Supreme Court of Texas
July 11, 2014

Bostic v. Georgia-Pacific Corp.
No. 10-0775
Case Summary written by Carter Bowers, Staff Member.

Justice Willett delivered the opinion of the Court, joined by Chief Justice Hecht and Justices Green, Johnson, and Brown. Justice Guzman joined in all but Parts II.A.3 and II.B.

In 2003, Timothy Bostic passed away from mesothelioma. His estate sued forty defendants (including Georgia-Pacific) on negligence and products liability claims based on his exposure to asbestos. At trial, the jury found Georgia-Pacific to be seventy-five percent responsible and awarded approximately $6.8 million in compensatory damages as well as approximately $4.8 million in punitive damages. On appeal, however, the court of appeals determined there was insufficient evidence as to causation and entered a take-nothing judgment.

Issue: Whether the causation analysis from asbestosis cases also applies to mesothelioma cases in asbestos litigation. If so, whether the court of appeals erred in applying a "but for" causation analysis to the underlying case.

In *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007), the court held that in asbestos-related disease cases, the plaintiff must not merely prove that the plaintiff was exposed some of defendant's asbestos, but instead must prove that defendant's asbestos constituted a substantial factor in causing the disease. Despite the differences pointed out by plaintiffs between asbestosis and mesothelioma, the court held that the *Flores* analysis applied in both circumstances. For example, plaintiffs' experts in this case and the court in *Flores* both noted that minimal exposure to asbestos can lead to mesothelioma. Thus, applying a lower threshold of exposure (some) to mesothelioma cases than to asbestosis cases (substantial factor) would ultimately result in a *de facto* strict liability against defendants in mesothelioma cases. Furthermore, if the "some exposure" theory were to stand, then it could be extended to nearly all carcinogens. The court was also weary of a theory that would focus on any level of exposure, but ignore other factors, such as other sources or background exposure.

The court of appeals' opinion suggested that the plaintiff must show "but for" causation to prove their case. In other words, they must show that but for defendant's products, the deceased would have not contracted the disease. The court agreed in many negligence situations, but for causation is a proper test for enforcing liability against a defendant, but did not extend such causation to this case. Because of the nature of asbestos products liability cases, where plaintiffs nearly always have been exposed to multiple sources of asbestos, the court maintained that the substantial factor test is a more preferable standard than a "strict" but for causation test. Thus, the court held that the court of appeals erred in applying a "but for" test.

Nevertheless, the court did not overturn the court of appeals's decision, finding instead that the plaintiffs failed to prove that Georgia-Pacific's products were a substantial factor in causing Bostic's disease. In doing so, the court applied the quantitative analysis from *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). In *Havner*, the court held that scientific studies showing exposure to a toxin doubled the risk of disease in people. Thus, the plaintiffs in that case would have to show that their risk of disease was at least doubled in similar circumstances to the scientific study in order to prove causation. Ultimately, *Havner* established the criteria for utilizing scientific studies as proof of causation in toxic tort cases where there is no proof of direct scientific evidence in the case. The *Bostic* court therefore required proof that Georgia-Pacific's products at least doubled Bostic's risk of exposure to mesothelioma. Proof of this doubled risk should come from expert testimony based on epidemiological surveys and other reliable scientific sources, and not simply conclusory statements of an expert witness.

When applying these standards to this case, the court ultimately decided that the plaintiffs had failed to prove Georgia-Pacific's liability for Bostic's mesothelioma. In cases where multiple sources of exposure are claimed, the plaintiffs are required to approximately quantify the dosage amount for which the defendant is responsible. In this case, the plaintiffs failed to do so, instead seeking relief on the "some exposure" theory. Thus, even though the court disagreed with some of the court of appeals's analysis, the court affirmed the ruling because plaintiffs failed to meet the causation standards of proof laid out in *Flores* and *Havner*.

Justice Guzman, concurring.

Justice Guzman concurred in the result, but chose a "more nuanced" approach to mesothelioma cases, believing that in some circumstances an occasional exposure case could be proved through proper scientific data. One of Justice Guzman's chief concerns was that the standard of proof for causation accepted in the majority's opinion may require a higher level of proof than what is legally sufficient—preponderance of evidence. She also rejects the dissent's analysis, suggesting that it would require a burden of proof below the preponderance threshold. Nevertheless, by her own analysis the plaintiffs in this case failed to scientifically prove Georgia-Pacific's liability because the plaintiffs were unable to properly find scientific studies which took place in similar circumstances or with similar subjects to the deceased.

