No. 05-0189

IN THE SUPREME COURT OF TEXAS

BORG-WARNER CORPORATION,
now known as Burns International Services Corporation,
Petitioner,

v.

ARTURO FLORES,
Respondent.

PETITIONER'S BRIEF ON THE MERITS

On Petition for Review from the
Thirteenth Court of Appeals at Corpus Christi, Texas

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STATEMENT OF THE CASE

Nature of the Case:	Products-liability case based on brake mechanic's alleged harmful exposure to asbestos-containing products.
Trial Court:	The Honorable Ricardo H. Garcia, Visiting Judge, 319th District Court, Nueces County, Texas.
Trial Court Disposition:	The trial court rendered judgment on the jury's verdict in favor of Flores. II CR 398. After applying the settlement credit, the final judgment awarded Flores $61,075 in compensatory damages, $55,000 in exemplary damages, and $24,145.54 in prejudgment interest. III CR 619.
Parties in Court of Appeals:	Appellant — Borg-Warner Corporation Appellee — Arturo Flores
Court of Appeals:	Thirteenth Court of Appeals at Corpus Christi; Justice Garza authored the opinion for the court, joined by Chief Justice Valdez and Justice Yanez. *See Borg-Warner Corp. v. Flores*, 153 S.W.3d 209 (Tex. App.—Corpus Christi 2004, pet. filed). Tab A.
Appellate Disposition:	The court of appeals affirmed the trial court's judgment on December 16, 2004. Tab A. On February 3, 2005, the court of appeals overruled Borg-Warner's motion for rehearing.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this case under section 22.001(a)(2) of the Texas Government Code because the court of appeals' opinion here conflicts with the Fourth Court of Appeals' opinion in *In re R.O.C. Pretrial*, 131 S.W.3d 129 (Tex. App.—San Antonio 2004, no pet.) (Green, J.) (Tab B), on the question of what kind of evidence is needed to show a causal connection between exposure to asbestos and a particular plaintiff's injury. TEX. GOV'T CODE § 22.001(a)(2); *compare* Tab A *with* Tab B. This inconsistency in the courts' respective decisions should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants. *See* TEX. GOV'T CODE § 22.001(e). Additionally, given the current state of asbestos litigation, the Court has jurisdiction under Texas Government Code § 22.001(a)(6) because the court of appeals' error in this case is of such importance to the jurisprudence of the state that it requires correction by this Court. This case presents fundamental causation issues that will affect asbestos litigation pending statewide.

ISSUES PRESENTED

1. Whether a plaintiff claiming to be injured by an asbestos-containing product has to meet the same causation standards that other plaintiffs do.

2. Whether the court of appeals' analysis of the jury's malice finding defies this Court's standard for an award of punitive damages as set out in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), and as codified by the Legislature in Texas Civil Practice & Remedies Code § 41.001(7).[1]

3. Whether there is any evidence to support the jury's strict liability findings.

4. Whether the court of appeals unfairly avoided review of Borg-Warner's challenge to the excessiveness of the damages by an unduly restrictive application of Texas Rule of Appellate Procedure 38.1(h).

5. Whether the erroneous admission of a chapter from a book offered in support of liability was harmful error in light of the entire record, including the exclusion of testimony and an exhibit on the same subject offered to defeat liability.

[1]This section has since been amended, but this case is governed by the prior version, and all citations are to that prior version. *See Borg-Warner*, 153 S.W.3d at 216 n.4.

INTRODUCTION

In this case, as it has in other published cases, the Thirteenth Court of Appeals has given the plaintiff the benefit of what is in effect a lesser causation standard when that plaintiff claims an injury from exposure to an asbestos-containing product. That lesser standard accepts proof of exposure to a product that contains asbestos, in any form, to be proof that the particular product in fact caused the plaintiff's injury. In applying this standard, the court of appeals has lost sight of fundamental principles of causation, the quality of proof needed to establish liability under either negligence or strict liability, and this Court's own insistence that a plaintiff prove that the defendant supplied the product that caused the injury. The court of appeals simply assumed that because the brake products Mr. Flores worked with contained asbestos, that the asbestos was of a sufficient quality and quantity to cause injury. Even if such an assumption could have been justified in early asbestos litigation involving plaintiffs who worked in asbestos-product manufacturing plants, the shipyard trades, or with asbestos insulation, for which there is a long history of epidemiological and other scientific evidence supporting causation, there is no justification for that assumption here, where there is no competent evidence of cause in fact.

In this case, there is no competent scientific evidence that working with brake products increases the risk of developing asbestos-related disease, or any evidence that a Borg-Warner product actually caused Mr. Flores's alleged injury. This case thus presents the Court with the opportunity to reject the court of appeals's lesser standard and to clarify that plaintiffs claiming to have been injured by an asbestos-containing product must meet the

same standards of causation and proof as must any other plaintiff claiming an injury from a defective product.

STATEMENT OF FACTS

61-year-old Arturo Flores sued Borg-Warner and a number of other defendants claiming that he suffered from asbestosis caused by working with brakes and gaskets during his almost forty years as an auto mechanic. 1 CR 193; 8 RR 17. By the time of trial, only Borg-Warner remained in the case, defending against claims of negligence and strict liability for defective design, manufacture, and marketing of the disk brake pads it made from 1971 to 1975. 1 CR 93; 7 RR 22.

At trial Flores testified that in 1964 he went to work at J.C. Penney's, where he worked on drum brakes. 8 RR 17-18. To service drum brakes he had to blow the dust out of the drum linings and "arc" or grind the brake shoes so they would fit properly on the drum. 8 RR 19-20. Both blowing out the drums and grinding the shoes created "a lot of dust." 8 RR 19. At that time he did two to three brake jobs a day, using GM, Ford, and Chrysler products. 8 RR 20-21. He moved over to Sears in 1966, doing the same work changing out drum brake linings and grinding brake shoes. 8 RR 22, 24.

In 1969 he saw his first disk brake pads, and began servicing brakes using those pads along with the drum brakes that most cars still had on the rear wheels. 8 RR 24, 26. He testified that the disk brake pads required grinding for three to four minutes to prevent squealing brakes. 8 RR 27. He used disk brake pads made by Raybestos, Bendix, Chrysler, Ford, and GM, and from 1972-1975, those made by Borg-Warner. 8 RR 29. Flores testified

that grinding disk brake pads also produced a lot of visible dust, which he inhaled. 8 RR 34-35. During the years he worked with Borg-Warner disk brake pads, he did four brake jobs a day, 8 RR 35, but out of those twenty brake jobs a week, he used Borg-Warner pads on only five to seven of those jobs. 8 RR 32.

Flores first learned that he had worked with asbestos-containing brake products and that he was suffering from asbestosis when Dr. Dinah Bukowski, M.D., one of plaintiff's two experts witnesses, told him so following her one examination of him in 2001. 8 RR 41-42. A half-pack-a-day smoker from the age of 25 until three weeks before the trial, 8 RR 49-50, Flores has problems with high cholesterol and coronary artery disease, and had angioplasty performed in 1999. 8 RR 86-90. The only health problem he related to his asbestosis diagnosis was shortness of breath, but he did not mention that problem to Dr. Bukowski. 8 RR 43.

