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Supreme Court of Texas.
Borg-Warner Corporation, Petitioner,
v.
Arturo Flores, Respondent.
No. 05-0189.

September 26, 2006

Appearances:
Deborah G. Hankinson, Law Offices of Deborah Hankinson PC, Dallas, Texas, for petitioner.
Brent M. Rosenthal,Baron & Budd, P.C., Dallas, Texas, for respondent.

Before:

Wallace B. Jefferson, Don R. Willett, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister, Justices.

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JUSTICE: Please be seated. The Court is ready to hear argument in 05- 0189, Borg-Warner Corporation versus Arturo Flores.

ORAL ARGUMENT OF DEBORAH G. HANKINSON ON BEHALF OF THE PETITIONER

MS. HANKINSON: May it please the Court. Deborah Hankinson, will present argument to the petitioner, petitioner. I'll reserve five minutes for rebuttal. May it please the Court. This cause presents a straightforward issue for the Court to decide whether evidence of any exposure to an asbestos containing product is sufficient to establish causation of an asbestos-related disease. The answer to this question is a resounding doubt and well established Texas Law provide the foundation for that answer. This cause, therefore, prevents the Court with the opportunity to reject the lesser causation standard used by the Court of Appeals in this case. And to clarify that plaintiff's claiming to be injured by an asbestos containing product must made the same standards and proof as left any other claimant conta-- claiming injury from a defective product. The starting point, of course, is to test for cause in fact and to other Texas Law and we moved traditionally to Union Pump, the 1995 decision of this case for that test. That standard is that a plaintiff must prove that the defendant's conduct or product was a substantial factor and bringing it back the

plaintiff's injury. I reviewed the evidence in this case shows why the any exposure standard that was used for causation should not be substituted with the substantial factor test. Here to see I held, relying upon its decision in Tate in 1990 and its own decision in Easter in 1999 that any exposure to any asbestos containing product is sufficient to establish causation. On this record, there were two facts that were important to the Court. Mr. Flores contended in the Court of Appeals agreed that there was causation because one or more had answered in interrogatory, that its-- this brake pads contained 7 to 20 percent chrysotile asbestos. And second, Mr. Flores's own testimony that he was exposed to dust while grinding Borg-Warner brake pads.

JUSTICE: So what-- so you're saying, all you would need in additional is you could obvious of vacate go back in time. You just want to experiment where you do what he says he did to his brake pads and then you test the air and see through if any asbestos at.

MS. HANKINSON: No, your Honor. I think it's a little bit more complicated than that in order to prove specific causation. I think you have to look at several pieces of this Court's jurisprudence to see how they ruled on substantial factor has played out from an evidentiary stand point.

JUSTICE: I'm, I'm curious now, I mean, that's I never tried any brake pad cases but in the pad fedo cases, you know, that's what's you do, you do it demonstration and, you know, plaintiffs turn it worst darkest plain blue-suites so the dust to get all over it. And you'd say, "Well, that was, you know, it was asbestos in the dust." I mean, your not going to be able to trace the fiber, your not required to trace the fibers.

MS. HANKINSON: Well, your Honor, yes. I mean, ...

JUSTICE: It should be able to trace, I mean, in their body -

MS. HANKINSON: Excuse me?

JUSTICE: - you'd be able trace them in their body and some ...

MS. HANKINSON: Well, I mean, that's one, one of the things that going to happen is there's testing that is done to determine if there are fibers in the lungs. But second of all, I mean, I think what you're looking at, is that what Texas Law would required him to prove is first of all, that asbestos fibers were in fact released during the grinding. That's questionable on this record whether that even happened.

JUSTICE: Are there some evidence found? There some ev -

MS. HANKINSON: Excuse me?

JUSTICE: - Is there some evidence that grinding releases asbestos fiber?

MS. HANKINSON: Well, the, the Dr. Castleman testified in this case that there, there were-- that, that a lot of the fibers, the heat friction that occurred during the process destroyed a lot of the fibers in most them. But in fact, there were probably some respirable fibers and that's as much as we have in the evidence.

