regulating locomotives and their appurtenances.

When federal law occupies a field, individual states must leave all law making activity within the occupied field to the federal government. *Mich. Carriers & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.,* 467 U.S. 461, 469 (1984); *see also Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992). Because field preemption by its very definition means that the Congressional intent is to occupy the entire field, it extends beyond the express terms of the federal statute and accompanying regulations to matters that come even within the contemplation of the federal statute and regulations. *See S. Ry. Co. v. R.R. Comm'n of Ind.,* 236 U.S. 439 (1915). Implied field preemption may be found "in the absence of explicit statutory language," and ***12** "state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English,* 496 U.S. 72, 79. "Such an intent may be inferred from a 'scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touches a field in which [the] federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " *Id.* (citations omitted).

In *Napier*, this Court unanimously held that the BIA occupies the field of all matter that is "within the scope of the authority delegated to the [Interstate Commerce] Commission" - now the Secretary of Transportation - including "the design, the construction and the material of every part of the locomotive," *i.e.*, the "entire locomotive ... and all parts and appurtenances thereof." 272 U.S. at 608, 611, 613. The phrase "all parts and appurtenances" encompasses "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission." *S. Ry. Co. v. Lunsford,* 297 U.S. 398, 402 (1936).

Furthermore, this Court has impliedly affirmed that *Napier* remains viable, and did so in a case, *Consol. Rail Corp. v. Pa. Pub. Util. Comm'n,* 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983), that impliedly overruled the very 1980 precedent of the Pennsylvania Supreme Court on the question of implied preemption that the Superior ***13** Court below felt constrained to follow. (App. 9a-13a); *Atwell v. John Crane, Inc.,* 986 A.2d 888, 893-94 (Pa. Super. Ct. 2009), citing *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n,* 413 A.2d 1037 (Pa. 1980).

In the *Norfolk & Western* case on which the Superior Court relied, the Pennsylvania Supreme Court reversed the Pennsylvania Commonwealth Court, which had determined that the BIA preempted a Pennsylvania Public Utility Commission railroad safety regulation. The Pennsylvania Supreme Court held in *Norfolk & Western* that a state railroad safety regulation was not preempted by the BIA, because language contained in the subsequently enacted FRSA allowed states to regulate railroad safety until the United States Secretary of Treasury adopted a rule or regulation covering the same subject matter. 413 A.2d at 1041-44. In so holding, the Pennsylvania Supreme Court stated in *Norfolk & Western* as follows: "[w]hile the broad language of the [Boiler Inspection] Act at one time could have been interpreted as reflecting Congressional intent to pre-empt the entire field of railroad safety, the enactment of section 205 of the [FRSA] no longer permits that reading." 413 A.2d at 1043.

Yet, nothing in the FRSA repealed the BIA, and the FRSA's legislative history expressly reaffirms that the BIA continues to preempt the field. In enacting the FRSA in 1970, Congress reaffirmed that under the BIA, and five other laws, "where the Federal Government has authority, with respect to rail safety, it preempts the field." H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4108. Congress further stated in 1970 that these laws "have served well" and therefore "chose to continue them without change." *Id.* at 4105. ***14** Moreover, in recodifying the BIA and other transportation laws in 1994, Congress made clear that "[a]s in other codification bills enacting titles of the United States code into positive law, [the] bill makes no substantive change in the law," and expressly preserved "the precedent value of earlier judicial decisions," such as *Napier.* Act of July 5, 1994, Pub. L. No. 103-272 §§ 1(a), 6(a), 108 Stat. 745, 1378; H.R. Rep. No. 103-180, 3, 5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 820, 822.

Most important, only three years after *Norfolk & Western* was decided, it was impliedly overruled. In *Consol. Rail Corp. v. Pa. Pub. Util. Comm'n,* 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983), the plaintiff railroad challenged a Pennsylvania statute that required locomotives to have speed recorders and indicators, contending the BIA preempted

this state regulation. Relying on the Pennsylvania Supreme Court's decision in *Norfolk & Western*, the Commonwealth countered that when Congress enacted the FRSA in 1970, it "redistributed railroad regulatory authority so that the total-preemption test of the [BIA] is no longer valid." *Id.* The district court rejected the Commonwealth's argument and held that *Napier* was controlling. *Id.* at 655-57. Specifically, the district court held that Congress "concluded that [the Act] was working well, and specifically determined to keep it independently in force 'without change.' " *Id.* at 656.

On appeal, both the Third Circuit and this Court summarily affirmed. *Consol. Rail Corp. v. Pa. Pub. Util. Comm'n,* 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983). Such summary actions "should ... be understood as ... applying principles established by prior decisions ***15** to the particular facts involved," and they "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley,* 432 U.S. 173, 176 (1977). Additionally, "lower courts are bound by summary decisions [of the United States Supreme Court] until such time as the Court informs them that they are not." *Hicks v. Miranda,* 422 U.S. 332, 344-45 (1975) (citations omitted). Therefore, this Court impliedly overruled the Pennsylvania Supreme Court's holding in *Norfolk & Western* on the federal law issue implicated here, and on which the Superior Court below relied.

