

No. 14-08-00886-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS
HOUSTON, TEXAS

FILED IN
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HOUSTON, TEXAS
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BENSON BAILESS AND ALNET BAILESS,

Appellants,

v.

KAISER GYPSUM COMPANY, INC., ET AL.,

Appellees.

ON APPEAL FROM THE
11TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY
HONORABLE MARK DAVIDSON, PRESIDING.

BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Nature of the Case: Appellants Benson Bailess and his wife Alnet sued several manufacturers of asbestos-containing joint compounds to recover for his mesothelioma-related injuries resulting from exposure to such compounds, some of which were manufactured by Appellee Kelly Moore Paint Company, Inc. ["Kelly Moore"].

Course of Proceedings: The former judge of the Texas Asbestos Multi-District Litigation and 11th Judicial District Court, the Honorable Mark Davidson, granted Appellee Kelly Moore's No-Evidence Motion for Summary Judgment on causation in open court on June 20, 2008. CR 169-70; 940-41; 1st Supp. CR 14. After the motion was granted and the remaining claims were remanded to the 333rd Judicial District Court for trial, the remaining defendants settled the Bailesses' remaining claims, and that court's former judge, the Honorable Joseph Halbach, Jr., signed a final order, dated August 11, 2008, which reflected the disposition of all of the Bailesses' claims, including its claims against Kelly Moore. CR 994. A timely appeal was then taken from the final order encompassing Judge Davidson's earlier ruling.

MDL Court: The 11th Judicial District Court of Harris County, Texas,
Former Judge Mark Davidson, presiding.¹

Trial Court: The 333rd Judicial District Court of Harris County, Texas,
Former Judge, Joseph Halbach, Jr., presiding.

Trial Court's Disposition: Interlocutory no-evidence summary judgment was granted in favor of Appellee Kelly Moore and against Appellants Bailess. The trial court thereafter entered a final order reflecting the disposition of all of the Bailesses' claims, including their claims against Kelly Moore.

¹As this is an appeal from an order of the MDL court, this appeal should be expedited by this Court. *See* TEX. R. JUD. ADMIN. 13.9(c).

ISSUES PRESENTED

1. Whether the MDL court misread and misapplied *Borg-Warner Corp. v. Flores*' requirement that exposure to each defendants' product be a substantial factor in an injured plaintiff's *aggregate* exposure to asbestos and resulting increased risk of asbestos-related cancer to require instead that Appellants demonstrate that Appellee Kelly Moore *alone* exposed Mr. Bailess to a dose of asbestos *sufficient by itself* to have resulted in his mesothelioma.
2. Whether the MDL court's ruling violates TEXAS CIVIL PRACTICE & REMEDIES CODE § 33.002 by immunizing or scape-goating otherwise proportionately-labile parties and effectively removing asbestos cases from its sweep.
3. Whether this Court may, as the MDL court did, ignore reliable expert evidence raising a fact issue as to whether mesothelioma even has a fixed threshold for asbestos exposure beyond background, that is, whether it may pick and choose among evidence and inferences in a no-evidence context, consider unfavorable evidence submitted by the movant, and/or view that which it selects in the light most *un*favorable to the non-movant Bailesses.

STATEMENT OF FACTS

It is not disputed that, at all relevant times, Appellee Kelly Moore's "Paco" joint compound, the product to which Appellant Benson Bailess was exposed, contained asbestos.² Kelly Moore's product is used primarily in building construction, specifically to float and smooth sheetrock. Mr. Bailess, a carpenter by trade, CR 419, described the standard nine-step process employed to install sheetrock using Paco and other joint compounds: 1) install sheetrock; 2) tape and float the sheetrock, which includes cutting open the top of the bag of joining compound and pouring it into a bucket, mixing the joint compound using water and a stick, applying the joint compound to the seams, and allowing it to dry; 3) sand all areas on walls and ceilings, including the areas where the joining compound has dried; 4) apply second coat of joint compound; 5) sand it again; 6) apply a third coat of joint compound; 7) sand it again; 8) mix the joint compound and water for texturing; 9) apply it and paint the finished walls. CR 272-74, 957.

Appellant Bailess testified that pouring the joining compound from the sack, mixing the joining compound, sanding it repeatedly, and sweeping it off the floor after sanding, created visible dust that he breathed during each step of this process. CR 297. His son agreed that this process created visible dust and that his father had breathed this dust when he performed these tasks. CR 325-26. Experts in the case also testified, from peer-reviewed studies and industry internal documents, that such activities generated airborne asbestos dust.

²See, e.g., CR 411. In fact, experts in this case testified and Kelly Moore admitted that its product contained up to 8.3% of asbestos. CR 410.

In fact, Dr. William Longo testified that joint compound dust of this sort generates asbestos exposure levels to workers such as Mr. Bailess well above the 1976 OSHA standard of 2.0 fibers/cc, and its excursion limit of 10 fibers/cc.³

Appellant Benson Bailess's exposure to Kelly Moore's asbestos-containing Paco joint compounds began in 1969, when, using the techniques described above, he converted a garage into a bedroom, utility room and storage closet in his home in Corpus Christi, Texas using Georgia Pacific and Appellee Kelly Moore's Paco brands of joint compound equally. CR 296-97. In completing this project, Appellant Bailess used 501 pounds of joint compound for taping and floating and 278 pounds of joint compound for texturing. CR 297. This totaled 31, 25-lb. bags of joint compound, including approximately *15.5, 25 lb.bags* or *389.5 pounds of Appellee Kelly Moore's Paco joint compound. Id.*

The Bailesses also purchased two rental homes in Corpus Christi in 1968 and Mr. Bailess did repair work on them through 1972. CR 298, 331. In particular, he repaired sheetrock in these homes each year when tenants would leave in order to prepare the properties for the incoming tenants. CR 298. Mr. Bailess testified that he spent one week on each of the two homes repairing the sheetrock when he first purchased the homes. CR 232. He also did other repairs to the sheetrock when there were changes in tenant occupancy. *Id.* In performing these tasks, he once again used Georgia Pacific and Kelly Moore's Paco

³CR 413. This Court may take judicial notice of the fact that OSHA reduced the overall threshold limit values 0.1 fibers per cubic centimeter in 1994. *See Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304, 316 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

brands of joint compound equally. CR 232-33, 326. Appellant Bailess testified that he was exposed to asbestos, as previously described, when performing such work on the rental homes. CR 221, 233, 297, 326.