It is undisputed that Flores does not have pleural thickening or plaques, does not have mesothelioma (a cancer of the membrane lining the chest cavity), and does not have lung cancer. 7 RR 92-93, 162-63. Dr. Bukowski based her diagnosis of asbestosis primarily on her interpreting his chest x-rays as showing "interstitial markings" or scarring of his lungs consistent with asbestosis, but agreed that many other things, including smoking, can cause such scarring. 7 RR 163. This diagnosis was also based on her inference from his work history that he was exposed to asbestos. Even though she was not able to say that he had inhaled any asbestos from a Borg-Warner disk brake pad, she concluded that "from his exposure history, I infer that it was from the grinding of brake pads." 7 RR 177. She further

agreed that she could not testify as an expert that Borg-Warner disk brake pads definitively released dust, again stating, "I can only infer." 7 RR 205.

Dr. Bukowski, a pulmonologist, is not an epidemiologist or an oncologist, and at the time of trial had been diagnosing asbestos-related diseases for only two years. 7 RR 122. She offered no specific opinion about brake mechanics and asbestos exposure other than to say she had seen literature that brake dust can cause asbestosis. 7 RR 187, 189, 205. She was not familiar, however, with the five articles cited by Borg-Warner's counsel concluding that auto mechanics have no increased risk of developing mesothelioma or lung cancer. 7 RR 186-87.

Dr. Kathryn Hale, also a pulmonologist, examined Flores on behalf of Borg-Warner, reviewed his chest x-rays and part of his medical records, and testified that in her opinion he does not have asbestosis. 8 RR 154, 159-60, 162-63. She further testified that she had reviewed the epidemiological studies on auto mechanics, including an article from 2001 that looked at a number of earlier studies, and which concluded that there is no increased risk of mesothelioma or lung cancer in auto mechanics. 8 RR 178-80. That article (which the trial court excluded from evidence, but which is included in the record as DX 10) contains a meta-analysis of six prior epidemiological studies, and the author concluded that there is no epidemiological evidence that auto mechanics suffer from an increased risk of mesothelioma or lung cancer. DX 10. The author specifically concluded that "clearly there is no evidence to support or even to suggest an association between an increased risk of mesothelioma and exposure to brake linings or clutch facings among garage mechanics. On the contrary, the

six studies reviewed . . . provide strong evidence that garage mechanics' mesothelioma risk is similar to that in the general population. None of the six studies reported any increased mesothelioma risk among auto mechanics." DX 10 at 173. The author further explained that "[f]iber measurement studies have indicated that garage mechanics are exposed to extremely low levels of asbestos as a result of the thermal transformation of asbestos fibers during the braking process." DX 10 at 174. Dr. Hale was asked about the studies cited in the 2001 article, but the trial court sustained Flores's hearsay objection to this line of testimony. 8 RR 181-82. The trial court also sustained Flores's hearsay objection to Borg-Warner's offer to admit the 2001 article into evidence. 9 RR 10. Dr. Hale did testify, however, that in the five to seven years she has been testifying in asbestos cases, she has not seen any articles concluding that auto mechanics have an increased risk of developing lung cancer or mesothelioma. 8 RR 183.

The plaintiff's only other witness, Dr. Barry Castleman, testified by video deposition. Dr. Castleman has a doctorate in occupational and environmental health policy, 5 RR 111, and is the author of a book entitled ASBESTOS: MEDICAL & LEGAL ASPECTS (4th ed. 1996). 5 RR 122. He gave his view of the history of the literature linking asbestos with disease, and discussed Chapter 8 of his book, "Asbestos Disease in Brake Repair Workers," which he described as a review of the literature on asbestos as a hazard to brake mechanics. 5 RR 125, 146-51; *see* Tab C. Dr. Castleman testified that he understood from his review of the available public literature that brake mechanics can be exposed to asbestos by grinding brake pads or shoes or blowing out brake housings, but acknowledged that "most of the asbestos

in brake linings is destroyed by the heat of friction and therefore is not released to the public air as asbestos fiber." 5 RR 147, 150; Tab C. He stated that he also understood that some respirable fibers remained, and that brake mechanics would be exposed to those fibers by grinding brake parts or blowing out brake housings. 5 RR 150; Tab C.

Chapter 8 of Dr. Castleman's book was admitted into evidence over Borg-Warner's hearsay objection. 7 RR 5-6; PX 1. The chapter contains no reference to Borg-Warner or its products, *see* PX 1, and Dr. Castleman admitted he has no file on Borg-Warner, has not done any research on Borg-Warner products, has not reviewed any Borg-Warner materials, and has no specific knowledge regarding Borg-Warner's products, or any other particular brake products. 5 RR 156-57; Tab C. Dr. Castleman did not testify to any technologically or economically feasible safer alternative design, to any design specifications or standards for Borg-Warner or any other company's brake products, or to any flaw in the manufacture of Borg-Warner brake pads. Nonetheless, based on Borg-Warner's acknowledgment that its disk brake pads contained chrysotile, serpentine asbestos fibers, varying from 7 to 28% of weight depending on the type of brake pad, 7 RR 22, Dr. Castleman summarily concluded in response to three hypothetical questions that these brake pads would be unreasonably dangerous, and would contain design and marketing defects if they lacked adequate warning labels. 5 RR 151-53; Tab C.

The jury found that Flores sustained an asbestos-related disease, that Borg-Warner's negligence was a proximate cause of that injury, and that its brake products contained marketing, manufacturing, and design defects that were a producing cause of Flores's injury.

II CR 401-09. (The jury found that three other settling defendants were also responsible for a percentage of Flores's injury. II CR 409.) The only damages awarded for any past injury were $1200 for physical pain and mental anguish. II CR 410. The balance of the award was $102,000 for future damages—future physical impairment, medical care, and physical pain and mental anguish—split equally among the three categories. *Id.* The jury awarded no damages for past physical impairment, *id.*, and Flores withdrew his claims for past or future earnings or loss of earning capacity, 7 RR 3. The jury also found that Borg-Warner (and the other settling defendants) had acted with malice (II CR 411), and awarded Flores $55,000 in exemplary damages. II CR 418. The trial court was not persuaded by Borg-Warner's Motion for Judgment Notwithstanding the Verdict, II CR 422, and rendered judgment on the jury's verdict after application of the settlement credit for a total of $140,220.54. III CR 619.

The Thirteenth Court of Appeals affirmed the judgment. *Borg-Warner Corp. v. Flores*, 153 S.W.3d 209 (Tex. App.—Corpus Christi 2004, pet. filed); Tab A. Among other challenges, the court rejected Borg-Warner's legal-sufficiency challenge to the negligence finding, holding that Dr. Castleman's and Dr. Bukowski's testimony amounted to more than a scintilla of evidence of proximate cause. *Id.* at 213-15. The court did not address Borg-Warner's no-evidence challenge to strict liability. *Id.* at 215. The court also rejected Borg-Warner's no-evidence challenge to the malice finding, concluding that Dr. Castleman's testimony on the history of asbestos literature coupled with the fact that Borg-Warner answered in an interrogatory that it did not do research on asbestos and its health effects was sufficient to support both the objective and subjective elements. *Id.* at 216-17. Citing Texas

Rule of Appellate Procedure 38.1(h), the court refused to rule on Borg-Warner's challenge to the excessiveness of the damages on the ground that Borg-Warner "failed to provide a statement of the law regarding factual sufficiency and the law regarding excessive damages," and thus "preserved nothing" for the court to review. *Id.* at 218. The court also determined that the likely erroneous admission of Chapter 8 of Dr. Castleman's book was not harmful error. *Id.* at 218-19.