In arriving at its conclusion that "state tort law, especially in strict liability asbestos cases, occupies one of the interstices not covered by Congressional demand," (App. 12a), the Superior Court mistakenly devoted much of its discussion to *Norfolk & Western*, without ever indicating that it was repudiated and impliedly overruled by the subsequent decisions in *Consol. Rail Corp. v. Pa. Pub. Util. Comm'n,* 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983). Furthermore, the Superior Court purportedly relied on modern preemption jurisprudence in an attempt to narrow the proper construction of field preemption, and by implication, to deem *Napier* superseded. (App. 8a-13a); *Atwell,* 986 A.2d 892-94. That effort must fail, as only this Court can make such a ruling. As this Court has stated:
"if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals [and state courts applying federal law] should follow the ***16** case which directly controls, leaving to this Court the prerogative of overruling its own decision."

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); *Agostini v. Felton,* 521 U.S. 203, 237 (1997).

Therefore, *Napier* remains the controlling precedent in the area of BIA preemption. *See, e.g., Forrester v. American Dieselelectric, Inc.,* 255 F.3d 1205, 1210 (9th Cir. 2001) ("None of the Court's more recent preemption cases have questioned the authority of *Napier* and, in any event, the rule is too well established to permit such a qualification by a lower court"); *Wright v. Gen. Electric Co.,* 242 S.W.3d 674, 679 (Ky. App. Ct. 2007) (rejecting plaintiffs' argument that modern preemption jurisprudence has undermined the continuing viability of *Napier*); *Gen. Motors Corp. v. Kilgore,* 853 So. 2d 171, 177-178 (Ala. 2002) (rejecting plaintiffs' claim that the field of the BIA's preemption has been narrowed by recent Supreme Court jurisprudence). The Superior Court erred by failing to follow *Napier.* This Petition should be granted.

***17** II. THIS COURT SHOULD GRANT DISCRETIONARY REVIEW, BECAUSE THE SUPERIOR COURT DECISION IS CONTRARY TO AN "AVALANCHE" OF STATE AND FEDERAL AUTHORITY SUPPORTING FIELD PREEMPTION.

For over 80 years, since Justice Brandeis's opinion for a unanimous Supreme Court in *Napier v. Atlantic Coast Line R.R. Co.,* 272 U.S. 605 (1926), it has been settled that Congress intended the BIA to preclude all state law respecting locomotives and locomotive parts and equipment used in interstate commerce. In particular, the highest state courts of review that have been asked to decide the precise federal issue in this Petition, in the context of asbestos liability litigation against manufacturers of locomotive equipment, have uniformly ruled in favor of federal preemption. *See Darby v. A-Best Prods. Co.,* 811 N.E.2d 1117 (Ohio 2004) (BIA preempts state-law tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives), *cert. denied*, 543 U.S. 1146 (2005); *In re W. Va. Asbestos Litig.,* 592 S.E.2d 818 (W. Va. 2003) (BIA preempts any state action that would affect the design, the construction, and the material of locomotives), *cert. denied sub nom. Abbott v. A-Best Prods. Co.,* 549 U.S. 823 (2006); *Gen. Motors Corp. v. Kilgore,* 853 So.2d 171 (Ala. 2002) (BIA preempts claims against manufacturer for use of asbestos in locomotive parts); *Scheiding v. Gen. Motors Corp.,* 993 P.2d 996 (Cal. 2000) (holding BIA preempted state-law defective design and failure-to-warn claims against manufacturer), *cert. denied*, 531 U.S. 958 (2000).

***18** So too have numerous state trial courts, and state courts of intermediate review. *See, e.g., Wright v. Gen. Electric Co., 242* S.W.3d 674 (Ky. Ct. App. 2007) (BIA bars state common law tort claims against carriers, locomotive manfuacturers, and locomotive component part manufacturers); *Frastori v. Vapor Corp.,* 70 Cal. Rptr. 3d 402 (Cal. Ct. App. 2007) (BIA forecloses state tort claims

against locomotive manufacturers for defective design of their product); *Caradonna v. A.W. Chesterton Co., Inc.,* 2007 N.Y. Misc. LEXIS 8994 (N.Y. Slip Op. April 25, 2007) (finding claims of railroad worker, against various manufacturers of locomotives and their components and parts, preempted under the BIA); *Seaman v. A.P. Green Indus.,* 707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) (finding federal field preemption under the BIA and accordingly dismissing all claims against locomotive manufacturer).

Importantly, two federal district courts in Pennsylvania have, in asbestos liability actions against locomotive equipment manufacturers, held that federal preemption impliedly preempts these state law claims, and have rejected the very arguments adopted by the Superior Court on the federal issue implicated in this case. *See D'Amico v. Garlock Sealing Techs., LLC,* No. 92-5544, 2007 U.S. Dist. LEXIS 67664, at *18 (E.D. Pa. 2007) ("Forcing railroad manufacturers to conform to state design and construction standards would naturally impinge on the field of locomotive equipment that Congress occupied through the BIA"); *Kurns v. A.W. Chesterton, Inc.,* No. 08-2216, 2009 U.S. Dist. LEXIS 7757, at *22 (E.D. Pa. Feb. 3, 2009) (holding that "common law tort claims are preempted by the BIA, a federal law enacted to occupy the field of regulating ***19** locomotives, their parts and appurtenances"). The *Kurns* case is presently pending on appeal before the Court of Appeals for the Third Circuit. *Id., appeal docketed*, No. 09-1634 (3rd Cir. March 11, 2009). In the meantime, asbestos liability claims against locomotive equipment manufacturers - barred in the neighboring states of Ohio, New York, West Virginia, and Kentucky, and in the federal courts in Pennsylvania itself,[FN1] are continuing to be filed in the state court system in Pennsylvania because of the decision in this case.[FN2]