From this information, *Kelly Moore's own expert, William Fritz, estimated that Mr. Bailess had been exposed to a total dose of 74 [25 lb.] bags or 1,850 pounds of asbestos-containing joint compounds of which Kelly Moore's Paco joint compound comprised 9 bags, 225 pounds, or 12 percent in relation to other asbestos-containing joint compounds exposures.*⁴ One of Appellant Bailess's experts estimated that his exposure to Kelly Moore's joint compound product would have been about 2.88% of his total exposures to asbestos from joint compounds.⁵ Put another way, the evidence before the MDL court was that Mr. Bailess was exposed to .07 fiber years of asbestos from Kelly Moore's product and to 2.4475 fiber years of all asbestos from asbestos-containing joint compounds. *Id.*

When Mr. Bailess was diagnosed with mesothelioma, the Bailesses sued Kelly Moore, among other joint compound manufacturers. *See* CR 3-5. Thereafter, Kelly Moore moved for no-evidence summary judgment on the question of the dose to which Kelly Moore had exposed Mr. Bailess and whether it was a substantial factor in increasing his risk of

⁴CR 393. Mr. Fritz, however, analyzed only the exposures for which Mr. Bailess was able to state specifically the number of bags of joint compound used. Thus, his estimate may seriously underestimate Mr. Bailess's actual exposure even though this exposure alone is clinically significant. CR 350.

⁵*See* CR 970-71; 3rd Supp. CR 57-79. Although he did not provide the exact percentages, Jerry Lauderdale testified that, in order to arrive at such a percentage exposure, one would use the types of calculations he discussed. *Id.* Dr. Hammar, however, made these calculations. CR 969.

mesothelioma. CR 169-70. In response, Appellants submitted numerous expert reports and evidence, some of which are described above. *See generally* CR 213-700, 748-885; 3rd Supp. CR 5-93, 341-421, 436-1248. Among these items was the expert testimony of Dr. William Longo, who has studied the release of asbestos from asbestos-containing joint compounds. Based on his studies, Dr. Longo concluded that the mixing, sanding and cleaning activities performed with these substances release airborne asbestos fibers leading to asbestos exposure for workers, bystanders as well as take-home household exposures. He observes that "all the analytical data that we have collected has shown that the joint compounds tested released substantial amounts of airborne asbestos fibers during the work activities that were tested." CR 411. In particular, he stated: "*For the Kelly Moore product, the average asbestos concentration for the worker during the mixing phase was 5.0 fibers/cc, and for sanding it was 1.7 fibers/cc, and clean-up was 1.3 fibers/cc.*"⁶ Dr. Longo has compared the results of his studies with other studies of asbestos-containing joint compounds which have been published in the medical and scientific literature and noted that his studies have demonstrated similar and sometimes lower results. CR 412.

Dr. Samuel P. Hammar, Appellant Bailess's medical expert, reviewed Appellant Benson Bailess's medical records, deposition testimony and expert affidavits, along with the medical literature in this area and concluded with a reasonable degree of medical certainty:

⁶*Id.*, citing MAS Work Practice Study: "*Kelly-Moore, Mixing, Applying, Sanding & Cleanup of Asbestos Containing Finishing Compound*," October 1999.

[E]ach and every time Mr. Bailess sanded and swept up asbestos-containing joint compounds . . . he was exposed to levels of asbestos well above background/ambient levels of exposure. In addition, each and every time Mr. Bailess worked in the vicinity of other workers who were mixing and sanding asbestos-containing joint compound, he was exposed to levels of asbestos well above background/ambient levels of exposure. . . .

Mesothelioma is a dose-response related disease; the more someone is exposed to asbestos, the greater their risk for the development of mesothelioma. . . in a patient who develops an asbestos-related mesothelioma, *all asbestos exposures above background contribute to the development of mesothelioma*. Inasmuch as each and every exposure above background to asbestos that Mr. Bailess sustained while working with asbestos-containing joint compounds . . . contributed to the total dose of asbestos above background that Mr. Bailess was exposed to . . . *each and every exposure to asbestos that Mr. Bailess sustained was a significant contributing factor in the development of his mesothelioma*.

Each asbestos-containing joint compound that Mr. Bailess was exposed to was a significant contributing factor in the development of his mesothelioma.

CR 968 (emphasis supplied). Dr. Hammar estimated that Appellant Bailess's exposure to asbestos was from 0.69325 f-yr/cc to 2.4475 f-yr/cc. CR 968. By contrast, the ordinary background level of asbestos is from 0.00005 f/cc to 0.00023 f/cc.⁷ Using the highest background level number, these dose estimations, and simple math, Mr. Bailess's exposures were *3,014 to 10,641 times* the asbestos background level. Even using the lowest background level number, Mr. Bailess's exposures were *13,865 to 48,950 times* the background level of asbestos.

⁷See PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 26 (Roggli, et al., eds. 2d ed. 2004), 3rd Supp. CR 95-96 (estimating "background" levels to be in the range of 0.00005 f/cc to 0.00023 f/cc or tens of thousands of times lower than the existing permissible OSHA exposure limit of 0.1 f/cc).

On this basis, Dr. Hammar concluded that Mr. Bailess's exposure to asbestos-containing joint compounds was more than enough to have caused his mesothelioma.⁸ In prior affidavits, Dr. Hammar had testified that any exposure to asbestos fibers above background levels played a significant role in Mr. Bailess's development of mesothelioma.

I believe that there is a background/ambient level of asbestos exposure which exists in the environment and I do not believe that background/ambient levels of exposure are sufficient to cause mesothelioma. However, if a person sustains asbestos exposures above background/ambient levels of exposure and goes on to develop mesothelioma it is my opinion that *all of the exposures above background are significant contributing causes in the development of the mesothelioma.*⁹

Dr. Hammar rejected the notion, so critical in *Borg-Warner* and the MDL's court's decision, that there is some "threshold," other than background, at which exposure to asbestos cannot cause mesothelioma. He stated:

With respect to a "threshold" above which asbestos causes disease, it is my medical opinion that *there is not a threshold below which asbestos-related mesothelioma will not occur.* It is my opinion with a reasonable degree of medical certainty that there is not a safe level of asbestos exposure and I believe that adverse health effects are frequently seen in those with low levels of asbestos exposure.

Id. (emphasis supplied). Dr. Hammar, however, is not alone in his conclusion that there is no real exposure threshold below which mesothelioma does not occur. In particular, Appellants' expert, Dr. Richard A. Lemen, the former Assistant Surgeon General of the

⁸CR 968 (emphasis supplied). He noted that this conclusion is supported by the work of other experts on this subject including Nicholson, Hodgson & Darnton, Iwatsubo, Hillerdal and others. *Id.*

⁹3rd Supp. CR 33 (emphasis added).

