

NO. 10-0775

In the Supreme Court of Texas

**SUSAN ELAINE BOSTIC, INDIVIDUALLY AND AS PERSONAL
REPRESENTATIVE OF THE HEIRS AND ESTATE OF TIMOTHY SHAWN
BOSTIC, DECEASED; HELEN DONNAHOE; AND KYLE ANTHONY BOSTIC,
*Petitioners,***

v.

**GEORGIA-PACIFIC CORPORATION,
*Respondent***

**Petition for Review Arising From the Court of Appeals
For the Fifth Judicial District
Dallas, TX
No. 05-08-01390-CV
(Hon. Robert M. Fillmore)**

PETITION FOR REVIEW

Respectfully submitted,

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TABLE OF CONTENTS

IDENTITIES OF PARTIES AND COUNSEL	i
INDEX OF AUTHORITIES	iv
REFERENCE CITATION GUIDE	v
STATEMENT OF THE CASE	vi
STATEMENT OF JURISDICTION	vii
ISSUES PRESENTED FOR REVIEW	ix
STATEMENT OF FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
1. The court of appeals erred in holding that “substantial factor” causation in an asbestos case requires that Plaintiffs prove the Georgia-Pacific joint compound was a “but for” cause of Timothy Bostic’s mesothelioma.	4
2. The court of appeals errs by failing to apply the proper “no evidence” standard of review.	8
3. The court of appeals fails to apply this Court’s qualification that the “frequency, regularity, and proximity” test may differ depending on the type of disease and product	12
4. The court of appeals errs in holding that this Court requires Plaintiffs to calculate the dose of asbestos inhaled by Timothy Bostic.	14
CONCLUSION	15

APPENDIX

TAB A Final Judgment

TAB B *Georgia-Pacific Corp. v. Bostic*, 320 S.W.3d 588 (Tex. App. – Dallas, 2010)

TAB C Court of Appeals Judgment – August 26, 2010

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

INDEX OF AUTHORITIES

FEDERAL CASES

Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156 5

Tragarz v. Keene Corp., 980 F.2d 411 13

STATE CASES

Borg-Warner Corp. v. Flores, 232 S.W.3d 765 2 *et seq.*

City of Keller v. Wilson, 168 S.W.3d 802 9

Ford Motor Co. v. Ledesma, 242 S.W.3d 32 5

Georgia-Pacific Corp. v. Bostic, 320 S.W.3d 594 1 *et seq.*

Georgia-Pacific Corp. v. Stephens, 239 S.W.3d 304 2

Merrell Dow v. Havner, 953 S.W.2d 706 9

Rutherford v. Owens-Illinois, Inc., 16 Cal.4th 953 6, 7

Smith v. Kelly-Moore Paint Co., Inc., 307 S.W.3d 829 2

Union Pump Co. v. Allbritton, 898 S.W.2d 773 5, 8

STATE STATUTES

Tex. Gov't Code Ann. §§ 22.001(a) vi

Tex. Gov't Code Ann. § 22.001(a) vii

REFERENCE CITATION GUIDE

Abbreviations

Susan Elaine Bostic, Helen Donnahoe, & Kyle Bostic (Petitioners) Plaintiffs

Georgia-Pacific Corporation Georgia-Pacific or Defendant

Record References

Cites to the Reporter's Record are in the form of ([vol #] RR [page #]).

Cites to the Clerk's Record are in the form of ([vol #] CR [page #]).

Cites to Plaintiffs' Exhibits are in the form of (PX #).

Cites to Defendants' Exhibits are in the form of (DX #).

Cites to the Appendices attached hereto are in the form of (App. [appendix tab]).