> FN1. Federal courts in Pennsylvania, including the judge overseeing the asbestos MDL proceedings in Philadelphia, have begun to stay asbestos liability actions against locomotive equipment manufacturers because of the unsettled state of the law created by the decision at issue here. *See* discussion *infra* Section III.
>
> FN2. Following upon the Superior Court's decision at issue here, another panel of the Superior Court allowed an asbestos liability action against locomotive equipment manufacturers to proceed under state law. *Harris v. A.W. Chesterton, Inc.,* 996 A.2d 562 (Pa. Super Ct. 2010). The defendant's Petition for Allowance of Appeal to the Pennsylvania Supreme Court in Harris was denied by the Pennsylvania Supreme Court on August 3, 2010. *Harris v. A.W. Chesterton, Inc.,* No. 153 EAL 2010, 2010 Pa. LEXIS 1679 (Pa. Aug. 3, 2010).

It should be noted that the rule of federal field preemption articulated by *Napier* does not bar a plaintiff from recovering. A plaintiff may recover for an asbestos-related injury in a suit against his employer under FELA. 45 U.S.C. §§ 51-60. FELA provides railroad employees injured or killed on the job a range of damage recoveries if the railroad's negligence was a cause of the injuries to the employee. 45 U.S.C. § 51; *Consol. Rail Corp. v.* ***20** *Gottshall,* 512 U.S. 532, 543 (1994) (FELA liability attaches if the employer's negligence contributed "any part" to the injury).

More broadly, and outside of the context of asbestos liability litigation, at least five federal courts of appeals have also held that the BIA impliedly preempts state common law or statutory claims against manufacturers and distributors of locomotive equipment. *See, e.g., Forrester v. American Dieselelectric, Inc,* 255 F.3d 1205 (9th Cir. 2001) (BIA preempts non-employee product liability actions against manufacturer of locomotive cranes); *Law v. Gen. Motors Corp.,* 114 F.3d 908 (9th Cir. 1996) (BIA preempts design defect and failure to warn claims against manufacturer concerning engine insulation and brake noise); *First Security Bank v. Union Pacific R.R. Co.,* 152 F.3d 877 (8th Cir. 1998) (BIA preempts state common-law remedies against railroad manufacturers for injuries arising out of alleged design defects); *Springston v. Consol. Rail Corp.,* 130 F.3d 241 (6th Cir. 1997) (BIA preempts claim based on inadequacy of warning devices), *cert. denied*, 523 U.S. 1094 (1998); *Oglesby v. Delaware & Hudson Ry.,* 180 F.3d 458 (2d Cir. 1999) (BIA preempts claim that manufacturer should have placed warning label on defective seat), *cert. denied sub nom. Oglesby v. Gen. Motors Corp.,* 528 U.S. 1004 (1999); *United Transp. Union v. Foster,* 205 F.3d 851 (5th Cir. 2000) (BIA preempts statute requiring engine be equipped with signal devices); *Mo. Pac. R.R. Co. v. R.R. Comm'n of Tex.,* 833 F.2d 570 (5th Cir. 1987) (BIA preempts state requirement for emergency equipment).

Further, as recognized by the Supreme Court of Appeals of West Virginia, "an overwhelming body of case ***21** law" follows *Napier* without exception, and holds that the BIA preempts common law and statutory claims against railroad operators and locomotive manufacturers related to the design, construction, or material of locomotives and their parts, and "any other path [is] blocked by an avalanche of adverse authority from other jurisdictions, both state and federal." *In re W. Va. Asbestos Litig.,* 592 S.E.2d at 822. *See, e.g., Roth v. I & M Rail Link LLC,* 179 F. Supp. 2d 1054 (S.D. Iowa 2001) (BIA preempts state law negligence claims against the manufacturer of a locomotive); *Norfolk S. Ry. Co. v. Denson,* 774 So. 2d 549 (Ala. 2000) (BIA preempts state law claim seeking to hold locomotive manufacturer liable for failure to install air conditioning); *Mickelson v. Mont. Rail Link, Inc.,* 999 P.2d 985 (Mont. 2000) (BIA preempts common law claims against railroad concerning locomotive equipment); *In re Train Collision at Gary, Ind.,* 670 N.E.2d

902 (Ind. App. Ct. 1996) (BIA preempts claims regarding alleged defects in the design and structure of train cars), *appeal denied sub nom. Dillon v. Chicago Southshore & South Bend R.R. Co.,* 683 N.E.2d 591 (Ind. 1997), *cert. denied sub nom. Dillon v. Northern Ind. Commuter Transp. Dist.,* 522 U.S. 914 (1997); *Stevenson v. Union Pac. R.R. Co.,* No. 4:07CV00522BSM, 2009 U.S. Dist. LEXIS 6148 (E.D. Ark. Jan. 20, 2009) (holding that the BIA preempts a contribution and indemnification claim because the underlying claim was preempted by the BIA); *Key v. Norfolk S. Ry. Co.,* 491 S.E.2d 511 (Ga. App. Ct. 1997) (BIA preempts common law claims against railroad by employee injured in fall from locomotive steps); *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala. On Sep. 22, 1993,* 188 F. Supp. 2d 1341 (S.D. Ala. ***22** 1999) (BIA preempts passenger and employee common law negligence and design defect claims against Amtrak).