United States and a practicing epidemiologist for over thirty years, testified that he knows

*of no concentration below which there is not a risk to some individuals that were developing mesothelioma. That's pretty universally agreed to by most of the scientific consensus organizations, and by that I am talking about The World Health Organization, the International Program for Chemical Safety, The International Agency for Research on Cancer, the World Trade Organization, The International Labor Organization; and the United States, I'm talking about EPA, the NIOSH, the OSHA, the Consumer Products Safety Commission, and others that all agree with this statement that there is no concentration below which there is not a risk for some individuals developing mesothelioma.*¹⁰

Moreover, he explained,

*It is not scientific to separate out or isolate a single exposure to asbestos and to conclude that a single exposure in and of itself is the cause of a mesothelioma. As exposure to asbestos continues, multiple exposures become additive and cumulative and the risk of mesothelioma increases with each and every exposure.*¹¹

It is, therefore, generally accepted in the scientific community – or there is at least enough serious dispute to raise a fact issue – *that mesothelioma has no known threshold of asbestos exposure above background levels.*¹² In fact, the available data indicate that the risk for pleural mesothelioma increases “relatively more steeply *at low exposures* but less steeply at

¹⁰3rd Supp. CR 453 (emphasis supplied).

¹¹ *Id.* (emphasis added).

¹²See, e.g., PATHOLOGY OF ASBESTOS-ASSOCIATED DISEASES 107 (Roggli, et al., eds. 2d ed. 2004), 3rd Supp. CR 97 (“a threshold level of exposure below which mesothelioma will not occur has not been identified.”); World Health Organization, *Environmental Health Criteria 203: Chrysotile Asbestos* (1998) (“EHC 203”), 3rd Supp. CR 266 (“no threshold has been identified for carcinogenic risks.”); Antman, *Malignant Mesothelioma*, NEW ENG. J. MED. 303:200-202 (1980), 3rd Supp. CR 324 (“a threshold below which exposure to asbestos is safe . . . has not been demonstrated.”); *Mesothelioma: Has Patient Had Contact With Even Small Amount of Asbestos?*, 257 JAMA 1569 (Mar. 27, 1987), 3rd Supp. CR 327 (“to date, there has been no threshold level defined for asbestos-induced mesothelioma”).

high exposures.”¹³ Acknowledging this scientific consensus, courts around the country have consistently recognized that relatively low exposures may represent a “substantial factor” in causing mesothelioma.¹⁴ It is not surprising then that Appellants’ experts all testified that the 2.88 to 12 percent of Mr. Bailess’s asbestos exposure attributable to Kelly Moore’s asbestos-containing product was a substantial contributing factor in the aggregate dose of asbestos inhaled by Mr. Bailess and resulting increased risk of mesothelioma.

The MDL court thus had to ignore applicable law, scientific consensus, admissible evidence, and the plain wording of *Borg-Warner*, to require that the Bailesses raise a fact issue on whether Mr. Bailess’s exposure to Kelly Moore’s joint compound *alone* met an arbitrary threshold sufficient to have caused his mesothelioma and in holding that he had failed to meet that standard. The Court explained:

This motion is going to be decided straight up on what *Borg-Warner* says and what *Borg-Warner* requires. . . . If *Borg-Warner* requires that the dose from each defendant be enough by itself to be the substantial contributing factor, the motion must be granted. If *Borg-Warner* does not require that, then the motion must be denied . . .¹⁵

¹³Coggon, et al., *Differences in Occupational Mortality from Pleural Cancer, Peritoneal Cancer, and Asbestosis*, OCCUP. ENVTL. MED. 52: 775-777 (1995), 3rd Supp. CR 331 (emphasis supplied).

¹⁴See, e.g., *Tragarz v. Keene Corp.*, 980 F.2d 411, 420 (7th Cir. 1992) (upholding jury finding of causation in light of “ample medical testimony and other evidence indicating that even a minimal exposure to asbestos can induce or contribute to the development of mesothelioma”); *Kurak v. A.P. Green Refractories Co.*, 689 A.2d 757, 765-66 (N.J. Super. A.D. 1997) (observing that mesothelioma can be “caused after only minor exposure to asbestos dust” and that proof of heavy exposure is not required to meet the “substantial factor” test).

¹⁵CR 932. See also CR 940 (“I am focusing on this sentence on Page 8 of the opinion if you printed it out: Defendant-specific evidence relating to the approximate dose to which the plaintiff was exposed, coupled with evidence that the dose – and I am assuming that the dose

Because it concluded that *Borg-Warner* requires that the dose from each defendant *independently* meet the threshold exposure upon which the Court seized, it granted Kelly-Moore's summary judgment motion,¹⁶ overruled its objections to Appellants' summary judgment evidence by implication,¹⁷ denied the Bailesses' Motion for Reconsideration, CR 981, and remanded the case for trial by order dated July 14, 2008. CR 982. When the Bailesses' settled their claims against the remaining defendants, the MDL court's order became final and appealable as reflected in the trial court's final order, dated August 11, 2008.¹⁸ The Bailesses took a timely appeal from that summary judgment, as encompassed by the trial court's final order. CR 1005.

refers back – by implication has the modifier of defendant specific as part of their language, there was a substantial factor in causing asbestos-related disease will suffice. In other words, I am reading that the Supreme Court has required the amount of a product – proving exposure to an amount of a product is enough to have caused asbestos”).

¹⁶ CR 941; 1st Supp. CR 14. Kelly Moore moved only on the issue of causation. CR 169-70. As the result, that is the only basis upon which this Court may affirm the MDL court's decision. See *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

¹⁷The MDL court overruled Kelly Moore's objections by implication because, among other things, it relied upon the challenged evidence in making its causation ruling. CR 940. To this extent, Appellants do not challenge rulings in their favor.

¹⁸CR 994; *Webb v. Jorns*, 488 S.W.2d 407, 409 (Tex. 1972) (interlocutory judgment becomes final when it merges into final judgment disposing of whole case); see also *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 779 n. 9 (Tex. App.–Houston [1st Dist.] 2004, no pet.) (citing *Newco Drilling Co. v. Weyand*, 960 S.W.2d 654, 656 (Tex. 1998) (interlocutory summary judgment becomes final and appealable when merged into final judgment)).

SUMMARY OF THE ARGUMENT

Under the MDL court's decision here, a group of companies may systematically poison or kill with impunity those who use their products so long as no one can prove that any single company *alone* administered the lethal or cancer-causing dose. Reminiscent of some murderous pact from the Inquisition, or the plot of an early Hitchcock thriller, this scheme is not just horrendous public policy, but imposes on injured victims an impossible burden of proof specifically *rejected* by the Texas Supreme Court, by the Restatement, and by the scientific community. In fact, the Restatement's commentators are crystal clear on this point: "*The actor who tortiously provides the straw that breaks the camel's back is subject to liability for the broken back*"¹⁹

To reach its misbegotten result, the MDL court had to eviscerate Texas statutes requiring proportionate liability and effectively exclude asbestos and other toxic exposure cases from their reach. For good measure, it also violated virtually every principle governing no-evidence motions for summary judgment. For these reasons, the MDL court's fatally-flawed decision granting Kelly Moore's No-Evidence Motion for Summary Judgment and the final order encompassing it must be reversed.

