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The Wiggin and Dana U.S. Product Liability Law E-Newsletter is a periodic newsletter designed to inform clients and others about recent developments in the field of product liability law. Nothing in the E-Newsletter constitutes legal advice, which can only be obtained as a result of personal consultation with an attorney. The information published here is believed to be accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

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Texas Supreme Court Increases Plaintiff's Causation Burden in Toxic Tort Case

The Texas Supreme Court recently issued a significant decision concerning a plaintiff's burden when attempting to prove causation in a toxic tort case.

Borg-Warner Corp. v. Flores concerned a retired automobile mechanic who had repaired and replaced brakes for more than 35 years. Flores claimed that he suffered from asbestosis as a result of extensive inhalation of asbestos fibers over many years. He sued Borg-Warner and several other manufacturers of brake parts allegedly containing asbestos to which he was exposed. At trial he presented evidence indicating that he had used Borg-Warner disk brakes on about 1000 to 1400 brake repair jobs over a three-year period in the early 1970s.

As is typical in toxic tort cases, Flores presented expert testimony that asbestos fibers were released into the atmosphere when he grinded brake pads, that his asbestosis was caused by his inhalation of such asbestos fibers, and that any fiber inhalation – including inhalation of asbestos fibers from Borg-Warner brake pads – played a causative role in his developing asbestosis. There was no evidence as to the quantity of asbestos fibers Flores inhaled from Borg-Warner products or any comparison of that amount to the total amount of fibers inhaled. The jury accepted Flores' experts' testimony and found in his favor.

On appeal the Texas Supreme Court held that "a plaintiff must prove that the defendant's product was a substantial factor in causing the alleged harm," that

Flores had failed to prove that element of his case, and vacated the verdict. Notably the Court stated that Flores failed to offer "Defendant-specific evidence relating to the approximate dose to which plaintiff was exposed, coupled with evidence that the dose was a substantial factor in causing the asbestos-related disease...." The Court continued, "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." Without such evidence Flores failed to rule out the possibility that his exposure to Borg-Warner products may have had only an insubstantial impact on his condition.

By this decision Texas now joins several other states – including California and New York – which have set the bar higher for expert evidence needed to prove causation in toxic tort cases. I expect that this will have a significant impact on the number of toxic tort cases which are brought in Texas. In fact, since this decision I am aware of several Texas cases which have been voluntarily dismissed prior to trial because of a realization that the *Borg-Warner* standard could not be met.

I hope that this is helpful. As always, please let me know if you have questions or comments.