In arriving at its conclusion that "state tort law, especially in strict liability asbestos cases occupies one of the interstices not covered by Congressional demand," (App. 12a), the Superior Court fails to mention this "avalanche of authority," notwithstanding that it was brought to the panel's attention. Pursuant to Rule 10(b) of this Court, the Superior Court's decision, which was allowed to stand by virtue of the Pennsylvania Supreme Court's denial of discretionary review, conflicts with a consistent and overwhelming body of case law from state courts of last resort and federal courts of appeal. The Petition should be granted. The conflict between the Superior Court's decision below, and the "avalanche" of contrary authority on this important issue of federal law warrants review by this Court.

III. THIS COURT SHOULD GRANT DISCRETIONARY REVIEW, BECAUSE THE QUESTION OF FEDERAL LAW INCORRECTLY DECIDED BY THE SUPERIOR COURT AFFECTS "SEVERAL THOUSAND" PENDING CASES

Finally, given the uncertainty in the law created by the Pennsylvania Superior Court's decision, asbestos liability lawsuits against locomotive equipment manufacturers have begun to be deferred, pending a determinative decision from either this Court or the Third Circuit, on the issue of the preemptive effect of the BIA. Indeed, as recently as August 12, 2010, U.S. District Judge Eduardo C. Robreno, who has been ***23** assigned by the panel on MDL, to administer the asbestos liability MDL cases, deferred ruling on summary judgment motions raising the issue advanced here. Order, *Perry v. A.W. Chesterton, Inc.,* No. 95-1996 (E.D. Pa. Aug. 12, 2010), ECF No. 218. In choosing to defer ruling, Judge Robreno stated on the record that "[t]here are several thousand cases probably, whose fate will depend upon what the Third Circuit or the United States Supreme Court decides on this issue." Hr'g Tr. at 32:8-11, *Perry v. A.W. Chesterton, Inc.,* No. 95-1996 (E.D. Pa. July 20, 2010). Given that the question of federal law incorrectly decided by the Superior Court affects thousands of other pending cases, this Court should review the question presented herein at this time.

***24** CONCLUSION

For the foregoing reasons, JCI respectfully requests that the Court grant the instant Petition for a Writ of Certiorari.

John Crane Inc. v. Atwell
2010 WL 3355815 (U.S.) (Appellate Petition, Motion and Filing)

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MOORE

Superior Court of Pennsylvania.

Judith MOORE, Administratrix of the Estate of Donnie R. Moore, Deceased, and in her Own Right, Appellee
v.
ERICSSON, INC. (Successor to Anaconda Wire and Cable Company), AMTCO/American Biltrite, CBS Corporation, Certainteed Corporation, Champlain Cable Corporation, Cleaver-Brooks, Inc., Crown Cork & Seal Company, Inc., DFT, RPM, Bondex International and Goodyear Tire and Rubber Co., DFT, RPM, Bondex International, Fosterwheeler, LLC, Garlock Sealing Technologies, LLC, General Electric Company, CY Goldberg, Ingersollrand, Georgia Pacific, Melrath Gasket Company, Metropolitan Life Insurance, Owens-Illinois, Inc., Riley Power, Inc., Union Carbide Corporation and Kelly-Moore Paint Co., Appellants.
Judith Moore, Administratrix of the Estate of Donnie R. Moore, Deceased, and in her Own Right, Appellant
v.
Ericsson, Inc. (Successor to Anaconda Wire and Cable Company), AMTCO/American Biltrite, CBS Corporation, Certainteed Corporation, Champlain Cable Corporation, Cleaver-Brooks, Inc., Crown Cork & Seal Company, Inc., DFT, RPM, Bondex International and Goodyear Tire and Rubber Co., DFT, RPM, Bondex International, Fosterwheeler, LLC, Garlock Sealing Technologies, LLC, General Electric Company, CY Goldberg, Ingersollrand, Georgia Pacific, Melrath Gasket Company, Metropolitan Life Insurance, Owens-Illinois, Inc., Riley Power, Inc., Union Carbide Corporation and Kelly-Moore Paint Co., Appellees.

Nos. 2213 EDA 2009, 2112 EDA 2009.

Sept. 17, 2010.

Appeal from the Order entered June 4, 2009, In the Court of Common Pleas of Philadelphia County, Civil Division, No. 001441 October Term, 2006.

BEFORE: ALLEN, LAZARUS, and FREEDBERG [FN*], JJ.

FN* Retired Senior Judge assigned to the Superior Court.

OPINION BY LAZARUS, J:

***1** In this asbestos personal injury action, Appellant/Cross-Appellee Ericsson, Inc. (Defendant/Ericsson) and Cross-Appellant/Appellee Judith Moore, Individually and as Administratrix of the Estate of Donnie R. Moore, Deceased (Plaintiffs/Moore), appeal from the order of the Court of Common Pleas of Philadelphia County denying Ericsson's post-trial motions and entering judgment on the molded jury verdict in the amount of $1,190,654.00 [FN1] in favor of Moore. We affirm.