In granting Kelly Moore's no-evidence motion, the MDL court fundamentally misread *Borg-Warner Corp. v. Flores*.²⁰ The MDL Court admitted that there was credible expert

¹⁹RESTATEMENT (THIRD) OF TORTS: Liability for Physical Harm (Basic Principles) § 36 cmt. b (Trivial and Insubstantial Contributions to Multiple-Sufficient Causal Sets) (Tentative Draft No. 3, April 7, 2003).

²⁰*Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 772 (Tex. 2007).

testimony that Appellant Bailess's exposure to Kelly Moore's asbestos-containing product substantially contributed to the *cumulative* dose that resulted in his mesothelioma, a dose well above the threshold it utilized. CR 939. Under *Borg-Warner*, such evidence is sufficient to defeat a no-evidence motion relating to causation.²¹ Nevertheless, the MDL court inexplicably imposed upon Appellants a new and wholly unwarranted standard: to show that each defendant, including Kelly Moore, had *independently* met an arbitrary exposure level and exposed Mr. Bailess to a dose of asbestos *sufficient alone* to have caused his mesothelioma. CR 940. Nothing in Texas law or American science holds an injured plaintiff to such an unwarranted standard.

In reaching this result, the MDL court violated TEX. CIV. PRAC. & REM. CODE § 33.002 by immunizing and/or scape-goating otherwise proportionately-liable parties. Under its new regime, a company that exposes a plaintiff to asbestos above an arbitrary threshold will be assigned all liability, irrespective of the culpability of other responsible parties whose product's exposure falls even slightly below that threshold.²² Thus, newly-immunized companies may well deem it more cost effective to expose their workers to toxic substances rather than make their workplaces safer, knowing that they can never be held even proportionately liable if they individually poison their workers below certain levels. Worst

²¹See *Borg-Warner*, 232 S.W.3d at 772 (quoting *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 67 Cal. Rptr. 2d 16, 941 P.2d 1203, 1219 (Cal. 1997)).

²²This Court may take judicial notice of the fact that, in subsequent orders, the MDL court also held that asbestos defendants may not name as responsible third parties any company whose product fails to expose the plaintiff to levels of asbestos above its chosen threshold. Order, dated Jan. 16, 2009, *In re Asbestos Litig.*, Cause No. 2004-03964 [attached].

of all, injured workers may be faced with the new nightmare of finding that they can hold *no one* even partially financially responsible for exposing them to known toxic substances because every wrongdoer's *individual* exposure is below an arbitrary limit even if their *cumulative* exposure of this worker is exponentially above that threshold. That is certainly not what the legislature had in mind in enacting TEX. CIV. PRAC. & REM. CODE § 33.002. Moreover, it is disastrous public policy.

In granting no-evidence summary judgment, the MDL court necessarily considered evidence unfavorable to the Bailesses, ignored fact issues they raised, and made inferences against Appellants in direct contravention of the rules governing summary judgment motions.

The MDL court had apparently concluded that, under *Borg-Warner*, it needed to identify some level of exposure to asbestos below which mesothelioma could allegedly not occur, then it searched the record, including movant's contrary evidence, to find something it could use as such. Instead of recognizing the obvious fact that the conflicting scientific evidence here at least created a fact issue as to whether such a threshold even exists, the MDL court seized upon a convenient number anyway then made inferences from it in favor of the movant, Kelly Moore. This Court is not free to take the same liberties with Texas law.

For all of these reasons, the MDL court's order granting Kelly Moore's no-evidence summary judgment on causation and the final order that encompasses it must be reversed and the Bailesses' claims against Kelly Moore must be remanded for trial.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews no-evidence motions for summary judgment *de novo* under the same legal sufficiency standards it uses to review directed verdicts.²³ Thus, its inquiry focuses on whether the non-movants, Appellants Bailess, produced more than a scintilla of probative evidence to raise a fact issue on the challenged elements.²⁴ As seen above, they did.

When analyzing a no-evidence summary judgment, this Court must consider the evidence in the light most favorable to the non-movant Bailesses, indulging every reasonable inference and resolving any doubts against the motion, crediting evidence favorable to the non-movant if reasonable jurors could, and disregarding all contrary evidence unless reasonable jurors could not.²⁵ Thus, this Court may consider Kelly Moore's evidence only if it creates a question of material fact,²⁶ that is, only if it serves to *defeat* Kelly Moore's summary judgment motion.

²³TEX. R. CIV. P. 166a(i); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003).

²⁴TEX. R. CIV. P. 166a(i); *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003); *King Ranch*, 118 S.W.3d at 751; *Preston Gate, L.P. v. Bukaty*, 248 S.W.3d 892, 896 (Tex. App.—Dallas 2008, no pet.).

²⁵*See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006); *King Ranch*, 118 S.W.3d at 751 (citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)); *Gen'l Mills Rests., Inc. v. Tex. Wings, Inc.*, 12 S.W.3d 827, 833 (Tex. App.—Dallas 2000, no pet.).

²⁶*See Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004); *see also City of Keller v. Wilson*, 168 S.W.3d 802, 825 (Tex. 2005) (when reviewing a motion for no-evidence summary judgment, the appellate court's review of the evidence "will effectively be restricted to the evidence contrary to the motion").

This Court also reviews questions of law, such as the proper interpretation of *Borg-Warner*, *de novo* without deference to the lower court's conclusion.²⁷ When the proper standards are used, this Court will have no choice but to reverse the decision of the MDL court on summary judgment and the final order encompassing it.

II. THE MDL COURT MISREAD AND MISAPPLIED *BORG-WARNER CORP. V. FLORES*²⁸ TO REQUIRE THAT APPELLANTS DEMONSTRATE THAT APPELLEE KELLY MOORE EXPOSED MR. BAILESS TO A DOSE OF ASBESTOS SUFFICIENT BY ITSELF TO HAVE CAUSED HIS MESOTHELIOMA

A. *Borg-Warner* Requires Causation Evidence Regarding Only an Individual Defendant's Contribution to a Plaintiff's Aggregate Dosage

In *Borg-Warner*, the Supreme Court found the evidence submitted to support causation legally insufficient because "the sparse record here contains no evidence of the *approximate quantum of Borg-Warner fibers to which Flores was exposed, and whether this sufficiently contributed to the aggregate dose of asbestos Flores inhaled, such that it could be considered a substantial factor in causing his asbestosis.*"²⁹ This conclusion reflects the balance the Court struck between requiring evidence to show "substantial factor" causation and its concern, expressed earlier in the opinion, about imposing too great a burden on plaintiffs in asbestos cases. It had observed:

²⁷*State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996).