JUSTICE: Well, that's the Court-- Well, that's -

MS. HANKINSON: [inaudible]-- Excuse me?

JUSTICE: - that expert refers to the grinding caused by the braking mechanism. I think grinding and its cause by when you're sending the brake pad to make it fit the brake drums [inaudible]-- considerably different.

MS. HANKINSON: No. He was also, he was also talking about that as well. What the Friction it says, that it with it-- that he couldn't set its ...

JUSTICE: What if he uses-- What if the brake mechanic uses a faw to make the brake fit. As supposed to some will the grinds at high rate

of speed.

MS. HANKINSON: Well, -

JUSTICE: Fibers are extra ordinant that instance.

MS. HANKINSON: Well, we don't have, we don't have any evidence in this record about that, your Honor, what we have is the testimony of Dr. Castleman. We have the fact that there was dust, what we don't know ...

JUSTICE: Dr. Barry Castleman was it? Is that his name? Barry -

MS. HANKINSON: Excuse me?

JUSTICE: - Barry Castleman?

MS. HANKINSON: Yes, Sir. What we don't have in the record is what was in the dust, what we don't have is the question about whether those fibers were actually in respirable form and what we don't have is any evidence about the dust. The question would be, what quantity and quality of respirable fibers in the dust were sufficient to cause an asbestos-related disease? And that's the piece that Justice Brister that I think is important, and that is important when we look at the evolution of toxic tort cases back from the days when we were dealing with pipefitters and shipyard workers and people who were dealing in that context. Now we have so many new contexts and so many new products and what the Court of Appeals did here was say, "Well, if there's asbestos in a product and the plaintiffs sees dust and if someone says that the person has an asbestos-related disease which was also disputed in this case." Then we can assume from the fact that there was an asbestos product, dust and a diagnosis that they as-- that, that particular product must of cause of disease.

JUSTICE: I just want to be clear. Are yours-- that your saying there's no evidence that there was respirable asbestos in that, that in this brake?

MS. HANKINSON: I, I think it's questionable.

JUSTICE: Is it-- but some, some are just completely at ...

MS. HANKINSON: I don't, I don't, I-- here, here were his works. Some asbestos, some respirable fibers were made. Those with works ...

JUSTICE: Why is it-- why, why is that enough?

MS. HANKINSON: Because -

JUSTICE: Why is that enough 'cause there some experts in this arena that testify, one fiber is enough one to cause mesothelioma.

MS. HANKINSON: - because there is, there is no testimony in this record. I understand that, that is a theory that some experts testified to. The idea that every fiber contributes to asbestos-related disease but that it is a scientific theory. And in order for that to be competent proof under this Court's tests for scientific evidence, then there must be the requisite proof under Havner and its progeny that, that theory in fact passed a scientific master. There is absolutely no evidence in this record that would support that determination. The plaintiff offered nothing to support from a scientific standpoint, the idea that if you breathe a five of a product, then that is a cause in fact. And remember the test is a substantial factor in causing the disease under Texas law. And that's what we're asking the Court to do, is to apply the substantial factor test. And I think when you look at the elements, I think the bottom line is your at, at the last element, Justice Brister in the analysis would been be, whether exposure to those particular fibers in fact cause the disease, were a substantial factor cause in the disease process. I think that when Justice Green -

JUSTICE: And how would you show, how would you show that? How would you show that?

MS. HANKINSON: I, I think that through the scientific evidence,

your Honor, I think you have to look at the particular product. And I think you have to have the scientific evidence to show that there was sufficient dust, sufficient exposure to that kind of asbestos in that kind of setting, were sufficient period of time to actually increase and meet the scientific standard to show that it was probably the cause of disease.

JUSTICE: How would you do that if the employer never did an air sampling, air monitoring, then warns its employees at this brakes contain asbestos and that their studies had indicate that asbestos exposure, causes asbestosis, mesothelioma and the like.

MS. HANKINSON: Well, it's done all the time. Is what this Court requires before I let assigned scientific evidence to be admitted with respect to causation in toxic.

JUSTICE: Is it ever been done, is it ever been done in an asbestos case?

MS. HANKINSON: Has-- I'm sorry, has whether ...