FN1. The molded jury verdict, $1,083,334.00, plus delay damages in the sum of $107,320.00.

Ericsson raises eight issues on appeal:

1. Did the court err when it failed to grant Ericsson's motion for nonsuit and/or directed verdict?

2. Did the court commit an abuse of discretion or error of law when it instructed the jury that the products in question were defective because they contained asbestos and then submitted an improper verdict form that did not require a finding of defect?

3. Did the court commit an abuse of discretion or error of law in allowing Plaintiffs' expert, Dr. Eugene J. Mark, to testify beyond the scope of his report and beyond the scope of his expertise?

4. Did the trial court commit an abuse of discretion in allowing Plaintiffs' experts to testify regarding EPA Clean Air standards and OSHA standards and then precluding defendants from commenting on governmental standards evidence favorable to it during closing arguments?

5. Did the trial court commit an abuse of discretion in not preventing the jury from hearing about insurance and permitting Plaintiffs' counsel to suggest to the jury specific sums of money as an appropriate award for the case?

6. Did the trial court commit an abuse of discretion or error of law when it consolidated unrelated asbestos cases for trial?

7. Did the trial court commit an abuse of discretion or error of law in entering judgment on improperly molded jury verdicts including, but not limited to, the satisfaction and payment of Gould's Pumps, Inc.'s proportionate share of liability and improperly allowing plaintiff to recover more than 100% of the damage award?

8. Did the trial court commit an abuse of discretion or error of law in improperly calculating delay damages?

Plaintiff Moore raises two issues on cross appeal:

1. Did the court err in failing to assign a full and equal share of liability to Johns-Manville when calculating the trial judgment in this case, when both Plaintiff and Defendant stipulated, and the court agreed, that Johns-Manville should be assigned a full and equal share of liability as a joint tortfeasor for purposes of calculating the judgment in this case?

2. Did the court err in calculating damages for delay as a result of its failure to assign a full and equal share of the liability as a joint tortfeasor to Johns-Manville?

Plaintiffs, Donnie Moore (Moore) and his wife, Judith Moore, initiated this action on October 11, 2006 against Defendant Ericsson and 34 other defendants [FN2], alleging Moore developed mesothelioma as a result of exposure to asbestos dust while working as a laborer and electrician at Kingsport Press, a printing company in Tennessee. Moore worked at Kingsport Press from 1960 until his retirement in 2004. Moore died prior to trial.

FN2. Ericsson is the only remaining active defendant; the remaining 34 have since settled.

***2** Ericsson claims the court erred in denying both its motion for nonsuit at the close of Plaintiff's evidence and its motion for directed verdict at the close of all the evidence. Ericsson claims Plaintiff failed to prove that: (1) Ericsson wire and cable contained asbestos; (2) Donnie Moore inhaled asbestos fibers from Ericsson wire and cable; and (3) Ericsson wire and cable were defective. We disagree.

In reviewing a trial court's decision whether or not to grant a motion for non-suit/directed verdict in favor of one of the parties, an appellate court must consider the evidence, together with all favorable inferences drawn therefrom, in a light most favorable to the verdict winner. Shay v. Flight C Helicopter Services, Inc., 822 A.2d 1 (Pa.Super.2003). To establish causation in an asbestos case the plaintiff must prove the exposure to asbestos caused the injury and that it was the defendant's asbestos-containing product that caused the injury. To satisfy this burden a plaintiff must meet the "regularity, frequency and proximity" test as articulated by our Supreme Court in Gregg v. V-J Auto Parts Co., 943 A.2d 216 (Pa.2007).

In Gregg, our Supreme Court explained the appropriate application of the "frequency, regularity and proximity" criterion this Court announced in Eckenrod v. GAF Corp., 544 A.2d 50 (Pa.Super.1988). In so doing, the Supreme Court adopted the approach utilized by the United States Seventh Circuit Court of Appeals in the case of Tragarz v. Keene Corp., 980 F.2d 411 (7th Cir.1992), explaining that there is no bright-line distinction between direct and circumstantial evidence cases "because this distinction is unrelated to the strength of the evidence and is too difficult to apply, since most cases involve some combination of direct and circumstantial evidence." Gregg, 943 A.2d at 226 (footnote omitted). More specifically, the Supreme Court opined:

Tragarz explains that these criteria do not establish a rigid standard with an absolute threshold necessary to support liability. Rather, they are to be applied in an evaluative fashion as an aid in distinguishing cases in which the plaintiff can adduce evidence that there is a sufficiently significant likelihood that the defendant's product caused his harm, from those in which such likelihood is absent on account of only casual or minimal exposure to the defendant's product. Further, Tragarz suggests that the application of the test should be tailored to the facts and circumstances of the case, such that, for example, its application should become "somewhat less critical" where the plaintiff puts forth [direct rather than only circumstantial] evidence of exposure to a defendant's product. Similarly, under Tragarz, the frequency and regularity prongs become "somewhat less cumbersome" in cases involving diseases [like mesothelioma] that the plaintiff's competent medical evidence indicates can develop after only minor exposures to asbestos fibers.