Justice Guzman did not, however, join in parts II.A.3 and II.B of the majority opinion, arguing that the substantial factor test articulated there may run afoul of comparative fault in Texas. For instance, Justice Guzman uses an example that if a defendant's product was found to be ninety-nine percent responsible for the disease, then a court may also apply the remaining one percent of liability to the defendant. In situations where the defendant's fault is lower, this could be even more problematic, as defendants are usually only responsible for their portion of liability.

Justice Lehrmann dissenting, joined by Justices Boyd and Devine.

The dissenting justices were swayed by the evidence that Bostic had contracted mesothelioma from asbestos and he had been exposed to Georgia-Pacific's products containing asbestos, thus leading to liability. Justice Lehrmann reviewed the testimony of the plaintiffs' experts and found enough evidence to scientifically establish Georgia-Pacific's fault.

One of the dissent's primary concerns is that the court's application of both the substantial factor test from *Flores* and the quantitative scientific proof requirements of *Havner* result in the requirement that a plaintiff must prove that the defendant's products alone caused his disease. Such a requirement might undermine the tort principle that multiple sources can cause one harm.

The dissent notes that in *Havner* the court did not address multiple-exposure situations. The court in this case applied the *Havner* standards to such a situation. The dissent believed this to be erroneous. Furthermore, Justice Lehrmann argues that even if a plaintiff had only been exposed to a single source of asbestos, the majority would require *Havner* standards of epidemiological scientific surveys as proof of causation. Ultimately, the dissent determined that the plaintiffs had met the scientific burden of proof as to substantial factor causation and that the majority and the concurrence had set a standard of proof too high for plaintiffs in multiple-exposure mesothelioma cases.

Petroleum Solutions, Inc. v. Bill Head

No. 11-0425

Case Summary written by C.J. Baker, Staff Member.

Justice Lehrmann delivered the opinion of the Court, in which Justices Hecht, Green, Johnson, Willett, Guzman, Devine, and Brown joined and in Parts I and II of which Justice Boyd joined.

Petroleum Solutions manufactured and installed an underground diesel tank at Bill Head's (Head) truck stop. In 2001, the tank spilled some 20,000 gallons of diesel into the ground. Petroleum Solutions investigated the spill and found that a flexible connector was the cause of the accident. Head allowed Petroleum Solutions to keep that connector for testing. Petroleum Solutions turned it over to their attorney who turned it over to a metallurgist named David Hendrix with instructions not to destroy the component. By the time Head filed suit in 2006, Hendrix had inadvertently destroyed the connector without notifying Petroleum Solutions or receiving its permission. Petroleum Solutions sued Titeflex for contribution claiming that Titeflex had manufactured the flexible connector that caused the accident. However, Petroleum Solutions could produce no evidence that Titeflex was the manufacturer so Titeflex was eventually dropped from the case. The trial court granted a spoliation instruction against Petroleum Solutions allowing the jury to presume that the lost connector would have shown evidence adverse to Petroleum Solutions. Titeflex sued Petroleum Solutions for

indemnification of its defense costs under the Civil Practice and Remedies Code and a jury awarded Titeflex $450,000.

Issue: Whether Head was entitled to the spoliation sanctions against Petroleum Solutions which included a spoliation jury instruction and then decided whether the statutory indemnity provision was available to Titeflex.

The Court recently announced a framework for spoliation sanctions in Brookshire Brothers, Inc. v. Aldridge. There the Court held that, even when a party has intentionally or negligently spoliated evidence, the sanction must be directed at the bad conduct and may not be excessive. Spoliation instructions are excessive unless the spoliating party intentionally concealed the evidence or, in doing so negligently, irreparably deprived the non-spoliating party of any meaningful chance to present a claim or defense. Assuming without finding that Petroleum Solutions spoliated evidence in the first place, the Court held that the spoliation instruction was excessive because no proof existed that Petroleum Solutions intended to conceal evidence or that the loss of the valve irreparably deprived Head of his ability to bring a claim.

The CPRC "requires the manufacturer of an allegedly defective product to indemnify an innocent seller for any loss arising out of a products-liability action[,]" including the cost of its defense. Because Petroleum Solutions and Titeflex were both manufacturers and sellers under the definitions in the statute, the duty to indemnify fell on the party whose product ultimately caused the damages; in this case, Petroleum Solutions.

Justice Boyd, dissenting.

Justice Boyd would not have extended the statutory indemnity provision to Titeflex because the allegations Titeflex defended against were related to the component that it manufactured rather than the fuel system as a whole. The better statutory interpretation according to the dissent is that the party whose product was ultimately defective is liable to only liable to innocent sellers for losses related to general allegations against the completed product, not for losses related to the component parts manufactured by the innocent sellers. Therefore, Titeflex should not have been allowed to seek indemnity from Petroleum Solutions because Titeflex only incurred expenses in defending against charges specifically related to its component.