JUSTICE: You said this Court does it all the time, has this Court made those decisions in asbestos case?

MS. HANKINSON: This Court has done it in toxic tort context but not specific in that article in the asbestos context but ...

JUSTICE: But then it's not done all the time, I mean, we have done it, it's not done all the time, so it's not -

MS. HANKINSON: Well, I, I -

JUSTICE: - appropriate response.

MS. HANKINSON: - I believe that the Courts in the state, when the Trial Courts and the Appellant Courts have been viewing Havner and its progeny from this Court as being the control in test with the ignition of scientific evidence in the toxic tort context. And that, that, they have been construing the Court's decisions as including asbestos within that group of cases. So I think that uniformly that is the approach that is taken in order to have scientific evidence submitted. This case has no scientific evidence in it. This is the kind, same kind of case that, that, that has the same kind of record that occurred when Justice Green wrote the opinion in San Antonio in the in way arms, the Petroquest. Where what you have looking for who were claiming exposure to asbestos and silica. And what, what you have is the vicious cycle of a diagnosis of a disease. And if there was a diagnosis of a disease then you could as-- and then you could assume that it was caused by the exposure-- the product to that is a vicious cycle without proof ever rises the level of satisfying the substantial factor test under Texas Law. So I think if you look at this Court's decisions with respect to causation, in the toxic tort context which requires reliable scientific proof. And there are plenty of studies being done everyday with respect to different exposures, to different kinds of products, different kinds of asbestos, and different kinds of other toxic substances.

JUSTICE: Does the Court distinguish between Pearl thickening or scarring versus Mesothelioma, where perhaps, many experts, I think, agreed that, though we know the cause of mesothelioma exposure to a chrysotile or chrysotile asbestos fiber. And there's also a small group of the population that just develops it for know-- known reason. Does the Court distinguish those type of cases?

MS. HANKINSON: I think the Court should apply the usual rules that are in place. This Court acknowledged in Golding, that you have to have causation in an asbestos case and that the exposure to the particular defendant's product cause the disease in point of that. Then we have the substantial factor test that has always been in Texas Law and was reaffirmed in Union Pump. In, In re Ethyl, this Court wrote and

acknowledged that each product that contain asbestos was different and have to be treated differently. It was very fine amicus brief that was cupeled with the Court by the Coalition for Litigation Justice and that gives the Court the context of the fact that individual products and individual environments create different exposure scenarios in effect disease process and that, that matters in terms of it. And then finally when you look at Havner and its progeny with respect to the requirements with the, the science behind causation. I think when we look at those pieces which a well established in Texas Law, there is no justification for that law also do not apply in the context of asbestos litigation in ...

JUSTICE: Can some of this be work out in the, in the, in depends on damages that, you know, the amount or the exposure level was so low then yes, perhaps, it contributed to scarring and some fibers in long as-- but our responsibility for that given the history of smoking and other, you know, work in other field that, that contributed great more dramatically, to the injury.

MS. HANKINSON: I understand, your Honor, and I think that might still be there-- which still be something that could played out in the context of litigation. For example, on this context Mr. Flores did have long history of smoking and, and there were questions about that. However, I don't know if any circumstance in which this Court has lowered the proof requirements or eliminated elements of a cause of action with respect to the threshold inquiry for liability saying that, "You can work it out in the damage cause." I think that in order to survive directed verdict, in order to be able to get to the jury, your going to have to have evidence at each of the elements of the cause of action -

JUSTICE: Well, ...

MS. HANKINSON: - and then once you get to the point ...

JUSTICE: But that, that, that goes back to my earlier question, if there's some evidence in this record, and I, I, I hear that your speaking that about there some evidence, that his exposure to that dust, which contain respirable fibers would, would be located in his lungs. And then there some causation there maybe not substantially aggravating the injury. But if there some evidence that be presence there that was attributable to the defendant. Then that the question become, "Well, how much in order for them ..."