Borg-Warner filed its petition for review on April 20, 2005, and this Court requested briefing on the merits on September 6, 2005.

SUMMARY OF THE ARGUMENT

In this case, the Thirteenth Court of Appeals has permitted the existence of asbestos in a product to stand as proxy for all the other required elements of a products-liability claim, and has upheld negligence and malice findings when there is no evidence of either.

First, as it has in other asbestos cases, the court of appeals applied a lesser causation standard, one that relieves plaintiffs claiming to be injured by an asbestos-containing product of their burden to prove that the defendant supplied the product that caused the injury. *See Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989). Then the court relied on incompetent, conclusory expert testimony to meet that lesser standard. There is no competent evidence in this case that Borg-Warner disk brake pads release asbestos fibers when used by brake mechanics, that any released fibers would be in respirable form, or that the kind of fibers inhaled could be a substantial factor in causing asbestos-related disease. There is no testimony that any epidemiological evidence or scientific study shows a doubling of the risk

of developing asbestos-related disease in auto mechanics from servicing brakes. *See Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 717-20 (Tex. 1997). Instead the testimony from a historian of asbestos literature and a medical doctor was based on the assumption that any asbestos-containing product can cause asbestos-related disease, and the inference that Flores therefore was injured by working with Borg-Warner products. These assumptions and inferences are wholly speculative, are not supported by any reliable record evidence, and cannot sustain liability. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004).

The court of appeals' causation analysis in this case is also in direct conflict with *In re R.O.C. Pretrial*, 131 S.W.3d 129 (Tex. App.—San Antonio 2004, no pet.), in which the Fourth Court of Appeals held that the circular assumption of asbestos-related disease based on the assumption of asbestos exposure to asbestos-containing products could not survive a no-evidence summary judgment motion. In this case, under the proper causation standard, neither the negligence nor the strict-liability findings of the jury can be sustained.

Second, the court of appeals' conclusion that legally sufficient evidence supports the jury's malice finding is likewise fundamentally flawed. Not only does the malice finding stand on the same conclusory, unsupported testimony as does the negligence finding, the court of appeals' analysis is so meager as to defy the gross-negligence standard of *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), and the Legislature's codification of that standard in Texas Civil Practice & Remedies Code § 41.001(7). The court of appeals recited the standard for malice but then relied on the same general testimony

about the hazards of asbestos generally to support its conclusion that Borg-Warner acted with malice. But there is no specific evidence that there was an extreme degree of risk to auto mechanics from using asbestos in disk brake pads at the time Borg-Warner did so or that Borg-Warner was actually aware of such a risk and nevertheless proceeded with conscious indifference to that risk. There is no testimony in this case about Borg-Warner at all. Again the court of appeals permitted the existence of asbestos in a product to substitute for proof of the required elements of a claim.

Third, the court of appeals permitted the existence of asbestos in a product to substitute for proof of each element of a strict-liability claim. The jury found in favor of Flores on theories of defective marketing, manufacture, and design. II CR 406-408. Yet there is no testimony in this case about Borg-Warner or its products or about any comparable products. There is no testimony, other than Dr. Castleman's unsupported and conclusory responses to three hypotheticals (which confused the liability theories of marketing and design defects, *see* 5 RR 151-53 (Tab C)), that Borg-Warner disk brakes were unreasonably dangerous and defectively designed because they lacked any warning labels. *Id*. There was no testimony at all about the risk or utility of the particular disk brake design, about any brake pad standards and specifications, about the technological or economic feasibility of any safer alternative design, or about any manufacturing defect in the brake pads Flores used. Dr. Castleman was not asked even one question about any manufacturing defect. *See* Tab C (containing all of Dr. Castleman's testimony about brake products). Should this Court determine that Flores did present legally sufficient evidence of causation, the Court should

address Borg-Warner's challenge to these other elements of Flores's strict-liability claims, or in the alternative, remand to the court of appeals to do so.

Fourth, the court of appeals unfairly avoided review of Borg-Warner's challenge to the excessiveness of the damages by an unduly restrictive application of Texas Rule of Appellate Procedure 38.1(h). The court concluded that Borg-Warner waived this challenge by failing to provide a statement of the law on factual sufficiency and excessiveness. While Borg-Warner did not cite to the specific standard of review, it did provide argument and appropriate citations to the record, and in fairness should not be held to have waived its challenge. The same rule of appellate procedure cited by the court of appeals directs that briefing rules are to be construed liberally. TEX. R. APP. P. 38.9; *see also Republic Underwriters Ins. Co. v. Mex-Tex., Inc.*, 150 S.W.3d 423, 427 (Tex. 2004) (reiterating that courts of appeals are "to construe the Rules of Appellate Procedure reasonably, yet liberally").

Finally, the court of appeals erred in concluding that the likely erroneous admission of Chapter 8 of Dr. Castleman's book over Borg-Warner's hearsay objection was not harmful error. The only possible basis here for receiving the substance of the chapter into evidence over Borg-Warner's objection would be Texas Rule of Evidence 803(18), which permits experts to testify about or read from "learned treatises" that would otherwise be excluded by the hearsay rule; but the rule expressly provides that such statements "may not be received as exhibits." TEX. R. EVID. 803(18). When the record is reviewed at as a whole, it is clear that admission of the book chapter was harmful error. Dr. Castleman's testimony alone is

not evidence of cause in fact or the elements of strict liability. *See* Tab C (containing all of Dr. Castleman's testimony about brake products). But by admitting the 41-page chapter, with its bibliography of isolated excerpts and summaries from a number of articles, all but four of which were not discussed during Dr. Castleman's testimony, the trial court defeated the very purpose of the rule of withholding such documents from the jurors: so that they do not draw improper inferences from technical discussions unaided by expert guidance. *See* 2 STEVEN GOODE, *ET AL.*, GUIDE TO THE TEXAS RULES OF EVIDENCE 570 (2d ed. 2002). Additionally, the error here probably caused the rendition of an improper judgment in light of: (1) the trial court's refusal to admit into evidence over Flores's hearsay objection the 2001 article surveying earlier epidemiological studies and concluding that working with brake products in particular does not increase auto mechanics' risk of developing mesothelioma or lung cancer; (2) the court's refusal to permit Dr. Hale to testify about those earlier studies, again in response to Flores's hearsay objection. Once the improperly admitted book chapter is omitted from consideration, it is clear that there is no evidence to support the jury's negligence or strict-liability findings, but that the jury could have improperly inferred causation from the materials in that book chapter.

For these reasons, the Court should reverse and render judgment that plaintiff take nothing, or in the alternative, reverse and remand to the court of appeals or to the trial court for further proceedings.

ARGUMENT

I. IN UPHOLDING THE JURY'S NEGLIGENCE FINDING, THE COURT OF APPEALS CONTINUES ITS PATTERN OF HOLDING PLAINTIFFS CLAIMING TO BE INJURED BY AN ASBESTOS-CONTAINING PRODUCT TO A LESSER CAUSATION STANDARD.