STATEMENT OF THE CASE

- Nature of the Case:* Wrongful death lawsuit based on exposure to asbestos.
- Trial Court:* The trial court judge was the Honorable Sally Montgomery, County Court at Law No. 3, Dallas County.
- Trial Court Judgment:* In the first jury trial in this case, the jury returned a verdict on March 14, 2005 for \$9,327,000 (\$3,127,000 in compensatory damages, and \$6,200,000 in punitive damages), allocating 100% to Georgia-Pacific. Based on an error in the verdict form, a new trial was granted. In the second jury trial in this case, the jury rendered a verdict of \$13,593,917 (\$7,554,917 in compensatory damages, \$6,038,910 in punitive damages) and found that Georgia-Pacific was 75% responsible.
- Georgia-Pacific filed a motion to recuse Judge Montgomery, which was granted. Georgia-Pacific filed a Motion for Mistrial, which was granted by Judge Russell Roden, County Court at Law No. 1, Dallas County. Plaintiffs filed a Motion to Vacate Judge Roden's Order and Enter Judgment, which was granted by Judge D'Metria Benson, the new presiding judge of County Court at Law No. 1, Dallas County. On October 22, 2008, Judge Benson entered the First Amended Final Judgment against Georgia Pacific for \$12,126,637.15 (App. A.)
- Court of Appeals:* Georgia-Pacific appealed the judgment to the Fifth District Court of Appeals on July 29, 2009.
- Court of Appeals Panel:* Justices David Bridges, Kerry Fitzgerald, and Robert Fillmore.
- Court of Appeals Opinion:* *Georgia-Pacific Corp. v. Bostic*, 320 S.W.3d 588 (Tex. App. - Dallas, 2010) (App. B.) Justice Fillmore authored the opinion.
- Court of Appeals Holding:* The court of appeals reversed and rendered the judgment of the trial court, finding that there was legally insufficient evidence of causation.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal because the court of appeals decision conflicts with prior decisions of this Court. TEX. GOV'T CODE ANN. §§ 22.001(a)(2). Specifically:

a. The court of appeals held that in order to meet the substantial factor causation standard in an asbestos case, the plaintiffs must show that each product at issue was a “but for” cause of the plaintiff’s asbestos disease. Consequently, the court of appeals’ decision conflicts with this Court’s holding in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007) (holding that in an asbestos case, while plaintiffs must show frequent-regular-proximate causation in order to prove substantial factor causation, they are not required to “demonstrate that fibers from the defendant’s product were the ones, or among the ones, that *actually* produced the malignant growth.”)(App. C.)

b. The court of appeals discredited the evidence of Timothy Bostic’s exposure to asbestos from Georgia-Pacific asbestos joint compound, and instead relied on contradictory evidence elicited by defendant on cross-examination. Consequently, the court of appeals holding conflicts with this Court’s holdings in *Merrell Dow v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)(in determining whether there is no evidence of probative force to support a jury’s finding, all the record evidence must be considered in the light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from that evidence is to be indulged in that party’s favor) and *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). (“No evidence” points may only be sustained when the record discloses one of the following situations: “(a) a complete absence of evidence of a vital fact; (b) the court is barred by the rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of a vital fact.”).

c. The court of appeals failed to recognize that proof of substantial factor causation in an asbestos case may vary depending on the type of product and the type of disease at issue. Consequently, the court of appeals’ decision conflicts with this Court’s holding in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007) (instructing that the requirements for frequent-proximate-regular exposure may differ depending on the type of asbestos product and the type of asbestos disease).

d. The court of appeals held that in order to prove substantial factor causation, one must calculate the dose of asbestos inhaled from the defendant’s product. Consequently, the court of appeals’ decision conflicts with this Court’s holding in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 772 (Tex. 2007) (holding that calculation of dose, or minimum threshold of exposure, is only required in cases where it is disputed as to whether asbestos caused the plaintiff’s disease in the first instance).

This Court has jurisdiction over this appeal, because the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected. See TEX. GOV'T CODE ANN. § 22.001(a)(6). The continual misinterpretation of this Court's decision in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 772 (Tex. 2007) has made it nearly impossible for plaintiffs to hold an asbestos judgment on appeal. Since this Court handed down the *Flores* decision in 2007, every asbestos judgment in Texas for plaintiffs has been reversed and rendered, and every judgment for defendant affirmed. See *Smith v. Kelly-Moore Paint Co., Inc.*, 307 S.W.3d 829 (Tex. App. - Fort Worth 2010, no pet.); *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304 (Tex. App. - Houston [1st Dist.] 2007, pet. denied); *Georgia-Pacific Corp. v. Bostic*, 320 S.W.3d 588 (Tex. App. -Dallas, 2010). Moreover, each different court of appeals has imposed standards on asbestos plaintiffs that are not scientifically possible, and thus present a complete bar of litigation to these claims - such as requiring that plaintiffs prove which fibers caused the disease, or that plaintiffs calculate the amount of asbestos inhaled by the injured party despite the fact that these injuries occurred decades ago. The court of appeals decision in *Bostic* perpetrates the confusion. In order to rectify the confusion this decision has created, and allow plaintiffs who have been wrongfully injured to have their fair day in court with a clear understanding of the law, the court of appeals' erroneous decision should be corrected.