***3** Gregg, 943 A.2d at 225 (internal citations omitted).

At trial in this case, the evidence established that Moore was employed at Kingsport Press for 44 years. Ericsson owned two companies, Anaconda Wire and Cable Company and Continental Wire and Cable Company; both companies made asbestos wire marketed under the name, "Anaconda." During his employment at Kingsport Press, Moore was exposed to various asbestos-containing products, including wire and cable attributable to Ericsson. A videotaped deposition showed Moore clearly identifying these products and stating that when these wires and cables were cut or stripped, dust was created. Donnie Moore Deposition, 11/14/2006, at 9-11. Moore stated that he knew the wire was coated with asbestos. Id. at 9-10. He testified that he used the cable and wire in small pieces, so he had to cut them. Cutting the cable and wire released dust and fibers into the air. Moore also testified that he worked within "arm's length" of that dust, and that he inhaled the dust. Id. at 10-12. Moore added that he worked with this cable approximately once a month for his entire career. Id. at 12.

Doctor Vittorio Argento, an environmental engineer and expert for Ericsson, testified that the Anaconda/Continental wire he tested contained asbestos, between 25% and 40%, and that when he cut the wire it released asbestos into the air. N.T. Trial, 2/26/2009, at 75-78.

Doctor Richard Lemen, an epidemiologist who began studying asbestos-related diseases in 1970, testified that if asbestos is released from the materials a person is working with, and the person inhales the fibers, that puts that person at risk of developing disease, including fibrosis of the lung, lung cancer, mesothelioma and laryngeal cancer. N.T. Trial, 2/19/2009, at 44.

Eugene Mark, M.D., a certified pathologist at Massachusetts General Hospital and Harvard Medical School, is an expert in mesothelioma and asbestos. He testified that if the evidence showed: (1) that Moore worked with Anaconda wire, (2) that the wire contained asbestos, (3) that Moore would cut or skin back the asbestos insulation to expose the wire once a month, (4) that the wire when cut released visible dust, (5) that he breathed the dust from an arm's length away, and (6) that, taking into account the frequency and proximity of exposure, Moore's exposure to Anaconda asbestos wire would have been a substantial contributing factor towards the development of his mesothelioma. N.T. Trial, 2/20/09, at 67-70. Doctor Mark testified that Moore had diffuse malignant mesothelioma, that there is no safe level of exposure to asbestos known, N.T. Trial, 2/21/09, at 47-48, and that Moore's exposure to Ericsson's wire and cable contributed to his death from mesothelioma. Id. at 41.

Ericsson's claims regarding certain conflicts in the evidence do not persuade us differently. We agree with Plaintiffs that conflicts in the weight of the evidence and a "battle of the experts" do not warrant a directed verdict. That is for the jury to resolve. Juliano v. Johns-Manville Corp., 611 A.2d 238, 240 (Pa.Super.1992).

***4** We conclude, therefore, that the evidence established that Donnie Moore was exposed to Ericsson asbestos products on a regular, frequent and proximate basis during his forty-four years as an electrician at Kingsport Press. Gregg, supra. The evidence was sufficient for the jury to find that Donnie Moore was regularly exposed to wire and cable manufactured, supplied or distributed by Ericsson, that these products contained asbestos, and that this exposure was a substantially contributing factor in the development of his mesothelioma and his death. See Bugosh v. Allen Refractories Co., 932 A.2d 901 (Pa.Super.2007); Donoughe v. Lincoln Elec. Co., 936 A.2d 52 (Pa.Super.2007); see also Harahan v. AC & S, Inc., 816 A.2d 296 (Pa.Super.2003) (evidence sufficient to establish worker had been injured from exposure to asbestos emanating from defendant's product where evidence showed decedent died from asbestos-related disease and pipe sealant and roofing cement, to which decedent had been exposed at workplace, contained asbestos and shed asbestos dust which decedent had inhaled); Andaloro v. Armstrong World Ind., Inc., 799 A.2d 71 (Pa.Super.2002) (causation of asbestos-related injuries is shown upon proof that plaintiff inhaled some fibers from products of defendant manufacturer; plaintiff does not have to prove through expert testimony how many asbestos fibers are contained in dust emissions from particular asbestos-containing product, or demonstrate specific lengths of fibers contained in manufacturer's product, the length of fibers he inhaled, or overall concentration of fibers in air).

Next, Ericsson claims the court abused its discretion or committed an error of law when it instructed the jury that the products in question were defective because they contained asbestos where the verdict form did not require a finding of defect. In a strict liability design defect case the issue is whether the product contained any element that made it unsafe for its intended use. Azzarello v. Black Bros. Co., 391 A.2d 1020 (Pa.1978) (question of defective design and unreasonably dangerous are questions of law). With respect to asbestos cases, what renders the product unsafe for its intended use is the presence of asbestos in the product, or the dangers from inhalation of asbestos fibers. See Estate of Hicks v. Dana Companies, LLC, 984 A.2d 943, 968 (Pa.Super.2009) (en banc).

Here, Ericsson stipulated that Moore's mesothelioma was caused by asbestos. The court determined as a matter of law that the asbestos wire was defective or unreasonably dangerous. As the trial judge stated, the issue was not whether a product was defective because it contained asbestos; "[i]nstead, the trial issues, and therefore the factual issues remaining for the jury were limited to whether the Defendant's particular product contained asbestos, whether the Plaintiff[ ][was] exposed to it, and whether such exposure caused Plaintiff's mesothelioma." Trial Court Opinion, 6/4/2009, at 9. We find no error or abuse of discretion.