MS. HANKINSON: Well, first of all I need to clarify that we don't have them discussed, I mean, we don't have evidence that there are fibers in his lungs. I mean, this case is a very small record that has nothing in it. But the bottom line again, if you look at the, the, the amicus brief that are referred to Court 2, you'll see that there is discussion that if all of us have our lungs examined today, someone would probably find in asbestos fibers in them 'cause asbestos is everywhere and through the course of our lives, with all breathe examine the ordinary course offense. So again, I think, Justice Jefferson, I don't think that, that in of itself should be there and there's no reason to compromise that legal standards at this Court already has implies because it is necessary to be able to actually shows substantial factor causation that rather than breathing dust that made of contain fibers should be enough. Look at the evidence in this case, Dr. Castleman just said ...

JUSTICE: Let me, let me ask you just a moment.

MS. HANKINSON: Yes, your Honor.

JUSTICE: I'm not sure your positional work.

MS. HANKINSON: I'm, your Honor, I think with respect to Lohrmann,

Lohrmann dates back to the 1980's and I think it had this day for all practical purposes, I don't think the Court needs to educt Lohrmann, because I think you already have. I don't think he characterize this Lohrmann. But I think, if the Court uses its precedent in the scientific area that's what Lohrmann said, Lohrmann said, he can't just have any exposure, we're going to have to have, you know, sufficient, sufficient exposure in terms of time, you know, quantity, quality, etc., in order to say, that there was causation. I think that's what happen here in which progeny did. So without using that nine, I think the Court over the last, you know, 15 of years as of, perhaps, stretching the Trouney has done what the Federal Court did in Lohrmann but through a different avenue. So I see no need for the Court to specifically adopt that test, I think that the Court gets to the same place by applying its existing trust.

JUSTICE: Further questions? Thank you, Miss Hankinson, the Court is ready to hear arguments from the respondent.

COURT ATTENDANT: May it please the Court, Mr. Brent Rosenthal will present argument to the respondent.

ORAL ARGUMENT OF BRENT M. ROSENTHAL ON BEHALF OF THE RESPONDENT

MR. ROSENTHAL: May it please the Court. Ways of using the entire vortical technique, I'd like to begin by saying what this cases not about. This case is not about the plaintiff's desire to have a liberalized standard causation or a different standard of causation where the Court of Appeals failure to follow the Texas requirement of a, of a requirement proof of causation in an asbestos case. It is our position that the Texas Court of Appeals properly applied the law and in fact, it is the petitioner that seeking a deviation most specific proof than was required. The Court of Appeals clearly required, the Tex-- the plaintiff in this case to prove that exposure to asbestos was a cause in fact of the plaintiff's injuries that could be supplied this case as, as ...

JUSTICE: Well, I don't understand that. The Court of Appeals wrote, the plaintiff need not prove that product could emit respirable asbestos fibers. In this case there's evidence that the plaintiff inhaled dust that when ground for feeding brake pads contain asbestos it can produce respirable asbestos and the plaintiff suffers from asbestosis. But it seems to me like there has to be, you have at least crew that if you grab up this brake pads while they are being ground, asbestos would be released that you did breathe in that could cause asbestosis. Don't you at least have prove that?

MR. ROSENTHAL: I think that, that proof-- Well, let me put it this way-- It-- I think that the Court of Appeals, was correct that they need not be expert testimony that the dust contain asbestos fibers, I think ...

JUSTICE: How, how else would you now?

MR. ROSENTHAL: Well, I think, that if you have product that contains up to 28 percent asbestos by weight, which is proven in this case, and the plaintiff testified that over a 4-year period ground brakes several times a week and they created a lot of dust. If you breathe that dust, I think it is reasonable to infer that the plaintiff breathe asbestos dust from that product. That is our position and I would think that's a common sense position, we also think that

precedents supports that. We cite in some cases in our brief that Fibreboard versus Pool case at Texarkana ...

JUSTICE: But in the other side, introduces evidence that the fibers get all smashed up and destroyed in the course of grinding but somebody that's know something more than I saw does took place, then, when do we have to meet something more than just dots?