ISSUES PRESENTED FOR REVIEW

Issue 1: In *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007), this Court held that in an asbestos case plaintiffs are not required to “demonstrate that fibers from the defendant’s product were the ones, or among the ones, that *actually* produced the malignant growth.” *Id.* at 773.

Did the court of appeals err in holding that in an asbestos case, where multiple exposures combine to cause the plaintiff’s disease, the plaintiff must prove that defendant’s individual product was the “but for” cause of plaintiff’s disease in order to show substantial factor causation?

Issue 2: In *Merrell Dow v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), this Court held that in determining whether there is no evidence of probative force to support a jury’s finding, all the record evidence must be considered in the light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from that evidence is to be indulged in that party’s favor.

Did the court of appeals, in finding no evidence of frequent, proximate, and regular exposure to asbestos, apply the wrong evidentiary standard of review by disregarding all evidence favorable to plaintiff and giving weight only to contradictory evidence elicited by defendant on cross-examination?

Issue 3: In *Borg-Warner*, 232 S.W.3d at 773, this Court held that the requirements for frequent-proximate-regular exposure in an asbestos case may differ depending on the type of asbestos product and the type of asbestos disease at issue.

Did the court of appeals err in failing to recognize that lower levels of exposure to defendant’s asbestos product may be necessary to prove substantial factor causation where the defendant’s product is friable, and not encapsulated, and the plaintiff has mesothelioma, for which there is no known safe level of exposure?

Issue 4: In *Borg-Warner*, 232 S.W.3d at 772, this Court held that calculation of dose, or minimum threshold of exposure, is only required in cases where it is disputed as to whether asbestos caused the plaintiff’s disease in the first instance.

In a case in which all parties agree that the plaintiff’s mesothelioma was caused by asbestos exposure, did the court of appeals err in holding that the plaintiff must calculate the dose inhaled from the defendant’s product in order to show substantial factor causation?

STATEMENT OF FACTS

Timothy Bostic was diagnosed with mesothelioma, an asbestos cancer, on October 31, 2002, at the age of 40. 7 RR 154; 7 RR 166. He died on September 5, 2003. 8 RR 66. He was survived by his wife of eighteen years, Susan, his eighteen year-old son, Kyle, his father, Harold Bostic, and his mother, Helen Donnahoe. 7 RR 167-8. Georgia-Pacific does not dispute that Timothy's mesothelioma was caused by exposure to asbestos.

Timothy Bostic's primary exposures to asbestos were from ten years working with and around Georgia-Pacific asbestos joint compound from 1967 to 1977; three months working in the "hot section" at a glass plant ("Knox Glass") in the early 1980's; six months exposure to gaskets and insulation as a welder's helper at Palestine Contractors in 1977-78; household exposure to his father when he was a child; and limited use of brake products. 7 RR 176-77; 8 RR 21-22; 7 RR 186-88; 12 RR 28-29; 7 RR 18-19; DX-33.

The court of appeals misstates the facts in stating that Timothy was exposed to asbestos for three full summers at Knox Glass, from 1980 to 1982. *Bostic*, 320 S.W.3d at 594, note 7. In fact, Timothy had two different responsibilities at Knox Glass: in the "cold end" of the plant he made boxes, packed glass, and performed janitor work; and in the "hot end" he was exposed to asbestos while he performed mechanic work and clean-up. 7 RR 172. Of the three summers he worked at Knox Glass, Timothy estimated that he spent an aggregate of only three months in the hot end. 8 RR 42.¹

¹Dr. Richard Kronenberg, a pulmonary physician who performed a study of workers at Knox Glass, testified that Timothy Bostic's work at the plant "would be really the extreme low end of the exposure for the folks out at the glass plant." 15 RR 218.