***5** In its third issue, Ericsson claims the court abused its discretion in allowing Plaintiffs" expert, Dr. Eugene J. Mark, a Pathologist at Massachusetts General Hospital and at Harvard Medical School, to testify beyond "his designation and his area of expertise." In particular, Ericcsson claims that the trial court abused its discretion in permitting Dr. Mark to testify beyond the scope of his expert report, in allowing Dr. Mark to testify using reports and summaries not provided to Ericsson prior to trial, and in permitting Dr. Mark to testify as to whether Moore's mesothelioma was caused by asbestos products attributable to Ericsson.

The admission of expert testimony is a matter for the discretion of the trial court and the trial court's decision will not be overruled absent a clear abuse of discretion. Rafter v. Raymark Industries, Inc., 632 A.2d 897 (Pa.Super.1993). Based on our review, we find no error or abuse of discretion.

As the trial court points out, prior to trial the parties had agreed that Moore had been exposed to asbestos products during his work life and that this asbestos exposure brought about his death from mesothelioma. Trial Court Opinion, at 6-7. The issue before the jury was product identification, that is, whether Moore was exposed to asbestos products attributable to Ericsson and whether that exposure was a substantial factor in causing Moore's mesothelioma. Id.

Doctor Mark was designated to testify regarding the general pathology of Moore's disease and its clinical course and progression. As an expert in "dust diseases," one of which is diffuse malignant mesothelioma, Doctor Mark's expertise encompasses diagnosis as well as causation and treatment of lung disease, tumors, dust disease and infectious disease. N.T. Trial, 2/19/09, at 42-43. Dr. Mark's opinion in response to the facts and information before him enabled him to give an expert opinion as to causation, and his reliance on summaries of depositions and reports was proper under Pa.R.E. 703.[FN3] Contrary to Ericsson's claim, Dr. Mark was not testifying with respect to product identification or what occurred when the wire or cable was cut. Rather, he was relying upon medical reports and Moore's video deposition, which was proper under the rules of evidence, and basing his opinion on hypotheticals from facts in evidence. See N.T. Trial, 2/19/09, at 67-72. We find no error or abuse of discretion. Rafter, supra .

> FN3. Pennsylvania Rule of Evidence 703 provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Pa.R.E. 703.

Ericsson next argues that it is entitled to a new trial because: (1) the court did not allow Ericsson's counsel to comment in closing arguments on the testimony of Plaintiffs' experts regarding governmental asbestos standards; (2) the court failed to prevent the jury from hearing about insurance and permitting Plaintiffs' counsel to suggest a sum of money as an appropriate award; and (3) the court abused its discretion in consolidating this case with three other unrelated cases.

In reviewing a trial court's decision to grant or deny a motion for a new trial, "it is well-established law that, absent a clear abuse of discretion by the trial court, appellate courts must not interfere with the trial court's authority to grant or deny a new trial." Harman v. Borah, 756 A.2d 1116, 1121-22 (Pa.Super.2000). Moreover, "[a] new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake." Id. at 1122 (citations omitted). A trial court abuses its discretion by rendering a judgment that is manifestly unreasonable, arbitrary or capricious, or has failed to apply the law, or was motivated by partiality, prejudice, bias or ill will. See Bednar v. Dana Corp., 962 A.2d 1232 (Pa.Super.2008).

***6** With respect to its claim that the court did not allow counsel to comment during closing on the Plaintiffs' evidence regarding government standards, Ericsson presents no argument that it was prejudiced by the court's ruling. Broad standards and bald assertions do not demonstrate prejudice. Harman, supra.

With respect to the jury hearing information regarding insurance and recovery sums, we note, as pointed out by the trial court, that Ericsson's recitation of the questioning is taken out of context. The exchange occurred in one of the companion cases,[FN4] when

Gene Sobel, the owner of a hardware store in Philadelphia, was questioned on direct examination by counsel for defendant in that case, Georgia-Pacific, who was attempting to discern whether Sobel's store stocked joint compound manufactured by Georgia-Pacific. In response to counsel's question on as to who hired his attorneys, the witness responded, his "insurance company." N.T. Trial, 2/27/2009, at 15, 45. Notably, there was no objection to either the question or the response at that time. See Pa.R.E. 103(a)(1). Much later, when the judge called a sidebar on another issue, counsel for Ericsson stated that he had a motion to make regarding that testimony, which the court summarily, and we believe properly, denied. N.T. Trial, 2/27/2009, at 25-26.

> FN4. The case before us was tried along with four other companion cases: Haywood v. Georgia Pacific; Wick v. Oakfabco; Confalone v. Melrather Gasket, Inc.; and Dove v. Crane Company. The Dove and Wick cases settled prior to opening and in the middle of plaintiff's case-in-chief, leaving the instant case, Moore, and Holloway and Confalone for the jury's consideration.

In a later exchange, Plaintiffs' counsel on cross-examination asked an argumentative question to that same witness about being accountable for "tens of millions of dollars." Id. at 47. Counsel for Georgia-Pacific objected to the question, and the trial court interjected and stopped the line of questioning.