MR. ROSENTHAL: Well, that's not in this record, your Honor, number one, number two, they've got a fact issue, I would think that the plaintiff once to win, the plaintiff would present its own proof as soon that is available of, of the scientific composition of the fibers. It maybe that someday, on some record that defendant can produce such compelling proof that it's brought that the dust coming out of its products didn't -

JUSTICE: Didn't they have, they never had them.

JUSTICE: - that, that, that it is establishes in-- as a matter of wa-- that a causation can't exist, but of course, that's not this case, the Counsel point it up, I would describe the record, in this case is economical. And there is-- what the plaintiff did produce the record requisite evidence. The plaintiff produced-- And, and comparing it to this other cases, I think demonstrates and the prove is, is considerably stronger. This plaintiff shall-- that again, over a 4-year period for several times a week, I think, up to ten times a week, he ground brakes which created dust which he breathe. That kind of proof wasn't really available in the Easter case, that, that is cited where plaintiff blow it entirely on circumstantial evidence. I would insist who, wherein vicinity of the deceiving can use the product to generate dust he said, he was around, so we can ensure that he was exposed in the same-- then I was. Here we have direct that out of its ...

JUSTICE: What is the evidence of those exposure?

MR. ROSENTHAL: The evidence of those exposure is simply the plaintiff's testimony as the, the number of times he used the product with, years that used the product and, and the circumstances.

JUSTICE: Which is ...

MR. ROSENTHAL: There is no fiber camp, there is no measurement of the amount of dust in the year in his has seen-- which is the state of this ...

JUSTICE: Well, they -

MR. ROSENTHAL: I'm sorry.

JUSTICE: - O'shea sets or used to, may still set the standards on those in the air or parts per used to be million cubic feet make it, it's a different standard now that is acceptable. How do we know that the amount of asbestos or number of asbestos fibers in the air were not acceptable if we don't know what the dose is in the air that the, that Mr. Flores was subject to?

MR. ROSENTHAL: Well, the-- there is testimony in the record from Dr. Castleman who said that, "The use of brakes has been reported to produce levels approaching that, of the, of the , lower when of lab by O'shea or upper when the lab by O'shea." In 1970, those limits had been raised, so the inference is reasonable that-- or beside those limits had been lowered dramatically. So the evidence is reasonable that those [inaudible] those exposures do exceed the O'shea levels.

JUSTICE: But that, those exposure tends not just on how much, how many fibers come out grinding. It depends upon the size and nature of the room in which the work is being done, the demolition, whether there's respirator being used or some other kind of-- it depends on lots of things that I study about what happened elsewhere or in other situations may not establish in a particular case like this one,

doesn't it?

MR. ROSENTHAL: Well, yes. Those measurements are affected by those factors. I, I submit that the minimum proof that was necessary in this case to support causation was the plaintiff's own testimony about the grinding and space cleaning in it and the, I mean, having level of dust that was in year. It simply has to be further, there's no measurements in this case, there's no dust levels. And of course, the plaintiff's circumstances on exposure were in the series and I, at that time there was no testing going on of asbestos levels in the series greater opinions ...

JUSTICE: You haven't shown the sense your opposition that, that 4-year exposure to dust, whatever its contents was a substantial factor in bringing, bringing you back injury. Now how do you encounter that?

MR. ROSENTHAL: Well, we do have Dr. Bukowski's testimony. No. 1 that each in every exposure those cause asbestos but also for general testimony about the nature of asbestosis. Asbestosis unlike mesothelioma which is, I believe, Justice Medina was asking about before is a cumulative disease, it is the mesothelioma does depend to some degree on a threshold level of exposure but once you get there, it's, it's, it's a cancer. It develops without reference to just how heavy that fiber would missed but asbestosis is a cumulative disease, the more you inhaled, the more likely you are to get it, the more severe it is, the more your fiber burden is. And Dr. Bukowski did testify about those characteristics of asbestosis in her testimony. So I mean, you could take it to the level that we don't take it to reduce. Each in every exposure is a substantial cause of some disease, yes, there are exposures that occur in the, in the, in view there without especially heavy exposures and those are de minimus exposures that been recognized in the legal whether it's your food, decades really is, is not creating a legal cause of action but we're talking about exposures over, over long period of time, over 4-year period of time. And I think that, that her testimony is not simply conclusion but it's purified. Oh, that back renowned discussion of asbestosis.