The court of appeals also misstates the evidence in concluding that there is “limited” evidence of Timothy Bostic’s exposure to Georgia-Pacific’s asbestos joint compound. *Bostic*, 320 S.W.3d at 588. In fact, Harold Bostic, Timothy Bostic’s father, testified that he worked with his son just about every day from when he was five until the age of ten, and then every weekend after that.² 12 RR 136. During this period, Harold testified that Timothy used Georgia-Pacific asbestos joint compound “many, many times.” 12 RR 137. Harold testified that “between the time Timmy was five years old until about 15 or 16 years old, he could “see him sand . . . that joint compound and breathing in that dust.” 12 RR 141. In 1977, the Consumer Products Safety Commission (“CPSC”) banned asbestos-joint compound for use by consumers as an “unacceptable risk.” 5 RR 145; 6 RR 11; PX-26.

SUMMARY OF THE ARGUMENT

The interpretation by the lower courts of this Court’s decision in *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007) has made it nearly impossible for plaintiffs in asbestos cases to survive “no evidence” challenges to causation in the courts of appeal. *See Smith v. Kelly-Moore Paint Co., Inc.*, 307 S.W.3d 829 (Tex. App. - Fort Worth 2010, no pet.)(upholding summary judgment based on “no evidence” of causation); *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304 (Tex. App. - Houston [1st Dist.] 2007, pet. denied) (reversing and rendering asbestos judgment based on this Court’s holding in *Flores*); *Georgia-Pacific Corp. v. Bostic*, 320 S.W.3d 588 (Tex. App. -Dallas, 2010) (reversing and rendering asbestos judgment based on this Court’s holding in *Flores*). Indeed, every judgment in an asbestos case since *Flores* has

²When Harold and his wife divorced, Timothy was ten years old. 12 RR 26. From that point on, Harold got Timothy every weekend and during the summer. 12 RR 26.

been reversed and rendered. The court of appeals decision in *Bostic* continues to perpetrate the confusion surrounding the *Flores* decision, and hence the unfair application of this Court's jurisprudence.

In this case, the court of appeals erred by holding that Plaintiffs must in essence trace the Defendant's asbestos fiber to Timothy Bostic's disease in order to show "but for" causation, which is not only scientifically impossible, but also contrary to this Court's holding in *Flores*. The court of appeals further erred by ignoring this Court's admonishment in *Flores* that the level of proof necessary to prove frequent-proximate-regular exposure in an asbestos case may vary based on the type of product and disease at issue. Here, in contradiction to *Flores*, the court of appeals failed to modify the level of proof necessary to show substantial factor causation, where Timothy Bostic was exposed to highly friable asbestos from joint compound, and where Timothy's disease - mesothelioma - is caused by extremely low levels of exposure to asbestos. Further, the court of appeals incorrectly required that Plaintiffs calculate the dose of asbestos inhaled from Defendant's product in order to show substantial factor causation, even though this is (i) not scientifically possible; and (ii) not required under *Flores*. Finally, the court of appeals erred in failing to apply the well-settled standard for "no evidence" review, and instead discredited all evidence favorable to Plaintiffs, and adopted only those points elicited by Georgia-Pacific on cross-examination.

The erroneous interpretation of this Court's holding in *Flores* will continue to place an insurmountable bar to plaintiffs in asbestos litigation, which the plain language of *Flores* reveals that this Court did not intend. Plaintiffs pray that this Court grant this Petition for Review, order full briefing on the merits, and reverse the decision of the court of appeals.

ARGUMENT

1. **The court of appeals erred in holding that “substantial factor” causation in an asbestos case requires that Plaintiffs prove the Georgia-Pacific joint compound was a “but for” cause of Timothy Bostic’s mesothelioma.**

The court of appeals erred in holding that this Court requires that a plaintiff in an asbestos case must prove “but for” causation in proving that an asbestos product is a “substantial factor” in causing the plaintiff’s disease. *See Bostic*, 320 S.W.3d at 597. In fact, the court of appeals misquotes this Court by adding “but for” language to a sentence from *Flores*: “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.* (quoting from *Flores* as to substantial factor, but adding the additional language “and without which the injuries would have occurred.”).

