GRAY REED

Attorney: Texas asbestos decision 'absolutely not' gaining traction in other jurisdictions

Washington Examiner

September 29, 2014

ST. LOUIS (Legal Newsline) – A Texas defense attorney recently said that as asbestos litigation changes, the laws governing legal causation must also change – and the recent *Bostic* decision from the Texas Supreme Court is a prime example of that change despite the fact that it is not having a nationwide impact yet.

Attorney Kenneth Rhodes of the Gray Reed & McGraw law firm was joined by plaintiff attorney J. Kyle Beale of the Karst & von Oiste law firm at the HarrisMartin Midwest Asbestos Litigation Conference in St. Louis on Sept. 18 to discuss the recent *Bostic* decision and causation trends. In *Bostic*, Texas Supreme Court showed that proving causation would not be taken lightly in the state's asbestos cases.

According to *Bostic*, which was decided on July 11, the court concluded that offering evidence of exposure regarding a dose-related disease alone should not imply automatic liability for asbestos claimants. Rather, plaintiffs must satisfy causation standards for their allegations to survive.

The *Bostic* court held that the every exposure theory negates the plaintiff's burden to prove causation by a preponderance of evidence because it accepts that the failure to find a safe dose means every exposure causes the illness, even background exposure.

"If any exposure at all were sufficient to cause mesothelioma, everyone would suffer from it or at least be at risk of contracting the disease," the court stated.

The *Bostic* court held that when proving evidence of causation, the plaintiff's expert testimony of causation must be scientifically reliable and must include epidemiological studies showing the product more than doubled the plaintiff's risk of injury.

"An expert's testimony that brings no more than 'his credentials and a subjective opinion' will not support a judgment," the court held.

Rhodes and Beale also discussed the *Flores* decision as it relates to the *Bostic* decision. In *Flores*, Borg Warner and three other defendants went to jury trial in a brake mechanic's asbestos case, where a Texas jury ruled in favor of the claimant.

However, the state Supreme Court concluded that the evidence provided was legally insufficient to establish causation, thus rejecting the "every exposure" theory.

As a result, the state Supreme Court ruled that substantial factor is required to establish causation in Texas.

Beale said the "bar was set pretty high" when the court determined that plaintiffs were required to provide defendant-specific dose, aggregate dose and respirable fibers sufficient to cause the disease.

As a result of the *Bostic* and *Flores* decisions, Beale warned plaintiffs attorneys present at the conference to get their cases "tied" before taking them to trial if the claimant has any Texas exposures.

"In Texas," he said, "if you get to verdict – based on the landscape now with the court of appeals – even if you get there, you may not get to keep it."

Rhodes added that the Court of Appeals has lost its trust in the jury to get decisions right, because the state Supreme Court has ruled against the jury's decisions in both the *Flores* and *Bostic* decisions.

The question, Rhodes asked, is whether these decisions will gain traction in other asbestos jurisdictions across the country.

It doesn't look like it.

In fact, his response to that question was, "absolutely not happening."

More specifically, the *Flores* decision has been cited in 38 opinions nationwide, 25 of which were in Texas, he said.

Since its conclusion in July, the *Bostic* decision has been cited in four opinions nationwide.

Together with Texas' *Stephens* decision, the cases have been cited 21 times in foreign jurisdictions, and there doesn't appear to be a trend as rulings are split down the middle. Texas law was applied in 11 courts and rejected in 10 courts.

While it appears the *Flores* and *Bostic* decisions requiring strict causation standards will not become the norm anytime soon, Rhodes noted that courts are still rejecting the "every exposure" theory as sufficient causation evidence.

Jurisdictions rejecting the *Flores* decision are instead adopting the *Lohrmann* test, which is viewed as a reasonable middle ground between the *Bostic*/*Flores* approach and the "every

exposure" approach. Courts have found that the idea of "anything goes" is too relaxed and exposure allegations must be held to a higher standard.

"This is a balancing test," Rhodes said of legal causation. "Every single case out there is a balancing of the plaintiff's right to recover and the defendant's liability."

The Fourth Circuit Court of Appeals issued the *Lohrmann* ruling in 1986. As a result, plaintiffs were then required to show frequency, proximity and regularity of exposure.

In other words, a plaintiff must be around the asbestos-containing product often enough and close enough to get sick.

The *Lohrmann* standard may have been appropriate before the first wave of asbestos bankruptcies because the amphibole asbestos fibers were more potent and involved claimants who had lengthy, concentrated exposures.

However, the standard is considered weak by Texas courts when assessing asbestos cases today, because most current exposure allegations include weaker exposures to less potent chrysotile asbestos fibers that were encapsulated inside metal products.

Rhodes said the *Bostic* decision is an example that asbestos litigation has changed since traditional defendants sought bankruptcy protection.

"I've been doing this for a long time," he said, "and it is a much bigger issue than 20 years ago."

Rhodes explained that early in his career, he never once denied that a defendant's product caused the alleged asbestos-related injury in court, because the exposures were much more concentrated and it was clear that the claimant was exposed.

"Product manufacturers did not challenge the ability of their products to create sufficient quantities of respirable asbestos fibers to cause mesothelioma," he stated in his presentation.

However, asbestos litigation today has changed dramatically from the early years, because new claimants' exposures do not have the intensity or duration of those in the early years, he explained.

"It's an apple and an orange as compared to exposures in the early years," Rhodes said of alleged asbestos exposures today.

As a result, he added that courts today are "faced with the difficult task of re-defining legal causation."

Rhodes said that because asbestos litigation is changing, the laws governing legal causation need to change with it.

Beale also noted that the state Supreme Court did reject the “but for causation” standard in its *Bostic* ruling, which requires a plaintiff must prove that but for exposure to the defendant’s product, the asbestos-related disease would not have manifested.

The *Bostic* court held that proving “but for causation” can be humanly impossible, as it is difficult to establish which fibers from which defendant actually caused the injury.

“This would have done away with asbestos litigation in Texas altogether, especially in multiple exposure cases,” Beale said. “That would have been a high hurdle to jump.”