JUSTICE: If we were to follow Judge-- Ms. Hankinson's argument, without with, would require the plaintiffs approves substantial exposure in causation to each of specific manufacturer's product. For example, few client work in series, now they may use products apply by Borg-Wagner in a whole list of asbestos manufacturing. Company is a manufacturer best of brake linings. Do they have to show substantial exposure to each one them?

MR. ROSENTHAL: Yes, we did. I-- we believe that, that's the current burden under Texas law is that to hold a manufacturer liable for asbestos-related injury. You have to show that, that manufacturer's product was a substantial cause, a substantial contributing cause in the plaintiff's injuries. So each member, if I-- we can't just show de minimus exposure and some hold them in those, the-- it's depend in specific in other words, yes, that is a requirement. But if you'd -

JUSTICE: How?

MR. ROSENTHAL: - admit it that as to Borg-Warner. There was evidence in this case of different products when the plaintiff was exposed. I mean, there were findings by the juror at that of Texas Law at the time, took that into account by miracle also. There was a change reason -

JUSTICE: How far [inaudible]? I'm sorry, Mr. Rosenthal.

MR. ROSENTHAL: No. I'm sorry.

JUSTICE: How far this it the apart from at the DMEL edge co-staff, how far is it to do with testing find out how much part from they in

there are, from grinding sort kinds of product, sort amount of time in the year?

MR. ROSENTHAL: Well, there have been ...

JUSTICE: Expensive testing inside of it?

MR. ROSENTHAL: I would say it's expensive but I will say that, that there are industrial hygienists and other experts that can conduct that type of testing if they're provided with similar materials. My understanding is-- I will actually, I don't know this, I was about to say, "I don't know whether products are available from Borg-Warner, that resemble those types of brakes that were used in the, in the early 70's." But if they were available, I believe testing could be done as matter of expense.

JUSTICE: You expect me with the quality of the exposure evidence in this case, virtually identical to, to what it was in the, In re R.O.C.. That the argument that you're making today which was not sustained in that case. There is making-- Are you saying that, that case, that stand was too descriptive? Well, how would you reconcile that?

MR. ROSENTHAL: That-- No, your Honor, I wouldn't, I would say that, that's-- are very distinguishable in this case and in R.O.C. In R.O.C., my understanding is, of course, you wrote the opinion that none of the plaintiffs personally identified the manufacturer of the asbestos containing products that were used. In R.O.C, I believe the plaintiffs relied upon general testimony that they were in the area where the products were used. General testimony that the products created dust and they relied on, their diagnosis of asbestosis as confirming their exposure to injuries quantities of dust. We don't do that. Our evidence, the evidence that regarding this case is independent. We, we say that Mr. Flores's testimony and the evidence that the Borg-Warner brakes did indeed could make asbestos is totally independent of the diagnosis. And the diagnosis, at the finding that abnormalities is not dependent on the fact that he was exposed to asbestos. Now the fact that he was-- the exposure history does identified the source of those abnormalities but it doesn't confirm the existence of disease. So it's not certain regulated. Ms. Hankinson's suggest that, I think that does have to be cause of it to the extent that R.O.C implied and I don't think it this that expert testimony was required to prove ingestion of a particular dose. I, I would disagree with that standard but I don't think it does that I think that the language that, I believe, Justice Hecht, quoted, added he, added Flores opinion itself when they se-- when the person rest through bufa-- asbestos fibers. Plaintiffs doesn't need to show respirable fibers. I think that mean, the plaintiff doesn't need to produce expert testimony that there was actually inhalation but the plaintiff doesn't to show exposure would that guide on this case.

JUSTICE: Move it there-- clearer I'm making deadline in, in this Court, few years ago, with all kinds of asbestos exposure fibers there are respirable in cause to, of injury had others that are not and I left aware of any evidence in this case, which type of exposure that there was?

MR. ROSENTHAL: There was not-- Okay. Opposition here, I guess, it's-- very start photo, is that once the plaintiff proves that defendant's products continued substantial matter of asbestos which we deal ...