In *Flores*, this Court concluded that exposure to “some” respirable fibers is not sufficient to show that asbestos was a substantial factor in causing asbestosis. *Flores*, 232 S.W.3d at 766. Plaintiff Arturo Flores, a mechanic, was alleged to suffer from asbestosis, a disease which this Court recognized is “usually observed in individuals who have had many years of high-level exposure, typically asbestos miners and millers, asbestos textile workers, and asbestos insulators.” *Id.* at 771. While this Court understood that Mr. Flores was exposed to “some asbestos,” there was no quantification of his total amount of asbestos exposure sufficient to conclude whether he had enough exposure to cause his asbestosis, nor was there evidence of what percentage of his exposure came from Borg-Warner products, the defendant in the case. *See id.* at 771-72. Indeed, it was hotly contested at trial whether Mr. Flores even suffered from

asbestosis. *See id.* at 766. (Mr. Flores, who had a 50-pack year smoking history, had a chief medical complaint at the time of trial of shortness of breath, which he testified manifested itself after he had been mowing the lawn for 35-40 minutes. *See id.* at 768).

In *Flores*, this Court concluded that the plaintiff in an asbestos case must show substantial factor causation by the frequency-regularity-proximity test established by *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986). *Id.* at 773. Further, when it is not clear that there was sufficient exposure to asbestos to produce an asbestos disease in the first instance, this Court held that the *Lohrmann* test is not enough: “[i]mplicit in that test, however, must be a requirement that asbestos fibers were released in an amount sufficient to cause Flores’ asbestosis, or the *de minimus* standard *Lohrmann* purported to establish would be eliminated, and the *Union Pump* causation standard would not be met.” *Id.*, referencing *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775-77 (Tex. 1995). In other words, this Court held that the plaintiff must show frequent, regular, and proximate exposure to the defendant’s product, in accord with the *Lohrmann* standard, and where it is contested that asbestos caused the disease, must also show that the plaintiff was exposed to enough asbestos in total to have caused his disease.

The court of appeals errs by holding every asbestos case, regardless of whether it is undisputed that the plaintiff has an asbestos disease, the plaintiff is required to show that each defendant’s product was sufficient in and of itself to cause the plaintiff’s asbestos related disease. *See Bostic*, 320 S.W.3d at 597, citing *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007). Indeed, by applying this Court’s language from *Ledesma* in an asbestos case, the

court of appeals ignores this Court’s carefully delineated asbestos causation standard as set forth in *Flores*, and instead applies the standard adopted by this Court in a car wreck case. *See id.* By so doing, the court of appeals imposes requirements on asbestos plaintiffs that were neither adopted by this Court nor scientifically possible.

The court of appeals holds that plaintiffs in an asbestos case must in effect trace the fibers from the defendant’s product to the plaintiff’s disease, in order to show that “but for” the plaintiff’s exposure to defendant’s product he would not have developed the disease. This ignores this Court’s plain language in *Flores* admonishing against just such a requirement, and also the basic principles of medicine and science, which state that it is not currently knowable which fibers in a neoplastic process ultimately cause the cancer. In *Flores*, this Court recognized the “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.” *Flores*, 232 S.W.3d at 773, citing *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 67 Cal. Rptr.2d 16, 941 P.2d 1203, 1219 (Cal. 1997). This Court quotes favorably from the California Supreme Court’s decision in *Rutherford*, which explicitly states that substantial factor causation does not require that the plaintiff prove which fibers were the ones that actually produced the harm, but rather instead requires that the plaintiff show that the exposure to defendant’s product contributed to the risk of the disease:

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 the fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.

Flores, 232 S.W.3d at 773, quoting *Rutherford*, 941 P.2d. at 1219 (emphasis added).³

Thus in *Flores*, this Court recognized the scientific impossibility of proving that asbestos fibers from a particular product were the "but for" nexus for the plaintiff's disease. *See id.* This accords with the evidence in this case. Dr. Samuel Hammar, Plaintiffs' expert in pathology, is the co-author of the text ASBESTOS: RISK ASSESSMENT, EPIDEMIOLOGY, AND HEALTH EFFECTS (Ronald F. Dodson and Samuel P. Hammar, eds. 2005). He has published over forty articles in the peer-reviewed literature on the issue of asbestos or mesothelioma. 11 RR 21. As a scientist, he testified that it is impossible to determine which asbestos exposures were the actual cause of an individual's mesothelioma. 11 RR 40. Therefore, Dr. Hammar explained that in a person with exposure to different asbestos product, one cannot say without which exposure he would not have developed mesothelioma:

³ This Court's recognition that "but for" causation is not required in an asbestos case where multiple products may combine to cause a Plaintiff's disease, and where it is unknowable which fiber was "the one" that produced the malignant growth, is affirmed by the Restatement (Third) of Torts. The comments to the Restatement explain that factual causation may be satisfied when multiple actors combine together to produce a harm, even when the actions of each individual actor are not sufficient in and of themselves to have caused the harm:

Able, Baker, and Charlie, acting independently but simultaneously, each negligently lean on Paul's car, which is parked at a scenic overlook at the edge of the mountain. Their combined force results in the car rolling over the edge of a diminutive curbstone and plummeting down the mountain to its destruction. The force exerted by each of Able, Baker, and Charlie would have been insufficient to propel Paul's car past the curbstone, but the combined force of any two of them is sufficient. Able, Baker, and Charlie are each a factual cause of the destruction of Paul's car.