In sustaining the negligence finding in this case, the court of appeals followed a troubling pattern of holding plaintiffs to a lesser causation standard when they claim to be injured by an asbestos-containing product. Under that lesser standard, once the plaintiff demonstrates exposure to asbestos in any form, the plaintiff has established the essential element of proximate cause. That is contrary to the causation standard that other plaintiffs must meet, contrary to the law of this Court, and should be corrected.

Negligence always requires a showing of proximate cause, which includes the elements of cause in fact and foreseeability. *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995). Causation must be established by reasonable probability, not possibility; neither element can be established by mere conjecture, guess, or speculation. *Western Invs. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005); *see Havner*, 953 S.W.2d at 711-12. Cause in fact means that the defendant's act or omission was a substantial factor in bringing about the injury, which otherwise would not have occurred. *Union Pump Co.*, 898 S.W.2d at 775.

In determining whether there is any evidence of probative force to support the jury's finding, the Court must consider all the record evidence in the light most favorable to the party in whose favor the verdict was rendered, and indulge all reasonable inferences in that party's favor. *See Havner*, 953 S.W.2d at 711; *see generally City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005). Moreover, in conducting a no-evidence review when expert

testimony is needed to support a claim, a court cannot disregard evidence showing that an expert's assumptions about the facts are unfounded. *City of Keller*, 168 S.W.3d at 812-13; *see Havner*, 953 S.W.2d at 712; *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499-500 (Tex. 1995); *Schaefer v. Tex. Emp. Ins. Ass'n*, 612 S.W.2d 199, 202-05 (Tex. 1980). When the proper standard of review is applied to the expert testimony offered here to prove causation, and when that testimony is examined under the proper substantive legal test, it becomes clear that if the court of appeals' analysis is wrong, and that if permitted to stand, its opinion will only further the confusion about causation in pending asbestos cases.

A. The Court of Appeals' Lesser Causation Standard Improperly Equates Asbestos in a Product with Proximate Cause of an Injury.

In *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989), this Court made clear that the mere fact that a product contains asbestos, and that a corporation manufactures asbestos-containing products, is not enough to sustain liability: "A fundamental principle of products liability law is that the plaintiff must prove that the defendants supplied the product which caused the injury." It is not enough that a plaintiff worked with or around asbestos-containing products. In keeping with the general rules governing causation, a plaintiff must prove that the defendant's conduct or product was a substantial factor in bringing about the plaintiff's injury. *See Union Pump Co.*, 898 S.W.2d at 775; RESTATEMENT (THIRD) OF TORTS: PRODS. LIABILITY § 15 (1998) ("Whether a product defect caused harm to persons or property is determined by the prevailing rules and principles governing causation in tort."). In the products-liability context, this Court has also acknowledged that the risk of exposure

from each product has to be examined separately: "In some products, the asbestos is embedded and fibers are not likely to become loose or airborne. In other products, the asbestos is friable. This, of course, bears on the extent and intensity of exposure to asbestos . . . ." *In re Ethyl*, 975 S.W.2d 606, 617 (Tex. 1998).

Nonetheless, the court of appeals here ignored the ordinary rules for determining causation and continued a pattern of inferring that a company that supplies any asbestos-containing product has in fact caused asbestos-related disease. For example, in *North American Refractory Co. v. Easter*, 988 S.W.2d 904, 909 (Tex. App.—Corpus Christi 1999, pet. denied), the court stated the test for causation as: "If there is sufficient evidence presented by appellees showing that appellant supplied any of the asbestos to which appellees were exposed, then appellees have adequately met their burden of proof." That causation standard originated in the court's earlier case of *Celotex Corp. v. Tate*, 797 S.W.2d 197, 203-05 (Tex. App.—Corpus Christi 1990, writ dism'd by agr.) ("If there was sufficient evidence presented by appellees showing that Carey supplied *any* of the asbestos to which Tate was exposed, then appellees have adequately met their burden of proof."). In *Easter*, the court of appeals also declined to apply the "frequency, regularity, and proximity test," *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), which is often used to evaluate whether substantial cause can be reasonably inferred from circumstantial evidence. *Easter*, 988 S.W.2d at 911; *see, e.g., Slaughter v. Southern Talc Co.*, 949 F.2d 167, 171-72 (5th Cir. 1991) (discussing *Lohrmann* and concluding that "[a] plaintiff must prove that, more probably than not, he actually breathed asbestos fibers originating in defendants' products").

Even if equating the simple fact of exposure to an asbestos-containing product with causation could be justified in earlier cases involving workers in plants that manufactured asbestos products or who worked with asbestos products such as thermal insulation, for which there is a long history of epidemiological and other scientific evidence supporting causation, there is no justification for applying it here, where there is no competent evidence of causation under any test.

B. There Is No Competent Testimony That Borg-Warner's Disk Brake Pads Proximately Caused Flores's Injury.

The evidence here is legally insufficient under any causation test. The Court has just reiterated that an expert's "bare opinion" is not enough to sustain a liability finding and that the substance of expert opinion testimony must be considered. *General Motors Corp. v. Iracheta*, 161 S.W.3d 462, 470 (Tex. 2005); *see Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004) (explaining that opinion testimony that is "conclusory or speculative" is "incompetent"). Neither of Flores's two experts offered anything more than conclusions based on inferences from the unproven assumption that servicing brakes can cause asbestos-related disease. This bare conclusion is not legally sufficient to support a judgment that exposure to Borg-Warner's disk brake pads caused Flores's injury.

Although Dr. Castleman, the self-described "independent consultant in basically the field of toxic substance control," 5 RR 110, testified about the literature involving asbestos and asbestos disease generally, he is not a physician or an epidemiologist, and was not

qualified to offer opinions on medical causation. 5 RR 103-04; PX 3. Dr. Castleman nonetheless testified that brake mechanics are at risk for developing asbestos-related disease based on the following: (1) a conference conducted by Ford of Britain in 1969 at which it was reported that exposure to asbestos fiber in the air from brake jobs in some cases came close to the allowable limits of exposure and "could be significant;" (2) some published reports on asbestosis in plants that manufactured brake linings in the 1930's and 1940's; (3) a report on an individual case of mesothelioma "in a garage hand and chauffeur" from 1965; and (4) two publications that came out after Borg-Warner stopped making asbestos-containing brake pads in 1975. 5 RR 147-51; Tab C. He discussed no epidemiological studies, although the chapter of his book that was improperly admitted into evidence as an exhibit contains brief summaries or excerpts from a variety of articles in other publications, some of which appear to conclude that there is a link between working with brake products and asbestos-related disease. PX 1.

Without explaining the basis for his conclusion, he further testified that even though most of the asbestos in brake linings is destroyed by the heat of friction and "therefore is not released into the public air as asbestos fiber," he understood that "respirable asbestos fibers still remain." 5 RR 150. Dr. Castleman certainly did not testify that exposure to asbestos while working with disk brake pads causes a doubling of the risk of asbestos-related disease in auto mechanics, or even that he has seen literature showing that to be the case. *See Havner*, 953 S.W.2d at 717-20. And he had no knowledge whatsoever about Borg-Warner or its products, other than understanding that Borg-Warner made brake pads; he had done no

research regarding Borg-Warner's products, and had not reviewed any material regarding Borg-Warner's products. 5 RR 156-7, Tab C (containing all of Dr. Castleman's testimony about brake products). Dr. Castleman's summary and unsupported conclusions cannot substitute for the necessary competent evidence of causation: that disk brake pads like those manufactured by Borg-Warner released asbestos fibers when used by brake mechanics, that any released fibers were in respirable form, and that the kind of fibers inhaled could be a substantial factor in causing asbestos-related disease.