²⁸Nothing in this brief should be interpreted as an endorsement or affirmation by Appellants or their counsel of the holding in *Borg-Warner*, no matter how it is interpreted, which they continue to believe was incorrectly decided. To the extent it is still the law of Texas, however, they are required to attempt to interpret that decision here.

²⁹232 S.W.2d at 772 (emphasis supplied).

We recognize the proof difficulties accompanying asbestos claims. The long latency period for asbestos-related diseases, coupled with the inability to trace precisely which fibers caused disease and from whose product they emanated, make this process inexact.³⁰ The Supreme Court of California has grappled with the appropriate causation standard in a case involving alleged asbestos-related cancer and acknowledged the difficulties in proof accompanying such claims:

Plaintiffs cannot be expected to prove the scientifically unknown details of carcinogenesis, or trace the unknowable path of a given asbestos fiber.... [W]e can bridge this gap in the humanly knowable by holding that plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.

Rutherford v. Owens-Illinois, 67 Cal. Rptr. 2d 16, 941 P.2d 1203, 1219 (1997).

Thus, substantial-factor causation, which separates the speculative from the probable, need not be reduced to mathematical precision. Defendant-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.

232 S.W.2d at 772-73 (emphasis supplied). Read in context then, it becomes clear that the *Borg-Warner* Court wanted to insure both that the aggregate dose of asbestos a plaintiff received was a substantial factor in causing his asbestos-related disease and that exposure to

³⁰232 S.W.2d at 772, citing *Rutherford*, 67 Cal. Rptr. 2d 16, 941 P.2d at 1218 (acknowledging that lengthy latency periods "mean that memories are often dim and records missing or incomplete regarding the use and distribution of specific products" and "[i]n some industries, many different asbestos-containing products have been used, often including several similar products at the same time periods and worksites").

the particular defendant's product substantially contributed to that *aggregate* dose. Nothing in either paragraph or the opinion as a whole can properly be read to conflate those two factors or to require that a plaintiff somehow show that the dose supplied by a single defendant alone was sufficient to cause his asbestos-related disease. Moreover, it is crystal clear that, rather than rejecting *Rutherford*,³¹ the *Borg-Warner* court embraced it.

It is telling that none of the academic commentators on the *Borg-Warner* decision nor any court has discussed, let alone embraced, the MDL court's idiosyncratic interpretation of *Borg-Warner*.³² To the contrary, in analyzing that decision, several Texas commentators explained:

The [Borg-Warner] court expressly states that it is not requiring that the plaintiff prove the scientifically unknowable details of which fibers caused what part of his injury. What, then, must the plaintiff show? The Flores court answers this question by quoting the well-known California asbestos case, Rutherford v. Owens-Illinois, for the proposition that:

³¹The MDL court wrongly concluded that the Court, in *Borg-Warner*, had somehow rejected *Rutherford* and its effort to balance the difficulties of proof with the need to show causation without speculation. See CR 940.

³²The ubiquitous Dorsaneo is typical and reflects the common understanding of *Borg-Warner*'s holding. He states that

In *Borg-Warner Corp. v. Flores*, the Texas Supreme Court held that merely proving that the plaintiff was exposed to an air contaminant is not sufficient to show that the exposure was a 'substantial factor' in bringing about the plaintiff's injury; instead, the plaintiff must present concrete evidence of the frequency, regularity, and proximity of the plaintiff's exposure, and that the *aggregate exposure* was sufficient to bring about the alleged injuries in order to support a finding of causation.

19 William V. Dorsaneo, III, *Texas Litigation Guide - PERSONAL INJURY* § 290.03, citing *Borg-Warner*, 232 S.W.3d at 771-774 (emphasis supplied).

[p]laintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product . . . was a substantial factor in contributing to the aggregate dose of asbestos . . . without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.

(Citation omitted). Thus, *Rutherford*, recognizing the inability of a plaintiff, given the current state of scientific knowledge, to show which asbestos exposures actually caused the disease *adopted a surrogate for proving causation. Plaintiff need only prove that defendant contributed to the risk of disease in exposing the plaintiff to asbestos.* In addition, *Rutherford* required that exposure to the defendant's asbestos constitute a "substantial factor" in the overall dose to which plaintiff resolved.

[T]o prove that defendant's asbestos contributed a substantial factor in the risk of plaintiff's disease, *plaintiff must prove not only of the dose of defendant's asbestos to which plaintiff was exposed but also the total dose of asbestos to which plaintiff was exposed. Thus, in the Flores court's view, proof of substantial factor will require some sort of determination of the proportion that defendant's asbestos constituted of the total dose.*³³

This reading of *Borg-Warner* as requiring a showing of total dose and an individual defendant's approximate percentage contribution to it is wholly consistent with the few cases interpreting that portion of the decision and the case law that underlies it. In *Georgia Pacific v. Stephens*, 239 S.W.3d at 319, for example, the First Court of Appeals interpreted *Borg-Warner* to hold that,

[a]bsent any evidence of dose, the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts were sufficient to cause asbestosis. Nor did Flores introduce evidence

³³Joseph Sanders, Michael D. Green, William C. Powers, Jr., *A Tribute to Professor David Fischer: The Insubstantiality of the "Substantial Factor" Test for Causation*, 73 MO. L. REV. 399, 410 (Spring 2008) (emphasis supplied).

regarding *what percentage of that indeterminate amount [dose] may have originated in Borg-Warner products.*

Id. (emphasis supplied). The *Stephens* court said nothing that could be read to require the showing the MDL court mandated in this case. Instead, the Court reminded practitioners that the *Lohrmann* test on which *Borg-Warner* was partly based required that a plaintiff prove that, ““more probably than not, he actually breathed asbestos fibers originating in defendants’ products. This proof can be made by showing that plaintiff frequently and regularly worked in proximity to defendants’ products such that it is likely that plaintiffs inhaled defendants’ asbestos fibers.””³⁴ Thus, nothing in *Lohrmann* offers support for the notion that a plaintiff must show that each defendant alone caused his injury. Instead, it suggests that it is enough to show that each defendant contributed to the total exposure suffered by the plaintiff.³⁵

The Restatement of Torts also fully supports Appellants’ reading of *Borg-Warner* and deals a fatal blow to the MDL court’s decision. The current Restatement states categorically that “in order that a particular act or omission may be the legal cause of an invasion of another’s interest, the act or omission must be a substantial factor in bringing about the harm, and *there must be no principle or rule of law which restricts the actor’s liability because of the manner in which the act or omission operates to bring about such invasion.*”³⁶ That

³⁴*Stephens*, 239 S.W.3d at 309-10 (quoting *Slaughter v. S. Talc Co.*, 949 F.2d 167, 171 (5th Cir. 1991)).