Restatement (Third) of Torts, § 27, cmt f, Illus. 3.

Q. Is joint compound an exposure in this case you can say without it he would never have developed mesothelioma?

A. No, I don't think you can do that. I don't think you can do that for probably any exposure that was a legitimate exposure.

11 RR 139.

The court of appeals errs by taking this quote, and concluding that Plaintiffs cannot prove causation because they cannot show “but for” causation as to Georgia-Pacific. *See Bostic*, 320 S.W.3d at 597, citing *Flores*, 232 S.W.3d at 770. In so holding, the court of appeals ignores this Court’s careful admonishment that “substantial factor” causation in an asbestos case does not require that a plaintiff show that the fibers from a particular product were “the ones, or among the ones, that actually produced the malignant growth.” *Flores*, 232 S.W.3d at 773. Instead, this Court stated that a plaintiff “must prove that the defendant’s product was a substantial factor in causing the alleged harm.” *Id.*, citing *Union Pump*, 898 S.W.2d at 775. In a case such as this, where the parties do not dispute that there was sufficient exposure to asbestos to overcome the threshold *de minimus* exposure question, the plaintiff must only satisfy the *Lohrmann* frequency, proximity, and regularity requirements, and not “but for” causation on a product-by-product basis.

2. **The court of appeals errs by failing to apply the proper “no evidence” standard of review.**

In holding that there is “insufficient evidence of Timothy’s frequent and regular exposure to Georgia-Pacific’s asbestos-containing joint compounds during the relevant time period,” and thus insufficient evidence of causation, the court of appeals errs by disregarding the evidence showing Timothy’s significant exposure to Georgia-Pacific asbestos joint compound. In

determining whether there is no evidence of probative force to support a jury's finding, all the record evidence must be considered in the light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from that evidence is to be indulged in that party's favor. *Merrell Dow v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). "No evidence" points may only be sustained when the record discloses one of the following situations: "(a) a complete absence of evidence of a vital fact; (b) the court is barred by the rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of a vital fact." *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). None of these situations apply here.

The court of appeals recognized that Harold Bostic testified to using Georgia-Pacific asbestos joint compound with Timothy "many times" over a ten year period, and that Timothy's work history sheets show that he was exposed to Georgia-Pacific asbestos joint compound as a co-worker of Harold Bostic and through household exposure. *Bostic*, 320 S.W.3d at 600. Nonetheless, in contradiction to the "no evidence" principles set forth by this Court, the court of appeals does not view the evidence in the record in a light most favorable to Plaintiffs, and instead chooses to credit competing evidence that the court of appeals states "belies" Harold Bostic's testimony and Timothy's work history sheets. *Id.* By so doing, the court of appeals does not apply the proper evidentiary standard of review. Without explanation, the court of appeals summarily states: "[o]n 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.” *Id.* Presumably, the court of appeals is giving great deference to the points elicited by Georgia-Pacific on cross-examination of Harold Bostic, in which Harold was pressed to recall the specific part-time jobs on which he used Georgia-Pacific with Timothy over forty years ago. *Id.* at 593. What the court of appeals discredits entirely is Harold Bostic’s testimony that in his lifetime of work as a handyman, he used Georgia-Pacific asbestos joint compound with Timothy for 98 percent of the time, or more, and that between the time that Timothy was five years old to 15 or 16 years old, he used Georgia-Pacific asbestos joint compound on a continual basis and “many, many times.” 12 RR 39; 137. Timothy testified that he worked around asbestos joint compound with his father his “whole life.” 7 RR 178. Harold testified that he “always had an extra job working for the family,” and that he “worked about six hours a day after my regular job.” 12 RR 22-23. Given that Harold testified that 98 percent of that time he used Georgia-Pacific asbestos joint compound, and that he worked with Timothy on a continual basis, the reasonable inference to be made is that during the ten year period from 1967 to 1977, Timothy was exposed to asbestos from Georgia-Pacific joint compound on a regular, frequent, and proximate basis.