Nor did Dr. Bukowski, Flores's sole medical expert, offer such testimony. Dr. Bukowski did testify that there is literature that brake dust can cause asbestosis, 7 RR 189, 205, but did not testify as to the particulars of any studies, and was unfamiliar with the five studies cited by Borg-Warner concluding that auto mechanics do not have an increased risk of mesothelioma or lung cancer. 7 RR 185-89Although she could not say that Flores had inhaled any asbestos from a Borg-Warner disk brake pad, she concluded that "from his exposure history, I infer that it was from the grinding of brake pads." 7 RR 177. She further agreed that she could not testify as an expert that Borg-Warner disk brake pads definitively released dust containing asbestos fibers, again stating, "I can only infer." 7 RR 204-05. Thus, her conclusion that Flores's injury was specifically caused by his working with brake pads is based on the multiple inferences that Borg-Warner disk brake pads release asbestos when ground, that any released asbestos fibers were in a respirable form, and that the kind of fibers inhaled were a substantial factor in Flores's injury. *See* 7 RR 76-77, 81, 177, 205. But it is impossible to tell from the evidence in this record whether Flores's exposure to

brake dust in fact caused any asbestos-related disease. The jury awarded nothing for past physical impairment and only $1200 for past pain and mental anguish. The only health problem Flores related to his asbestosis diagnosis was shortness of breath, but he did not mention that problem to Dr. Bukowski, 8 RR 43, and she agreed that the interstitial markings on his lungs, which were the primary basis for her asbestosis diagnosis, could have been caused by many other things, including Mr. Flores' many years of smoking. *See* 7 RR 163, 8 RR 49-50.

The fact that Dr. Castleman and Dr. Bukowski did not cite to specific epidemiological evidence as proof of causation is entirely consistent with Dr. Hale's limited testimony, based on the 2001 article analyzing the data from prior studies, that there is no increased risk of mesothelioma or lung cancer in auto mechanics. *See* 8 RR 178-80. It is also consistent with the January 2005 letter ruling issued by the trial judge in the pending asbestos Multi-District Litigation in Harris County, which is currently pending before this Court on petition for writ of mandamus. *See In re Daimler Chrysler Corp.*, No. 05-0598 (briefs on the merits requested on October 25, 2005). In that ruling, after conducting a three-day hearing on whether the plaintiffs' experts would be permitted to testify that mesothelioma can be caused by exposure to brake linings in automobiles and trucks, the trial court concluded that the relevant epidemiological studies have failed to show any general causal link between working with friction products and asbestos-related disease, and thus plaintiffs would have to show specific causation in their individual cases by their own pathology and work history. Tab D. The trial court heard testimony from an actual epidemiologist that no friction

products cohort study meets the *Havner* test of having a relative risk of two or greater to develop asbestos-related disease. *Id.* As pointed out by the MDL trial court, its ruling affects thousands of plaintiffs and dozens of defendants; the court of appeals' opinion in this case essentially conflicts with that ruling by upholding liability without evidence of general or specific causation.

Thus, the jury's finding that Borg-Warner disk brake products proximately caused Flores's injury is not supported by any competent evidence. Only under the court of appeals' lesser causation standard of "asbestos in a product" = "injury" could such evidence pass muster. Dr. Castleman and Dr. Bukowski's testimony of possibility does not approach the kind of probability required to sustain the jury's negligence finding. At a minimum, it does not make it more likely than not that Flores inhaled respirable asbestos fibers in sufficient quality and quantity to have been a substantial factor in causing him any asbestos-related disease; it certainly does not meet this Court's standard for competent toxic tort evidence under *Havner*. This case, in which the evidence of causation is so plainly deficient, is an appropriate vehicle for this Court to clarify that plaintiffs claiming an injury from an asbestos-containing product must meet the same proximate cause test as any other plaintiff.

C. This Case Is in Direct Conflict With *In re R.O.C. Pretrial*, 131 S.W.3d 129 (Tex. App.—San Antonio 2004, no pet.) (Green, J.).

In *R.O.C. Pretrial*, the court of appeals affirmed a no-evidence summary judgment on the basis that the plaintiffs failed to meet their initial burden to show that they were exposed to asbestos (or silica) from the defendants' products in a form that is capable of

causing injury. 131 S.W.3d at 137. The plaintiffs had come forward with the same kind of proof as did Flores here: While using asbestos-containing products the plaintiffs saw dust, and a doctor diagnosed them with asbestosis by assuming from the exposure to the dust that the plaintiffs' disease was caused by those products. The court correctly explained that "causation cannot be established by mere speculation," and that to defeat the no-evidence motion, the plaintiffs had to come forward with more than a scintilla of evidence that "asbestos or silica dispersed during activities at [the defendants' premises] caused their injuries." *Id.* at 134. The plaintiffs argued, as Flores does here, that it is well known that asbestosis is a compensable injury that is caused only by asbestos exposure. *Id.* In rejecting that argument, the court explained that the plaintiffs had come forward with no evidence that the kind of asbestos or silica they were exposed to is capable of causing injury, and noted that this Court has observed that each product presents a different risk of exposure. *Id.* at 136 (citing *In re Ethyl*, 975 S.W.2d at 617). Finally, the court concluded that the medical evidence was insufficient to support causation because "[t]he diagnoses are circular, from an assumption of exposure to a diagnosis based on that assumption." *Id.* at 137.

The court of appeals here attempted to distinguish *R.O.C. Pretrial* by citing the expert testimony in this case. 153 S.W.3d at 215 n.2. But, as explained above, neither Dr. Castleman's nor Dr. Bukowski's testimony is any evidence that Borg-Warner disk brake pads caused Flores's injury. Dr. Castleman did testify that "respirable asbestos fibers still remain" after the extreme friction heat of braking, but he made that remark while discussing literature showing that "most of the asbestos in brake linings is destroyed by the heat of friction and

is not released into the public air as asbestos fiber." 5 RR 150. Even considering all the evidence in the light most favorable to the jury's verdict, *see Havner*, 953 S.W.2d at 711, that testimony does not bridge the analytical gap between possibility and proof. There is no evidence of a causal connection between Borg-Warner's products and Flores's injury that can sustain liability. The court of appeals here used exposure as a proxy for causation and equated exposure with injury; this line of reasoning was squarely rejected by the Fourth Court of Appeals in *R.O.C. Pretrial*, and should likewise be rejected by this Court.

II. THE COURT OF APPEALS' LEGAL-SUFFICIENCY REVIEW OF THE MALICE FINDING IS SO WEAK THAT IT DEFIES *TRANSPORTATION INS. CO. V. MORIEL*, 879 S.W.2d 10 (TEX. 1994), AND TEXAS CIVIL PRACTICE & REMEDIES CODE § 41.001(7).

