

Environmental & Toxic Tort

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Administrative Law

Admiralty & Maritime Law

Appellate Law

Collections

Commercial Litigation

Construction Law

Environmental & Toxic Tort Law

General Business Law

Governmental Liability

Insurance Litigation

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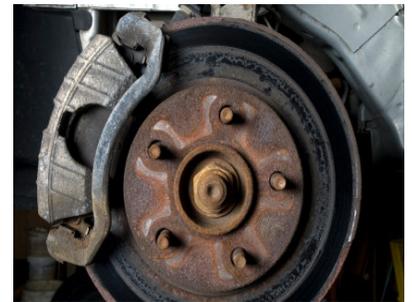
Plaintiffs Must Show Product-Specific Dosage Amounts in Asbestosis Cases

Borg-Warner Corporation v. Flores

No. 05-0189, Texas Supreme Court (June 8, 2007).

Flores, a retired brake mechanic, worked most of his life in the automotive department at Sears handling and using large numbers of Borg-Warner brake pads. According to his estimates, five to seven of the approximately twenty brake jobs he performed each week involved Borg-Warner disk brakes allegedly containing chrysotile asbestos fibers. Part of his job entailed grinding the brake disk pads in order to keep them from squealing, a procedure that would generate clouds of dust that he inhaled in the small 8 x 10 room where the procedure was performed. Having been diagnosed with asbestosis following his retirement, Flores sued Borg-Warner, among others, as the manufacturer of asbestos-containing brake pads under theories of negligence and strict liability. The other product manufacturing defendants were not parties to the appeal.

At trial, Flores presented two testifying experts, one of whom was a board-certified pulmonologist, Dr. Dinah Bukowski, who examined Flores on one occasion and, after reviewing his x-rays, noticed interstitial lung disease. Although such disease can have more than 100 other causes, including smoking, the doctor diagnosed Flores with asbestosis, listing Flores's brake work as the cause. Flores's second expert was Dr. Barry Castleman, an expert in "the field of toxic substance control," who had written books and other articles discussing asbestos-related risks to brake mechanics. He testified about the content of asbestos in brake pads and stated that most asbestos in brake linings is destroyed by the heat and friction during grinding, but that some respirable fibers can still remain in the dust clouds created by the grinding of the disks. Dr. Castleman, however, admitted to not having a detailed knowledge of Borg-Warner's brake pads or their levels of asbestos.



After examining Flores, Borg-Warner's expert, Dr. Kathryn Hale, did not believe that any x-rays indicated an asbestos-related disease. Furthermore, Flores admitted to smoking from the age of twenty-five until just three weeks prior to trial—a period of over forty years—at a rate of fifty packs per year. Flores reported to Dr. Bukowski that he only smoked fifteen to twenty packs per year.

The jury found the following: "(1) Flores sustained an asbestos-related injury or disease; (2) Borg-Warner's negligence (as well as that of three other settling defendants) proximately caused Flores's asbestos-related injury or disease; (3) all four defendants were 'engaged in the business of selling brake products'; and (4) the brake products had marketing, manufacturing, and design defects, each of which was a producing cause of Flores's injury." The jury apportioned 37% of the causation to Borg-Warner and 21% to each of the other three defendants. Flores was awarded \$34,000 for future physical impairment, \$34,000 for future medical care, \$12,000 for past physical pain and mental anguish, and \$34,000 for future physical pain and mental anguish.

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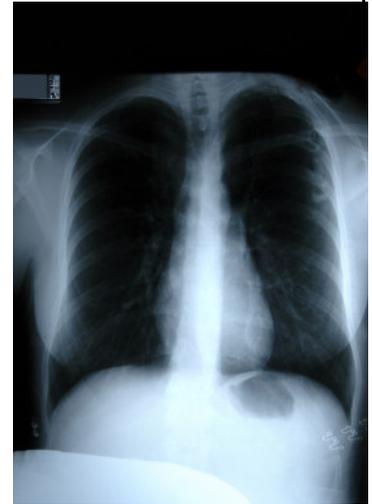
In the second phase of the bifurcated trial, the jury found, by clear and convincing evidence, that Flores's injury resulted from malice and awarded \$55,000 in exemplary damages against Borg-Warner. Borg-Warner appealed, however, the court of appeals affirmed the trial court's decision. Thereafter, Borg-Warner sought relief in the Texas Supreme Court.

“... the plaintiff must show that the asbestos contained in the defendant's product was a substantial factor in causing the disease.”

“... one of toxicology's central tenets is that 'the dose makes the poison.'”

“While he was exposed to 'some asbestos' on a fairly regular basis for an extended period of time, absent evidence of dosage amount, the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed...”

The first issue before the Supreme Court was whether to adopt the Fourth Circuit's *Lohrmann* test of “frequency, regularity, and proximity” to exposure. See *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). The *Lohrmann* court concluded that “[t]o support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked.” While the Supreme Court agreed this test was appropriate, the frequency, regularity, and proximity terms “do not, in themselves, capture the emphasis our jurisprudence has placed on causation as an essential predicate to liability.” Combined with the three factors of the *Lohrmann* test, the Court held that the plaintiff must show that the asbestos contained in the defendant's product was a substantial factor in causing the disease.



The next issue then became whether the asbestos contained in Borg-Warner's brake pads was a substantial factor in bringing about plaintiff's injuries. The Court first noted that one of toxicology's central tenets is that “the dose makes the poison.” Having previously recognized that “exposure to asbestos, a known carcinogen, is never healthy but fortunately does not always result in disease,” the Court required evidence of the amount of asbestos exposure and inhalation sustained by Flores.

Without showing more than mere exposure, Flores's evidence was insufficient to show Borg-Warner brake pads were a substantial factor in causing his disease. The trial court record revealed nothing about how much asbestos Flores inhaled during his employment. While he was exposed to “some asbestos” on a fairly regular basis for an extended period of time, absent any evidence of a dosage amount, the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts were sufficient to cause asbestosis. Additionally, Flores did not present evidence as to what percentage of that indeterminate amount may have originated in Borg-Warner products.

The Court did not require that substantial-factor causation be reduced to mathematical precision, but stated “[d]efendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease, will suffice.” The Court further noted that proof of causation may differ depending on the product at issue and whether the asbestos is friable. The Court concluded that the evidence of causation in this case was legally insufficient to meet the substantial factor causation requirement for both of his claims of negligence and strict liability. Accordingly, the Court reversed the lower courts and rendered judgment in Borg-Warner's favor.

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