The court of appeals also ignores Harold’s explanation that although he could no longer remember thirty or forty years ago which job he performed on a particular house, there was no doubt in his mind that he used Georgia-Pacific joint compound continuously, and on far more than the eight jobs he was able to recall:

- Q. Harold, all of these houses, I mean this is 20, 30 years ago. Is there any doubt in your mind that you worked on other places other than this, these seven or eight, that you just can’t recall?

A. Oh yeah. I worked on more.

...

Q. Did Timmy use Georgia-Pacific joint compound?

A. Many, many, many times.

12 RR 136-37.

Harold Bostic explained that of the eight jobs he was able to remember, it is incorrect to say that Timothy did or did not work on them: “I don’t think I ever said that he didn’t or did work on some place. He could have worked on all of them. He could have worked on half of them. I never said that he did or didn’t that I recall, that I say he did or didn’t.” 12 RR 131.

The court of appeals errs in viewing the evidence in a light most favorable to Georgia-Pacific, rather than viewing Harold Bostic’s testimony in a light most favorable to Plaintiffs. The jury found that Georgia-Pacific was 75% responsible, and clearly did not believe that the eight jobs that Harold was able to recall were the only jobs that he and Timothy worked on. Instead of following the requisite “no evidence” standard of review, the court of appeals instead finds that the evidence “believes” that Harold Bostic worked with Georgia-Pacific joint compound “many, many, many times” with Timothy. *Bostic*, 320 S.W.3d at 599.

The court of appeals, in discrediting all the evidence above, and in applying an incorrect standard of review, then compounds its error by refusing to acknowledge Dr. Hammar’s testimony that Timothy’s exposure to asbestos joint compound was sufficient in and of itself to cause his mesothelioma:

Q. Was Timothy Bostic exposed at high enough levels, to your knowledge, in doing this drywall work, in mixing, sanding, and cleaning up of drywall materials sufficient to cause the disease mesothelioma?

A. Yes.

11 RR 49.

Instead, the court of appeals insists, contrary to the evidence, that Plaintiffs proved substantial factor causation based on the “each and every exposure” theory. *Bostic*, 320 S.W.3d at 599.

3. The court of appeals fails to apply this Court’s qualification that the “frequency, regularity, and proximity” test may differ depending on the type of disease and product.

The court of appeals also ignores this Court’s qualification that proof of causation, and hence the amount of frequency, proximity, and duration of exposure, may differ depending on the product at issue and the disease at issue, and thereby applies too high a burden to Plaintiffs. First, this Court recognized that “it is generally accepted that one may develop mesothelioma [in contrast to asbestosis] from low levels of asbestos exposure.” *Id.* at 771. This is confirmed by the record in this case. Dr. Arnold Brody, professor of cell biology at medical school Tulane University, testified: “[T]here’s no safe level for mesothelioma. In other words, no one’s ever been able to show a level that will prevent everyone from getting mesothelioma. Now, you can do that for asbestosis, and you can get pretty close probably for most lung cancer cases, but for mesothelioma, no one’s ever shown a safe level.” 4 RR 92. Further, every expert, including Georgia-Pacific’s experts, agreed that in Timothy’s case, lower levels of asbestos than normal were required to cause his mesothelioma, because children are more susceptible to disease from breathing asbestos fibers. 4 RR 149-50; 5 RR 101; 14 RR 29-30; 13 RR 216.

The court of appeals errs by not recognizing that extremely low levels of exposure to asbestos can cause mesothelioma, and therefore in order to meet the legal standard of frequent,

proximate, and regular exposure, the causation standard is somewhat less rigid. *See Tragarz v. Keene Corp*, 980 F.2d 411, 421 (7th Cir. 1993) (holding that the frequency, regularity, and proximity test becomes “even less rigid” when dealing with mesothelioma, which can develop after only minor exposures to asbestos fibers).