Just as it did in affirming the jury's negligence finding, the court of appeals again improperly treated the existence of asbestos in a product as a proxy for proof of necessary elements. The court's minimal analysis of the evidence Flores offered in support of the jury's malice finding defies the express language of Texas Civil Practice & Remedies Code § 41.001(7), which incorporated the standard for gross negligence crafted by this Court in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994).

In this case, section 41.001(7) requires proof by clear and convincing evidence that: (1) when viewed objectively from Borg-Warner's standpoint, its conduct involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) that Borg-Warner had actual subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others. TEX. CIV. PRAC. & REM. CODE §§ 41.001(7)(B)(i), (ii), 41.003.

When reviewing the legal sufficiency of evidence to support a finding that must be proved by clear and convincing evidence, the court must look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. *Diamond Shamrock Ref. Co. v. Hall*, 168 S.W.3d 164, 170 (Tex. 2005). This Court has cautioned, however, that this does not mean that a reviewing court must disregard all evidence that does not support the finding: disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence. *Id.* Accordingly, a court must consider "*all* the evidence (not just that favoring the verdict) in reviewing cases of . . . punitive damages." *City of Keller*, 168 S.W.3d at 817.

As proof of the objective part of the test, the court of appeals cited Dr. Castleman's testimony on the history of the literature on the dangers of asbestos generally, and his conclusion that by 1968 the fact that exposure to asbestos can cause asbestosis was definitely confirmed. 153 S.W.3d at 216. But the court ignored the fact that most of Dr. Castleman's testimony about the known dangers of asbestos came not from studies of auto mechanics, but from studies of populations who worked in asbestos processing and asbestos product manufacturing plants, the shipyard trades, or with asbestos insulation, such as pipefitters, steamfitters, and boilermakers. 5 RR 140, 142. Without more, this evidence cannot be extrapolated to apply to working with brake pads, and a finding based on this evidence is directly contrary to the requirement that courts consider the evidence as a whole when evaluating the legal sufficiency of a gross-negligence finding, particularly under the clear-

and-convincing standard. *See Diamond Shamrock*, 168 S.W.3d at 170; *see also Moriel*, 879 S.W.2d at 25; *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 596 (Tex. 1999).

As highlighted above, Dr. Castleman testified about some literature specific to brake mechanics, including: (1) a conference conducted by Ford of Britain in 1969 at which it was reported that exposure to asbestos fiber in the air from brake jobs in some cases came close to the allowable limits of exposure; (2) some published reports on asbestosis in plants that manufactured brake linings in the 1930's and 1940's; (3) a report on an individual case of mesothelioma "in a garage hand and chauffeur" from 1965; and (4) two publications that came out after Borg-Warner stopped making asbestos-containing brake pads in 1975. 5 RR 147-51; Tab C. None of this evidence demonstrates by clear and convincing evidence that there was an extreme degree of risk to brake mechanics from working with asbestos-containing disk brake pads.

The court of appeals' analysis of the subjective part of the malice test is even more lax. The court again simply cited to Dr. Castleman's testimony about the dangers of asbestos generally, and to the fact that Borg-Warner "fail[ed] to invest in research promoting health and safety" or to research "asbestos and the health effects of asbestos." 153 S.W.3d at 217. The only evidence presented on this at trial came from reading Borg-Warner's response to an interrogatory. 7 RR 24-25, 29. Dr. Castleman himself testified that he "[hadn't] seen a great deal of information about [the] inside knowledge of [brake] companies, although [he had] seen a little," and agreed that he "[didn't] know much about what [the brake industry] actually knew." 5 RR 147; Tab C. He did not elaborate on what he had seen. Under no

possible interpretation of this Court's gross-negligence standard as codified in section 41.007 can this amount to evidence that in 1971-1975, when Borg-Warner made disk brake pads containing asbestos, the company had actual subjective awareness of an extreme risk, but nevertheless proceeded in conscious indifference to the safety or welfare others. *Cf. Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 924-25 (Tex. 1998). Much less can it be clear and convincing.

The court of appeals' upholding of the malice finding flows directly from the same flawed assumption underpinning the negligence finding: the assumption that the presence of any asbestos in a product means that the manufacturer of that product was negligent and grossly negligent, and that the product was defective. As with causation, permitting a judgment to be sustained on this assumption creates a special rule for plaintiffs claiming to be injured by asbestos-containing products, and exempts them from the standards of proof all other plaintiffs must meet. This Court should grant the petition for review to correct the court of appeals' wholly flawed analysis of the jury's malice finding in this case.

III. THERE IS NO EVIDENCE TO SUPPORT THE JURY'S STRICT LIABILITY FINDINGS.

The jury found that Borg-Warner's brake products contained marketing, manufacturing, and design defects. II CR 406-08. Because the court of appeals concluded that Flores presented legally sufficient evidence of causation to support the jury's negligence finding, it did not address Borg-Warner's no-evidence challenge to the strict-liability findings. 153 S.W.3d at 215. Should this Court determine that the negligence finding cannot be sustained, Borg-Warner's challenge to the strict liability findings must be addressed, either

by this Court or the court of appeals on remand. *See Riyad Bank v. Gailani*, 61 S.W.3d 353, 359 (Tex. 2001) (explaining that the supreme court can address issues not considered by court of appeals or remand them to the court of appeals); TEX. R. APP. P. 60.2(c). Given the lack of any evidence to support any of the required elements of a strict liability claim, this Court should address the issue and render judgment in favor of Borg-Warner.

Flores sued Borg-Warner claiming that its products were unreasonably dangerous and defective as designed, manufactured, and marketed, and the jury found in favor of Flores on all three claims. *See* 1 CR 193; II CR 406-08. To recover on his strict-liability claims, Flores must show some evidence that Borg-Warner's brake products were defective, meaning unreasonably dangerous, when they left Borg-Warner's hands. *See Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 381-82 (Tex. 1995). A product may be unreasonably dangerous because of a defect in marketing, manufacturing, or design. *Id.* A marketing defect is based on a claim that the defendant failed to warn of a product's potential dangers by providing adequate warnings or instruction. *Id.* A manufacturing defect exists when a product deviates, in construction or quality, from the design standards and specifications, and the flaw makes the product unreasonably dangerous. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). A design defect is present when the product conforms to product specifications, but the design itself is unreasonably dangerous. *Turner v. General Motors Corp.*, 584 S.W.2d 844, 847 (Tex. 1979). To prove a design defect, a plaintiff must show the existence of a safer alternative design, which design must substantially reduce the risk of injury and be both economically and technologically feasible. *General Motors Corp. v.*

Sanchez, 997 S.W.2d 584, 588 (Tex. 1999); *see* TEX. CIV. PRAC. & REM. CODE § 82.005(b)(1), (2). Under each of these theories of liability, a plaintiff must prove that the defect was a producing cause of the plaintiff's injuries, *Ridgway*, 135 S.W.3d at 600, meaning that the defendant's product must have been a substantial factor in bringing about the plaintiff's injuries. *Union Pump Co.*, 898 S.W.2d at 775.

First, for the reasons explained above in section I, there is no evidence here that Borg-Warner's disk brake pads were a substantial factor in bringing about Flores's injuries. Neither of Flores's experts offered competent testimony that disk brake pads like those manufactured by Borg-Warner released asbestos fibers when used by brake mechanics, that any released fibers were in respirable form, or that the kind of fibers inhaled could be a substantial factor in causing asbestos-related disease. The absence of any evidence demonstrating producing cause is fatal to all three grounds of recovery in strict liability.