JUSTICE: Doesn't matter, what kind?

MR. ROSENTHAL: And what's-- Well, in this case, it was chrysotile, but once the plaintiff proves that they handle the product in the way

that generate its significant dust they breathe at-- Then, they have met their burden of production showing exposure to respirable asbestos fibers. And if the defendant can disproves that by its own evidence that the food on this-- In this case, we will ...

JUSTICE: Are you saying the circular argument that she say doesn't exist in this case?

MR. ROSENTHAL: Well, I think the circular point ...

JUSTICE: Have it have-- having not shown that this is the time of asbestos that causes the injury that was alleged just that the exposure occurred and then the person has the asbestosis, that's the same circular argument that at least, that was rejected R.O.C. You have a certain, you have in this brake cases. An expert will testify that the exposure to the chrysotile fiber in this brake pads does cause asbestosis or an asbestos-related disease.

MR. ROSENTHAL: Yes, yes, we had an expert that testified that, I think Justice Green to point is that, that the assumption the-- we are not depending on our experts diagnosis of the disease to prove the exposure. We in, in R.O.C., I think they said, "See, proof we were exposed," or a plaintiffs will expose because the plate B doctor diagnosed an asbestos-related disease. The doctor diagnosed an asbestos-related disease assuming that the plaintiff had been exposed, so that was circular. Here, the plaintiff, plaintiff's proof of exposures independent of the diagnosis. We would say, standing alone, Mr. Flores's testimony and the answer is interrogatories allow a reasonable jury to conclude that there has been injurious exposures, significant exposure.

JUSTICE: In the independent proof, he knows that he says that he was breathing this asbestos dust.

MR. ROSENTHAL: Well, he says he was breathing dust ...

JUSTICE: That's the same thing in R.O.C? Though that we have the asbestos products and return into a dust form when he's sitting, standing there in this room that's full of dust and that's, that would be, you would say then, that would be an independent evidence of exposure.

MR. ROSENTHAL: If-- I don't think the evidence was direct and the circumstantial evidence of the exposure was as compelling as it is here. If the, if the, if you're suggesting that, that in order to attribute causation, an expert having diagnosed disease can't assume exposure to no one ever would be expo-- diagnosed with asbestos disease because, because in every case of asbestosis, the expert has to rely on the plaintiff's occupational history and whatever other evidence exists to assume that there was exposure, I mean, we are not depending on Dr. Bukowski, Dr. Bukowski was cross-examining the testimony was cited in the brief that she had no personal knowledge that he was exposed to Borg-Warner asbestos containing brakes. And of course, she did, she's a doctor. Her job is to see what's going on in the lung. What she saw in the lung was characteristic of asbestos exposure but she can't be sure accent either his testimony were an assumption that he was exposed and the plaintiffs ...

JUSTICE: Let's say this, let's say that we adopt in total, in total the briefing that-- of your opponent and say, "This is the stand." And you have admitted there's no evidence. How would a person like Mr. Flores make the case? How would you demonstrate under your oppositions imbued of the world that the exposure was a substantial factors there attributed?

MR. ROSENTHAL: Well, I, I imagine that would, we would have to independently test the brake product. If we could obtain it to ensure

that we'll to demonstrate that there have been, there, there that in a minute has of this levels or, or excessive levels of asbestos dust. If such a test is possible, I will add pound thetically that the Texas legislature has recently circumscribe asbestos litigation to put it mildly in the state and, and has, has control, attempted to control litigation by reducing the availability of those kind of claims. But again, obviously, by answering the question on that I conceding that, that's in should be for finger ...

JUSTICE: And, and can't the other side rebut whatever exposure they may have been to the mechanics buffering, perhaps, they did in this case the so-called "frost right offense" where the grinding the-- of some expert say, "Destroy 99 percent of the fibers ..."

MR. ROSENTHAL: Absolutely in course, most of our testimony focused on the, the frost grinding of the new product does suppose to the blow act of the oath. But yes, and that's my essential, ultimate point is that, is that, yes, that the record here was, was not as expensively developed as it might have been. But once we showed this threshold facts, the defense, that we have presented legal and sufficient proof and the defense could be brought by its own evidence which it has no control of in the ...