The court of appeals also does not recognize, as does this Court in *Flores*, that the nature of the asbestos product will change the analysis required for proof of causation. *Flores*, 232 S.W.3d at 773. In *Flores*, the asbestos fibers were embedded in brake pads, and often “destroyed by the heat of friction and therefore [are] not released released to the public as asbestos fiber.” *Id.* at 767. This Court cautioned that proof of exposure may differ where a friable product is at issue: “We note too, that proof of causation may differ depending on the product at issue; ‘[i]n some products, the asbestos is embedded and fibers are not likely to become loose or airborne, [while] [i]n other products, the asbestos is friable.’” *Id.* at 773 (citations omitted). Asbestos fibers in joint compound are neither embedded nor “destroyed” by the heat of friction. Dr. William Longo testified that persons who mixed, sanded, and cleaned-up Georgia-Pacific asbestos joint compound were exposed to levels of asbestos many times greater than the current OSHA permissible exposure limit of .1 fiber cc, and thousands of time higher than average background of asbestos in the air of .0005 fibers per cc. 10 RR 136; 95. Dr. Longo calculated that a twenty-five pound bag of Georgia-Pacific joint compound contains five percent asbestos, which equals 11.4 quadrillion asbestos fibers. 10 RR 108-10. Dr. Longo measured 16 billion asbestos structures on the clothing of the worker who sanded Georgia-Pacific asbestos Ready-Mix joint compound. 10 RR 239-40. The peer-reviewed,

published literature shows that exposures to asbestos from joint compound work is comparable to the asbestos exposures of asbestos insulators, with a mean exposure to asbestos of 10 fibers per cc. 5 RR 129, 139-40. The court of appeals, in rejecting Plaintiffs' evidence of frequent, proximate, and regular exposure in favor of some unknown, unattainable standard, errs by failing to consider the extremely friable nature of the individual product at issue in this case.

4. The court of appeals errs in holding that this Court requires Plaintiffs to calculate the dose of asbestos inhaled by Timothy Bostic.

Finally, the court of appeals errs by holding that “appellees’ evidence is insufficient to provide quantitative evidence of Timothy’s exposure to asbestos fibers from Georgia-Pacific’s asbestos-containing joint compound . . .” *Bostic*, 320 S.W.3d at 601. The court of appeals disregards Dr. Longo’s quantification of the asbestos fibers released from Georgia-Pacific joint compound, by stating that he failed to establish a “dose” for Timothy. *Bostic*, 320 S.W.3d at 601. Therefore, lacking an exact “dose” of the airborne fibers which Timothy inhaled, the court of appeals finds no evidence of quantification. *See id.*

The court of appeals errs in concluding that this Court requires an exact dose of exposure to satisfy the *Flores* quantification standard. In *Flores*, this Court required quantification because there was a legitimate question as to whether there was enough exposure to asbestos to cause Mr. Flores’ disease in the first instance: “In a case like this, proof of mere frequency, regularity, and proximity is necessary but not sufficient, as it provides none of the quantitative information necessary to support causation under Texas law.” *Flores*, 232 S.W.3d at 773 (emphasis added). In other words, this Court held in *Flores* that (i) the plaintiff must show frequent, regular, and proximate exposure to the defendant’s product, in accord with the

Lohrmann standard, and, (ii) where causation of the disease itself is in question, must show that the plaintiff was exposed to enough asbestos in total to have caused his disease in the first instance. “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.” *Id.* Here, it is undisputed that Timothy Bostic’s mesothelioma was caused by his exposure to asbestos. Thus, the threshold quantification required by this Court in *Flores* to show that the total asbestos exposure could cause the disease is not necessary in Timothy Bostic’s case. Rather, pursuant to *Flores*, Plaintiffs must show Timothy Bostic’s exposure to Georgia-Pacific’s asbestos joint compound was frequent, regular, and proximate, in order to “separate the speculative from the probable,” and thereby prove substantial factor causation. *Id.* at 773. Plaintiffs met this standard in this case.

CONCLUSION

For the reasons set forth above, Plaintiffs pray that this Court grant this Petition for Review, order full briefing on the merits, and reverse the decision of the court of appeals, and for such other relief for which Plaintiffs may be entitled.

Respectfully submitted,

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ATTORNEY FOR PETITIONERS

Certification by Counsel

I certify that I have reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

Denyse F. Clancy
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CERTIFICATE OF SERVICE

I certify that pursuant to the Texas Rules of Civil Procedure, I have served a true copy of the foregoing Petition for Review by certified mail, return receipt requested on November 9, 2010:

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