Because the questionable references occurred during the questioning of a witness in a companion case, and because the trial court halted the questioning referring to "millions of dollars," we conclude there was no prejudice to Ericsson in the Moore case. Neither reference had anything to do with the Ronnie Moore case, or defendant Ericsson. In fact, as Ericsson acknowledges in its brief, Ericsson was not a party in any of the other cases, and none of the other plaintiffs worked at Moore's place of employment. The jury had been instructed to compartmentalize these cases, and the trial judge made it clear that the jury was required to decide each case separately. Id. at 73-74. The fact that a large, similar verdict was rendered in each of the cases does not necessarily point to an unfair trial or to a jury's inability to appreciate specific facts or defenses and parse that out for each individual case. A review of the verdict form in this case indicates that the jury was clearly able to discern those distinctions; the jury's verdict form specifies which individual defendant's products were substantial factors in bringing about Moore's mesothelioma, and which were not. On the other hand, the jury's consistency in the three verdicts it rendered reflects the consistency in the valuation of the plaintiffs' suffering and losses.

***7** As to Ericsson's claim that the court should not have consolidated this case with four other asbestos cases, we note first that the decision whether to consolidate a case is within the trial judge's discretion. See Andaloro, 799 A.2d at 81. Particularly in asbestos-related actions, which involved common questions of law and fact, consolidation promotes judicial economy. See Pa.R.C.P. 213(a). Additionally, Ericsson has cited no case that disapproves of this practice. Ericsson claims that "it is apparent from the jury verdicts returned in this consolidated trial" that its due process rights were denied. The fact that the jury returned a verdict in favor of the Plaintiffs here, or in favor of plaintiffs in the companion cases, does not demonstrate an abuse of discretion or prejudice to the defendant. We find this claim meritless.

Ericsson next claims the court erred or abused its discretion in entering judgment on improperly molded jury verdicts including, but not limited to, the satisfaction and payment of Gould's Pumps, Inc.'s proportionate share of liability. The verdict against Ericsson in this case was $2,000,000. In addition to finding Ericsson liable, the jury found two other companies liable: Goulds Pumps, Inc. and Garlock. The court found Ericsson's per capita liability was one-third of the verdict, or $666,667. See Baker v. ACandS, 755 A.2d 664 (Pa.2000) (in strict liability actions, liability is apportioned equally among joint tort-feasors). The court also found Ericsson was responsible for the difference between Goulds Pumps' one-third share and the $250,000 pro tanto settlement that Goulds Pumps paid Plaintiff, or $416,667 ($666,667 minus $250,000), or the shortfall amount. The court, therefore, molded the verdict against Ericsson to $1,083,334 ($666,667  $416,667). Ericsson claims that it should not be responsible for the shortfall difference, and that the court should have required Goulds Pumps to pay Ericsson $416,667 in contribution. The trial court determined that Ericsson's argument ignores the holding in Baker v. ACandS, supra. We agree.

In Baker, our Supreme Court stated:

> [T]he proper method in calculating set-off is first to apportion shares of liability. In the matter sub judice, the trial court correctly determined that in this strict liability action, the verdict was to be apportioned equally among ACandS and the four settling defendants.... The next step in this process is to determine which set-off method applies with regard to each individual settling tortfeasor. As to the Manville Trust's share, ACandS is entitled to a pro tanto settlement in the amount of $30,000.00. Thus, ACandS is jointly and severally liable for both its share of the verdict as well as the shortfall between the Manville Trust's share and the $30, 000.00 it paid in settlement, or for $850, 000.00.

Baker, 755 A.2d at 672 (emphasis added) (internal citations and footnotes omitted). Here, Ericsson is jointly and severally liable for its one-third share of the verdict as well as the shortfall between Goulds Pumps' share and the settlement it paid. Id. Further, we note that Ericsson does not explain in its argument that it is precluded from filing an action in contribution against Goulds Pumps. The contents of Goulds Pumps' settlement release, i.e., whether the release contained a "hold harmless indemnity provision" protecting it from further liability of any type, is not an issue before this Court.

***8** Finally, Ericsson argues the trial court improperly calculated delay damages. Ericsson does not dispute that the delay damages should be calculated on the molded verdict, but claims it is responsible only for delay damages on its proportionate share of that molded verdict, not on the shortfall amount. We agree with the trial court that the shortfall amount represents additional liability on Ericsson's part, and, therefore, delay damages were properly calculated on the molded verdict. The court properly deducted the release amount ($250,000) from the verdict prior to the application of delay damages. We find no abuse of discretion. See Hughes v. GAF Corp., 528 A.2d 173 (Pa.Super.1987). Cf. Weber v. GAF Corp., 15 F.3d 35 (3d Cir.1994) (to allow nonsettling defendant to escape liability for delay damages based upon settlements of others would invite defendants to follow wait-and-see strategy rather than encourage them to make reasonable offers).

In their cross-appeal, Plaintiffs claim the court should have assigned a full and equal share of liability to Johns-Manville when molding the verdict and should have calculated delay damages accordingly. The court notes, however, that there was no evidence presented in the Moore case as to any liability on the part of Johns-Manville. Therefore, the court properly did not consider it in molding the verdict, and, consequently, there was no error in calculation of delay damages.

Affirmed.

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