³⁵*Stephens*, 239 S.W.3d at 309-10 (quoting *Slaughter*, 949 F.2d at 171); *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986).

³⁶RESTATEMENT (SECOND) OF TORTS § 9 cmt. b (1965) (emphasis supplied).

would seem to eliminate the possibility of arbitrary thresholds like the one imposed by the MDL court here. The newest draft Restatement is even more specific and sets forth the simple principle that *“the actor who tortiously provides the straw that breaks the camel’s back is subject to liability for the broken back.”*³⁷ It explains further that *“the limitation on the scope of liability provided in this section [and by the MDL court’s order] is not applicable if the trivial or insignificant contributing cause is necessary for the outcome; this section is only applicable when the outcome is overdetermined.”*³⁸ Indeed, the Restatement commentators illustrate this notion with an example perfectly apposite to a disease based upon the cumulative effects of toxic exposure.

Duro Company operated a manufacturing plant that required substantial amounts of water for the manufacturing operation. The water was contained in a closed system and recirculated. Because of Duro’s location and the area’s topography, an escape of water from Duro’s plant might cause flooding damage to others. Due to the negligence of Sewege Company, a plumbing contractor who installed much of the recirculation system at Duro, the system was breached one night. All of the water in the system escaped and ran into a nearby river that was dammed approximately 100 yards from where Duro’s water entered. Because of substantial spring rains and snow melt, the dam was very close to its capacity and the incremental contribution from Duro resulted in an uncontrolled escape of water that caused damage to Allan’s farm. Thus, had Sewege not been negligent, Allan would not have suffered harm. *Sewege is subject to liability to Allan for the harm caused by the escape of the water, even though the amount of water from Duro constituted a small fraction of a percent of the water being contained by the dam at the time of the uncontrolled escape.*

Id. (emphasis supplied). Thus, the Restatement drafts categorically reject the notion,

³⁷RESTATEMENT (THIRD) OF TORTS § 36 cmt. b (Tentative Draft No. 3, April 7, 2003).

³⁸*Id.* (§ 27 (Tentative Draft No. 2, 2002)).

embraced by the MDL court below, that relatively small exposures always merit complete immunity.³⁹ In other words, under the Restatement, small does not always mean insignificant.

Under a proper reading of *Borg-Warner* then, even if Kelly-Moore supplied only a fraction of the “straw that broke the camel’s back” here, it would still be liable if that exposure was a substantial or necessary factor in the total exposure that caused Mr. Bailess’s mesothelioma. As demonstrated below, even the MDL court admitted that it was and held that, if Appellants’ reading of *Borg-Warner* was correct, Kelly Moore’s motion should be denied. Because that reading was correct, the MDL’s court’s decision must be reversed.

B. Even the MDL Court Itself Admitted that Appellant Bailess Met *Borg-Warner*’s Strictures Under Appellants’ Reading of that Decision

The record here contains specific evidence of the approximate amount of Kelly-Moore’s product and asbestos to which Mr. Bailess was exposed as well as evidence of the aggregate dose he received, and Kelly Moore’s percentage contribution to that aggregate dose.⁴⁰ As demonstrated above, *Borg-Warner* requires nothing more. In fact, the MDL court conceded that “If *Borg-Warner* requires that the dose from each defendant be enough by itself to be the substantial contributing factor, the motion must be granted. *If Borg-Warner does not require that, then the motion must be denied . . .*” CR 932 (emphasis supplied).

³⁹*Id.* This interpretation of *Borg-Warner* is consistent with the long-held notion that a tortfeasor takes the plaintiff as he finds him. See *Driess v. Friederick*, 73 Tex. 460, 462, 11 S.W. 493, 494 (1889) (*a.k.a.* the “eggshell skull rule”). Kelly Moore should not gain immunity simply because it was not the first to expose Mr. Bailess to toxic substances.

⁴⁰See, e.g., CR 221, 232-33, 297-98, 326, 331, 393, 970-71.

Appellants' detailed showing distinguishes this case from both *Stephens*, a joint compound case involving mesothelioma, and *Borg-Warner*, an asbestos case involving brake pads. In *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d at 318, for example, the Stephens' expert witnesses were unable to estimate Fred Stephens's exposure to Georgia-Pacific joint compound. The Court noted

In this record, there is no evidence concerning the percentage of Georgia-Pacific joint compound used in comparison to the quantity of other products used on Fred's job sites, nor any quantitative estimate of the number of times Georgia-Pacific joint compound was used on Fred's job sites. . . . there was no quantitative evidence presented upon which Fred's experts could rely to determine that he was exposed to Georgia-Pacific's product in sufficient quantities to have increased his risk of developing mesothelioma.

Id. at 319. That is not the case here.

Likewise, in *Borg-Warner*, "the sparse record . . . contain[ed] no evidence of the approximate quantum of Borg-Warner fibers to which Flores was exposed, and whether this sufficiently contributed to the aggregate dose of asbestos Flores inhaled, such that it could be considered a substantial factor in causing his asbestosis."⁴¹ The record here suffers from no such deficiencies.

In *Borg-Warner*, the brake pads at issue had asbestos fibers embedded in them but most of those fibers were destroyed by the heat of friction when the product was used. As the result, it was virtually impossible to determine to how much asbestos Mr. Flores was actually exposed. Here, however, Kelly Moore admitted that its product contained up to 8.3 percent asbestos. CR 410. Moreover, in this case, Mr. Bailess was exposed to a specific

⁴¹232 S.W.2d at 772 (emphasis supplied).

quantity of a dry powdered form of asbestos which when mixed, applied and sanded, and later swept up generated levels of dust comparable to those generated by insulators using thermal insulation.⁴² Studies and expert testimony confirmed that this routine use of joint compounds containing as little as 3% chrysotile asbestos created asbestos exposures well above background levels and several-fold higher than any historical or current peak exposure limit under OSHA.⁴³ As the result, the trial court was correct in holding that Appellants would have met *Borg-Warner's* exposure standards had it read that case correctly.

C. Neither *Borg-Warner* nor *Stephens* Requires the Fixed Exposure Threshold the MDL Court Imposed, Particularly in Mesothelioma Cases

The MDL court apparently assumed that *Borg-Warner* requires that it set an exposure threshold in all asbestos-related cases. It does not. Contrary to the one-size-fits-all approach it took, *Borg-Warner* requires only that Appellants offer evidence to quantify the dose associated with a particular product and the aggregate dose as part of their attempt to meet the substantial-factor standard. It is then up to the plaintiff to show that both were a substantial factor in the plaintiff's increased risk of asbestos-related disease in question. To hold otherwise would be to assume that all asbestos-related diseases even have fixed

⁴²See Rohl, et al., *Exposure to Asbestos in the Use of Consumer Spackling, Patching, and Taping Compounds*, Science, Vol. 1 (1975), 3rd Supp. CR 438; Fischbein, et al., *Drywall construction and asbestos exposure*, AMER. INDUS. HYG. ASSOC. J., 40:402-407 (1979), Verma and Middleton, *Occupational Exposure to Asbestos in the Drywall Taping Process*, AMER. INDUS. HYG. J., Vol. 41 (1980), 3rd Supp. CR 439.