Second, there is no evidence whatsoever of any of the elements required to show a marketing, manufacturing, or design defect. There is no testimony about what kind of warnings, if any, would be appropriate or necessary. There is no testimony identifying an unreasonably dangerous manufacturing flaw, about any of the design specifications or standards for Borg-Warner's brake pads (other than Borg-Warner's interrogatory answer that its pads contained chrysotile, serpentine asbestos fibers, varying from 7 to 28% of weight), or about any other brake pads. There is no testimony about the technological or economic feasability of any substantially safer alternative design. There is no testimony about testing of any brake pads. Nonetheless, without any evidentiary support, Dr. Castleman agreed that

brake pads containing 7 to 28 percent chrysotile asbestos fibers would be unreasonably dangerous if they lacked warning labels, and that the lack of warning labels would make the pads unreasonably dangerous as designed. 5 RR 151-53; Tab C (containing all of Dr. Castleman's testimony on brake products). He was not asked any questions about manufacturing defects, although the jury found Borg-Warner's brake products were defectively manufactured. I CR 407. This testimony does not even rise to the level of creating an analytical gap—there is no gap to bridge because Flores presented no actual evidence about Borg-Warner's products or even brake pads in general that could be analyzed or evaluated. Dr. Castleman's conclusory and speculative opinion testimony is incompetent and cannot sustain the jury's strict-liability findings. *See Coastal Transp. Co.*, 136 S.W.3d at 232. This Court should accordingly reverse and render judgment that Flores take nothing on his strict-liability claims, or in the alternative, remand this issue to the court of appeals.

IV. THE COURT OF APPEALS UNFAIRLY AVOIDED REVIEW OF BORG-WARNER'S CHALLENGE TO THE EXCESSIVENESS OF THE DAMAGES BY AN UNDULY RESTRICTIVE APPLICATION OF TEXAS RULE OF APPELLATE PROCEDURE 38.1(h).

In its motion for new trial, Borg-Warner challenged the factual sufficiency and excessiveness of the jury's damages award. III CR 650-51. Borg-Warner raised the same complaint in its brief at the court of appeals (Br. of Appellant at 25-29). Citing Texas Rule of Appellate Procedure 38.1(h), the court of appeals held that Borg-Warner waived consideration of this issue by "fail[ing] to provide a statement of the law regarding factual sufficiency and the law regarding excessive damages." 153 S.W.3d at 218. It concluded that Borg-Warner "has preserved nothing" for the court to review. *Id.* This holding is an unfair

application of Rule 38.1(h) and is not supported by a review of Borg-Warner's Appellant's brief.

Rule 38.1(h) requires an argument in a brief to contain "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(h). In four pages of briefing, Borg-Warner argued that the evidence was factually insufficient to support the jury's award, which was almost entirely for future damages for physical impairment, medical care, and pain and mental anguish. Br. of Appellant at 25-29. The argument first set out the jury's award, and then the legal requirement that recovery for future medical conditions must be based on reasonable medical probability, not possibility. Br. of Appellant at 26-27 (citing *Gideon v. Johns-Manville Sales Corp*., 761 F.2d 1129 (5th Cir. 1985)). Borg-Warner then provided analysis of and record citations to Dr. Bukowski's expert testimony, pointing out that her testimony was based only on possibility, and that ultimately she agreed that only a very small percentage of people with asbestosis as mild as Flores actually have progression of their illness. Br. of Appellant at 27-28. The argument also analyzed and provided record citations to Dr. Hale's testimony that she did not find evidence of asbestosis, and that Flores was more likely to develop health problems because of his history of cigarette use. Br. of Appellant at 28. Although Borg-Warner did not cite the standard of review for factual sufficiency, this is not a case in which it can fairly be said that Borg-Warner "preserved nothing." 153 S.W.2d at 218; *see Mayhew v. Dealey*, 143 S.W.3d 356 (Tex. App.—Dallas 2004, pet. denied) (finding waiver for inadequate briefing when argument contained two sentences and one citation on factual

sufficiency, but did not argue how the damages were excessive or even which damages were excessive).

Rather, Borg-Warner did provide a "clear and concise argument for the contentions made." TEX. R. APP. P. 38.1(h). It contended that Flores lacked factually sufficient evidence to support the future medical damages awarded; argued the reason for that contention was because the appropriate legal test requires testimony based on reasonable medical probability, not possibility, and the only evidence presented was speculative and was not based on probability; examined in detail the testimony of the only two medical experts to demonstrate how the evidence was not based on probability; and argued that given the nature of the testimony presented, the jury's award was against the great weight and preponderance of the evidence, or in other words, was factually insufficient. Br. of Appellant at 26-28.

The court of appeals even acknowledged that Borg-Warner did cite authority, but then incorrectly concluded that the authority, "*Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129 (5th Cir. 1985, no writ [sic]) . . . was disapproved by the Texas Supreme Court in *Pustejovsky v. Rapid-Ame. Corp.*, 35 S.W.3d 643, 653 (Tex. 2000)." 153 S.W.3d at 218, n.5. In *Pustejovsky*, this Court declined to follow the Fifth Circuit in applying the single-action rule to certain asbestos-related conditions. *Pustejovsky*, 35 S.W.3d at 653. But this Court certainly did not "disapprove" of the Fifth Circuit's opinion, and more importantly, Borg-Warner cited *Gideon* not for its application of the single-action rule, but for its legal statement that testimony about possible future medical conditions and expenses must be based on reasonable medical probability, not possibility. Br. of Appellant at 27 (citing

Gideon, 761 F.2d at 1137-38). Borg-Warner cited *Gideon* to support its argument that Dr. Bukowski's testimony on future medical expenses was speculative and was factually insufficient. Borg-Warner thus cited the appropriate substantive legal standard and explained how the evidence, properly cited, failed to meet that standard.

Moreover, Texas Rule of Appellate Procedure 38.9 provides that the briefing rules are to be liberally construed, and establishes a substantial-compliance standard: "Because briefs are meant to acquaint the court with the issues in a case and to present argument that will enable the court to decide the case, substantial compliance with this rule is sufficient . . . ." TEX. R. APP. P. 38.9; *see also Republic Underwriters Ins. Co. v. Mex-Tex., Inc.*, 150 S.W.3d 423, 427 (Tex. 2004) (reiterating that courts of appeals are "to construe the Rules of Appellate Procedure reasonably, yet liberally"). The rule further provides that if a court determines that a case has not been properly presented in the briefs "or that the law and authorities have not been properly cited in the briefs," the court may postpone submission, require additional briefing, and make any other order necessary for a satisfactory submission of the case. TEX. R. APP. P. 38.9(b). It is hard to understand how Borg-Warner's oversight in failing to cite a case for the commonplace factual sufficiency standard, when it provided four pages of analysis with extensive citation to the record, could be construed as waiver of its factual sufficiency challenge. Even in cases in which the complaining party had presented far less to review and a waiver finding would have been justified, courts have been reluctant to find waiver and have proceeded to address the factual sufficiency challenges presented, even if they were improperly briefed. *See In re Estate of Trawick*, 170 S.W.3d 871, 876

(Tex. App.—Texarkana 2005, no pet.) (agreeing that factual sufficiency not properly briefed, but addressing the issue "in the interest of justice"); *Manon v. Solis*, 142 S.W.3d 380, 390-91 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (concluding that appellant waived the issue by failing to brief properly, but addressing it anyway).