JUSTICE: There is no biopsy taken here?

MR. ROSENTHAL: But-- No, your Honor. There, there is no biopsy. If there are no other questions, I will proceed the remainder of my time.

JUSTICE: Thank you.

REBUTTAL ARGUMENT OF DEBORAH G. HANKINSON ON BEHALF OF PETITIONER

MS. HANKINSON: I agree with Justice Green that this case in the record and is no different than that, that he considered when in deciding the R.O.C decision while he was on the San Antonio Court of Appeals. The evidence in this case briefly from Dr. Castleman was this that brake mechanics can be expose to asbestos by grinding brake pads that 1970 study show that exposure from servicing break pads would be significant. The entirety of his testimony is it, is it to catch those, top see do are bleak. He pertained, he said, he would absolutely conducting about Borg-Warner products. Dr. Bukowski had no specific opinion about brake mechanics and asbestos exposure. She did say that Mr. Flores does not have plural thickening plaques, measles or lung cancer that in fact, there was storing on the lung consistently asbestos exposure but also with other things like smoking. She based her diagnosis on his work history that he was exposed to asbestos. So although she was unable to say that he had inhaled any asbestos fi-- respirable asbestos fibres from a Borg-Warner brake, this brake pad, she concluded, quote, from his exposure history, I infer it was from grinding brake pads. But she could not testified that Borg-Warner brake, this brakes definitely release that. She said, "I can only infer." That is R.O.C. and R.O.C. is the proper analysis for why this evidence is not legal and sufficient to, to show cause in fact, substantial fact-- factor as we part them in Texas Law. Mr. Rosenthal eluded to the scientific theory behind this case that he says that Dr. Castleman testified to that every fiber contributes to the disease. There is no science in this record that supports that or that this Court to draw that conclusion. And I alerted Mr. Rosenthal before argument to its recent decision by, by a Court in Pennsylvania which we

will provide to the Courts available on West Law in which the Judge there conducted in a very extension-- extensive hearing ...

JUSTICE: Whose the Judge?

MS. HANKINSON: I don't recall the name of the Judge.

JUSTICE: Judge Winnerp? The man of ...

MS. HANKINSON: No. It's a State Court Judge, your Honor. And I don't recall the name of the Judge. The cite, the citation to the-- see I got the citation here-- the citation is, at 2006 West Law 2404008, it was August 17, in right toxic substitutes in which the Court there rejected and said there was no science to support the fact that the idea of, if you inhaled a fiber, it then contributes to the disease process in a way that would satisfy causation. This gentleman had 40 years as a brake mechanic. He was required under Texas law to come forward and show under the Texas' test for causation, substantial factor causation, that his exposure during that 40 years, over a 4 or 5 year period of time where he work with Borg-Warner brakes. Several times a week, the 3 or 4 minutes was a substantial factor in causing the disease he claims to the pad. It was his burden to prove that the excision in n re R.O.C., applies the principles that exist under Texas law for substantial factor causation and for scientific proof that shows what a plaintiff needs to prove. And we ask that this is in fact apply that standard in asbestos cases and not a doctor lesser standard. Mr. Flores should have shown and the legal standard should be, that a, that the product complain about, released asbestos fibers during grinding or during the exposure, there were actually res-- fibers released. And if those fibers where in respirable form and that the dust, the quantity and quality of respirable fibers in the dust should be sufficient to causing asbestos-related disease and that the exposure in the particular case, in fact, cause the particular injury complained about. We ask the Court to use this case as a vehicle to clarify that, that is the legal standard that should applied. The Court need brake nonogram with respect to the law. It need only apply the existing precedent in the context of asbestos litigation to reach that result to bring clarity to Texas law.

JUSTICE: Thank you, Ms. Hankinson, the case is submitted and I conclude all arguments for today. Partially now, adjourning the Court.

COURT ATTENDANT: All rise. Oyez! Oyez! Oyez! Honorable. The Supreme Court of Texas is [inaudible] adjourn.

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