⁴³CR 413 and *supra* note 3.

exposure thresholds. The Supreme Court in *Borg-Warner* did not go so far.⁴⁴ Nor did the Court in *Stephens*.⁴⁵ Instead, both left the door open for further proof in mesothelioma cases.

Attempting to fix an immutable exposure level in mesothelioma cases is particularly inappropriate. As discussed above, the consensus in the scientific community is that there is not one.⁴⁶ In fact, attempts to quantify the minimum dose of asbestos that will result in mesothelioma through epidemiology have demonstrated that “[a] significant excess of mesothelioma was observed far below the limits adopted in most industrial countries during the 1980s.”⁴⁷ This is because of the peculiar nature of this disease. Brief, short time

⁴⁴It noted, for example that “it is generally accepted that one may develop mesothelioma from low levels of asbestos exposure.” 232 S.W.3d at 771 (quoting 3 David L. Faigman et al., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 28:22, at 447 (2007); cf. id. § 28:5, at 416).

⁴⁵The Court, in *Stephens*, extended *Borg-Warner* to mesothelioma cases but cautioned:

This is not to suggest that the levels of exposure evidenced in this case could never be proved to increase the risk of developing mesothelioma. In Borg-Warner, the supreme court notes a treatise that links mesothelioma with “low levels of asbestos exposure.” . . . Here, however, the experts and studies upon which they relied did not attempt to correlate low exposures with increased risk, but used instead an “any exposure” test. If “any exposure” leads to an increased risk of mesothelioma, then the testimony in this case proved that Fred was sufficiently exposed. The studies admitted in this trial record, however, do not link “any exposure” to asbestos with an increase in the risk of developing mesothelioma.

239 S.W.3d at 321, n.12.

⁴⁶See *supra* notes 10 and 12.

⁴⁷Iwatsubo, et al., *Pleural Mesothelioma: Dose-Response Relation at Low Levels of Asbestos Exposure in a French Population-based Case-Control Study*, AM. J. EPID. 148(2):133-142 (1998), 3rd Supp. CR 381. In one of the largest population-based case-control studies ever published, Iwatsubo and his colleagues calculated that cumulative intermittent exposures as low as 0.5 f/cc, the equivalent of 5 years of exposure at the current permissible exposure limit of 0.1 f/cc, resulted in a four-fold increase in the risk of mesothelioma with a 95% CI of 1.7-9.7. See

exposures to asbestos have resulted in malignant mesothelioma.⁴⁸ Moreover, the medical and scientific literature has established that there is an inverse relationship between the amount of asbestos a person inhales and the time period in which a mesothelioma will develop. As exposure level increases, the latency period decreases.⁴⁹

Perhaps the best description of the disease process of mesothelioma was set forth by a British court in *Fairchild v. Glenhaven Funeral Services Ltd.*, [2003] 1 A.C. 32 (H.L. 2002). The Court explained:

also Rodelsperger, et al., *Asbestos and Man-Made Vitreous Fibers as Risk Factors for Diffuse Malignant Mesothelioma: Results from a German Hospital-Based Case-Control Study*, AM. J. INDUS. MED. 39:262-275 (2001), 3rd Supp. CR 397 (odds ratio of 7.9 CI 2.1-29.5 for cumulative exposures of between 0.15 and 1.5 f/cc-years).

⁴⁸See Newhouse and Thompson, *Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area*, BRIT. J. INDUS. MED. 22:261-66 (1965), 3rd Supp. CR 345 (a case of mesothelioma in a patient who worked at a large asbestos factory for two months in 1941); Greenburg and Davies, *Mesothelioma Register 1967-68*, BRIT. J. IND. MED. 31:91-104 (1974), 3rd Supp. CR 362 (“In this study the briefest occupational exposure to asbestos associated with a mesothelial tumor was three weeks, but if asbestos was a cause of mesothelioma it cannot be assumed that lesser exposures are safe.”); Giarelli et al., *Malignant mesothelioma of the pleura in Trieste, Italy*, AM. J. IND. MED. 22:521-530 (1992), 3rd Supp. CR 369 (“very short periods spent in a workplace polluted by asbestos are sufficient to induce a malignant mesothelioma after many decades”); Browne and Smither, *Asbestos-related mesothelioma: factors discriminating between pleural and peritoneal sites*, BRIT. J. IND. MED. 40:145-152 (1983), 3rd Supp. CR 375 (in a study of 143 cases of mesothelioma, 22% were exposed for under one year, of whom 15% had no more than six months of exposure and 6% no more than three months.).

⁴⁹See Bianchi, *Latency periods in asbestos-related mesothelioma of the pleura*, EUR. J. CANCER PREV. 6:162-166 (1997), 3rd Supp. CR 406 (the shortest mean latency periods were seen among those most heavily exposed to asbestos while the longest mean latency periods were found among men and women who generally experienced exposures of a relatively low intensity); *see also* Neumann, et al, *Malignant Mesothelioma Register 1987-1999*, INT. ARCH. OCCUP. ENVIRON. HEALTH 74:383-395 (2001), 3rd Supp. CR 418 (concluding that “higher cumulative asbestos-fibre dose lead to an earlier development of mesothelioma”).

[Mesothelioma] is a condition which may be latent for many years, usually for 30-40 years or more; development of the condition may take as short a period as ten years, but it is thought that that is the period which elapses between the mutation of the first cell and the manifestation of symptoms of the condition. It is invariably fatal, and death usually occurs within 1-2 years of the condition being diagnosed. The mechanism by which a normal mesothelial cell is transformed into a mesothelioma cell is not known. It is believed by the best medical opinion to involve a multi-stage process, in which 6 or 7 genetic changes occur in a normal cell to render it malignant. Asbestos acts in at least one of those stages and may (but this is uncertain) act in more than one. It is not known what level of exposure to asbestos dust and fibre can be tolerated without significant risk of developing a mesothelioma, but it is known that those living in urban environments (although without occupational exposure) inhale large numbers of asbestos fibres without developing a mesothelioma. *It is accepted that the risk of developing a mesothelioma increases in proportion to the quantity of asbestos dust and fibres inhaled: the greater the quantity of dust and fibre inhaled, the greater the risk. But the condition may be caused by a single fibre, or a few fibres, or many fibres: medical opinion holds none of these possibilities to be more probable than any other*

...