The court of appeals has a duty to address every issue raised and necessary to final disposition of the appeal, *see* TEX. R. APP. P. 47.1, and its avoiding that duty, under these circumstances, was inappropriate and unfair. Should this Court determine that the jury's negligence or strict-liability findings can be sustained, it should remand this issue to the court of appeals.

V. THE ERRONEOUS ADMISSION OF A BOOK CHAPTER OFFERED IN SUPPORT OF LIABILITY WAS HARMFUL ERROR IN LIGHT OF THE ENTIRE RECORD, INCLUDING THE EXCLUSION OF TESTIMONY AND AN EXHIBIT CONCERNING ARTICLES ON THE SAME SUBJECT OFFERED TO DEFEAT LIABILITY.

During his testimony, Dr. Castleman gave his view of the history of the literature linking asbestos exposure with disease, as set out in his book entitled *Asbestos: Medical & Legal Aspects* (4th ed. 1996). 5 RR 122. He discussed Chapter 8 of his book, "Asbestos Disease in Brake Repair Workers," which he described as a review of the literature on asbestos as a hazard to brake mechanics. 5 RR 125, 146-51; Tab C. This chapter, which contains no reference to Borg-Warner or its products, was improperly admitted into evidence over Borg-Warner's hearsay objection, 7 RR 5-6, PX1, and in light of the record as a whole probably caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1), 61.1(a); *Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 144 (Tex. 2004).

As the court of appeals apparently agreed, the trial court here abused its discretion in admitting Chapter 8 over Borg-Warner's hearsay objection. *See* 153 S.W.3d at 219. Texas Rule of Evidence 802 proscribes the admission of hearsay (defined in Rule 801 as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted") absent an exception under the rules of evidence or a statute. TEX. R. EVID. 802. The only possible basis for admitting the substance of Chapter 8 would be under Rule 803(18), which permits experts to testify to "statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art established as a reliable authority." TEX. R. EVID. 803(18). But, the rule expressly forbids the statements to be received as exhibits: "If admitted, the statements may be read into evidence but may not be received as exhibits." *Id.* The purpose of keeping "learned treatises" out of the jury room is to prevent a jury from "rifling through a learned treatise and drawing improper inferences from technical language that it might not be able to properly understand without expert guidance." *Godsey v. State*, 989 S.W.2d 482, 491-92 (Tex. App.—Waco 1999, pet. ref'd); *see* 2 STEVEN GOODE, *ET AL.*, GUIDE TO THE TEXAS RULES OF EVIDENCE 570 (2d ed. 2002). The possibility that a treatise might be misunderstood and misapplied by the jury is avoided when an expert is testifying to the contents on the stand and can explain and assist the jury in understanding the material in the treatise. *See* GOODE, *supra* at 570.

Despite agreeing that "Borg-Warner has argued persuasively that the trial court erred in admitting Dr. Castleman's book into evidence," the court of appeals concluded that the

error was harmless because Dr. Castleman testified about the contents of his book and Borg-Warner "was given the opportunity to cross-examine him." 153 S.W.3d at 219. This conclusion is incorrect. First, Chapter 8 contains much more than the four items Dr. Castleman mentioned in his testimony, *see supra* at 16-17, including an annotated bibliography with brief excerpts from or one-sentence summaries of numerous other materials that were not the subject of Dr. Castleman's testimony, from which one cannot tell what kind of scientific data was used to reach any particular conclusion. *See* PX1. The jury certainly could have misinterpreted these brief summaries as supplying sufficient proof of causation. *See Godsey*, 989 S.W.2d at 491-92. Moreover, Borg-Warner was not in fact given a complete opportunity to cross-examine Dr. Castleman. His testimony was presented by video deposition, but Borg-Warner had not received fair notice of a change of the date of the deposition, which moved it back a day from its originally scheduled date. The deposition was taken in Baltimore, Maryland, and despite her attempts, Borg-Warner's trial counsel was not able to participate. The deposition went forward, and Borg-Warner's trial counsel was finally able to get another attorney in Baltimore to appear just as the deposition was concluding. That attorney was permitted to ask only a few questions. *See* 5 RR 98-102, 156-57. The trial court, however, overruled Borg-Warner's motion to exclude the deposition on the basis that it was not given fair notice or an opportunity to participate in the deposition. 5 RR 101-02.

Second, the error in admitting this chapter in support of liability is harmful in light of the trial court's refusal to admit articles and testimony showing that auto mechanics do not

suffer from an increased risk of asbestos-related disease. Dr. Hale testified that she had reviewed the epidemiological studies on auto mechanics, including an article from 2001 that looked at a number of earlier studies, and which concluded that there is no increased risk of mesothelioma or lung cancer in auto mechanics. 8 RR 177-80. That article (which the trial court excluded from evidence, but which is included in the record as DX 10) contains a meta-analysis of six prior epidemiological studies and the author concluded that there is no epidemiological evidence that auto mechanics suffer from an increased risk of mesothelioma or lung cancer. DX 10. Dr. Hale was also asked about the studies cited in the 2001 article, but the trial court sustained Flores's hearsay objection to this line of testimony. 8 RR 181-82. And the trial court also sustained Flores's hearsay objection to Borg-Warner's offer to admit the 2001 article into evidence. 9 RR 10.

Under these circumstances, the erroneous admission of Chapter 8 probably caused the rendition of an improper judgment, and the court of appeals' judgment must be reversed. Although the erroneous admission of evidence may result in a new trial without that evidence, *see Nissan*, 154 S.W.3d at 148, this Court may also consider the state of the record without the erroneously admitted evidence, and render judgment that based on the remaining testimony and exhibits, there is no evidence to sustain recovery on any of Flores's claims. *See Havner*, 953 S.W.2d at 730.

CONCLUSION AND PRAYER

"Causation cannot be established by mere speculation." *In re R.O.C. Pretrial*, 131 S.W.3d at 134. By equating exposure to an asbestos-containing product with causation of

asbestos-related disease, the court of appeals' causation analysis in this case improperly rests on mere speculation and conflicts with the causation standard applied in *In re R.O.C. Pretrial.* The opinion thereby creates confusion in the law that only this Court can resolve. The court of appeals' analysis of the malice finding is likewise flawed, resting on mere speculation and applying a "should have known" standard, which if allowed to stand, will result in an improper judicial dilution of the Legislature's standard for the recovery of punitive damages. This Court should take the opportunity presented by this case to clarify, for the many cases pending statewide, including in multi-district litigation, the correct causation standard and quality of proof needed to sustain recovery when a plaintiff claims to have been injured by an asbestos-containing product.

For these reasons, Borg-Warner requests that the Court grant its petition for review, and reverse and render judgment that Flores take nothing. In the alternative, Borg-Warner requests that the Court grant its petition for review, reverse the court of appeals' judgment and remand the cause to the court of appeals or the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2005, a true and correct copy of Petitioner's Brief on the Merits was served on the following counsel of record:

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