Id. (emphasis supplied). For all of these reasons, the very scientific treatise upon which the *Borg-Warner* court relied acknowledges that imposing exposure thresholds is inappropriate in cases involving mutations such as those causing mesothelioma. It explained:

For agents that produce effects other than through mutations, it is assumed that there is some level that is incapable of causing harm. If the level of exposure was below this no observable effect, or threshold, level, a relationship between the exposure and disease cannot be established. . . . *This analysis, however, is not applied to substances that exert toxicity by causing mutations leading to cancer. Theoretically, any exposure at all to mutagens may increase the risk of cancer, although the risk may be very slight and not achieve medical probability.*⁵⁰

(Emphasis supplied). Other commentators agree:

⁵⁰Bernard D. Goldstein & Mary Sue Henifin, REFERENCE GUIDE ON TOXICOLOGY, in Federal Judicial Center, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 401, 426 (2d ed. 2000), cited in *Borg-Warner*, 232 S.W.3d at 770.

In mesothelioma cases courts have specifically acknowledged that “each exposure to asbestos over a period of time, regardless of the degree or concentration, increases the probability that a person will get an asbestos-related disease.” . . . *Since any asbestos exposure can increase the risk of contracting mesothelioma, requiring plaintiffs to satisfy a dosage requirement is illogical.* . . . Scientific studies have not conclusively identified a threshold level of asbestos exposure below which mesothelioma will not occur in humans or animals. *There is no basis for courts to require plaintiffs to meet a threshold that is scientifically non-existent and that has not been definitively determined.* Additionally, the necessary intensity of exposure to cause mesothelioma varies with individual idiosyncrasy.⁵¹ *Even if a general threshold did exist, an overall threshold level is unsuitable since the requisite amount of exposure differs with each individual. Whether one believes that each exposure increases the risk of contracting mesothelioma or only accepts the truism that science has not yet identified a threshold level low enough to not cause mesothelioma, requiring plaintiffs to prove that their exposure exceeded a threshold level of dosage is irrational.*⁵²

Faced with the scientific evidence the MDL court had before it, it was “irrational” and inappropriate for it to impose an immutable exposure threshold in this case. Moreover, as demonstrated below, *Borg-Warner* did not authorize the MDL court to impose such a threshold in contravention of long-standing summary judgment rules and conflicting evidence. For these reasons alone, the MDL court’s decision to grant Kelly Moore’s no-evidence motion for summary judgment should be reversed.

⁵¹*Celotex Corp. v. Tate*, 797 S.W.2d 197, 203 (Tex. App.—Corpus Christi 1990, writ dismissed).

⁵²Casenote: *Toxic Tort - Causation in Asbestos Claims - The Texas Supreme Court Creates New Causation Requirement and Leaves Numerous Victims Without a Remedy*, 61 SMU L. REV. 487, 493 (Spring 2008) (emphasis supplied).

III. THE TRIAL COURT'S RULING VIOLATES TEXAS CIVIL PRACTICE & REMEDIES CODE § 33.002 BY IMMUNIZING AND/OR SCAPE-GOATING OTHERWISE PROPORTIONATELY-LIABLE PARTIES AND REMOVING ASBESTOS CASES FROM ITS SWEEP

Appellants' reading of *Borg-Warner* as requiring that a plaintiff show an approximate aggregate dose of a toxic substances and an individual defendant's percentage contribution to that aggregate dose is consistent with the requirement of proportionate responsibility in toxic tort cases in Texas by allowing risk contribution to act as a surrogate for proportionate liability. The MDL court's reading is not. It would immunize relatively small contributors in all cases, irrespective of causation, and thus impose more liability than is warranted on those who exposed a plaintiff to relatively larger doses. In the worst cases, it would leave a plaintiff with no remedy at all if his exposure was due to a number of relatively small contributors.

Reduced to their essence, *Borg-Warner* and the MDL court's interpretation of it involve attempts to make the level of contribution to a toxic exposure match the liability for it. As several commentators explained:

The real concern in many of these cases is the relative allocation of responsibility to various defendants. One of the reasons the *Rutherford* court was relatively undisturbed about the trial outcome in the case is that the jury seems to have attributed an appropriate share of liability to the defendant: 1.2%. In *Flores*, however, the jury apportioned 37% of the liability to *Borg-Warner* even though it was responsible for less than 10% and perhaps as little as 2% of the asbestos to which plaintiff was exposed.⁵³

⁵³Joseph Sanders, Michael D. Green, William C. Powers, Jr., *supra* note 33, at 426-27. As the commentator explained:

One explanation for the 37% allocation to *Borg-Warner* is that, at the time, Texas

For that reason, they concluded that

Given the reality of causal uncertainty, we believe the *Rutherford* solution to the problem is the best yet devised. The *Rutherford* approach of imposing liability for risk contribution is self-correcting in the case of small doses, at least in jurisdictions with several liability. The defendant who contributes .05% of the dose to which the plaintiff was exposed will be liable for that same percentage of the plaintiff's damages. . . . *Especially with respect to mesothelioma, risk contribution is more honest, consistent with existing scientific information, and provides a ready and more efficient mechanism for apportioning liability among those to whose asbestos plaintiff was exposed.*

Id. at 427.

Unfortunately, courts, including the MDL court here, have increasingly “used the substantial factor test to do an increasing variety of things it was never intended to do and for which it is not appropriate,”⁵⁴ including allocating legal responsibility. As the court in *Rutherford* explained, such a test is particularly ill-suited for this task:

only permitted apportionment to parties and those who had settled. *See* TEX. CIV. PRAC. & REM. CODE § 33.003 (1995). (Shortly after the trial in Flores, Texas changed its law to permit apportionment to responsible non-parties who the defendant could add as “responsible third parties.” *See* TEX. CIV. PRAC. & REM. CODE § 33.003 (a)(4) (2003)). Flores only sued four defendants, presumably because the others with whose brake pads he had worked were in or had been through bankruptcy and therefore could not be sued or because he could not identify them. Thus, the jury could only allocate to the one remaining defendant, Borg-Warner, and the three others with whom Flores had settled. We do not have any information on the percentage of total exposure from these four sources attributable to Borg-Warner brake pads and, therefore, cannot determine whether the jury based its percentage allocations on a causal contribution or a fault analysis.

Id. at 427.

⁵⁴David A. Fischer, *Insufficient Causes*, 94 KY. L.J. 277 (2005/2006) (who argues that the test has outlived its usefulness), *citing* RESTATEMENT (THIRD) OF TORTS: *Liability for Physical Harm* § 26 cmt. j and Reporters’ Note cmt. j (Proposed Final Draft No. 1, 2005).

