GED:MB 10/14/71 0-4-f

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
OCT 15 1971
JAMES R. COONEY, CLERK
BY DEPUTY Beatrice J. Boyer

CLARENCE BOREL

vs.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

CIVIL ACTION NO. 6449

MOTION OF PITTSBURGH CORNING CORPORATION FOR JUDGMENT, NOTWITHSTANDING THE VERDICT OF THE JURY UNDER RULE 50-B

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now this Defendant, PITTSBURGH CORNING CORPORATION, and moves the Court to set aside the verdict of the jury entered in the above-entitled and numbered cause on September 29, 1971, and to enter Judgment in accordance with Defendant's Motion For Directed Verdict and as grounds for said Motion would respectfully show the Court the following:

A. Defendant's Motion For Directed Verdict should have been granted because there was no evidence of any probative force adduced at the trial of this cause of a breach of warranty by this Defendant, Pittsburgh Corning Corporation, which could have been the proximate cause of the injuries and death of the deceased, Clarence Borel.

B. The undisputed medical evidence adduced at the trial, conclusively established that after the first exposure to asbestos dust, the disease of asbestosis will not manifest itself until twenty years after such exposure and the disease of mesothelioma will not manifest itself until some twenty or forty years after first exposure, and there is there fore no evidence in the record which would sustain the jury's finding that this Defendant had breached any warranty, which breach could have been the proximate cause of the injuries

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and death of the deceased, Clarence Borel, because of an insufficient time lapse between August 1962, when this Defendant first commenced the manufacture and sale of the product UNIBESTOS, and the manifestation of asbestosis and/or mesothelioma in Plaintiff's decedent, Clarence Borel.

C. It was stipulated by and between counsel for Plaintiff and counsel for this Defendant, Pittsburgh Corning Corporation, that this Defendant did not manufacture the product UNIBESTOS until subsequent to August 1962, and therefore the Plaintiff has failed to sustain its burden of proving that Plaintiff's decedent, Clarence Borel, worked with the product UNIBESTOS subsequent to August 1962, and there was therefore no evidence of any probative force to sustain the jury's finding in answer to Interrogatory No. 4 that this Defendant, Pittsburgh Corning Corporation, was guilty of a breach of warranty which could have been a proximate cause of the injuries and death of the deceased.

D. In its general charge, the Court defined "proximate cause" as follows:

> "Proximate cause means that cause which in a natural and continuous sequence, produces an event and without which cause such event could not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care could have foreseen that the event or some similar event might reasonably result therefrom. There may be more than one proximate cause of any event."

By the very nature of the definition of "proximate cause," as defined by this Honorable Court in the above-quoted charge, there must have been reasonable foreseeability on the part of this Defendant, Pittsburgh Corning Corporation, in connection with breach of warranty. If there was no reasonable foreseeability in connection with the acts of negligence as contended for by the Plaintiff in connection with the jury's answer to Interrogatory No. 1, then, there could have been no reasonable foreseeability in connection with the jury's answer to Interrogatory No. 4 that this Defendant, Pittsburgh Corning Corporation, was guilty of a breach of warranty.

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E. The Plaintiff's counsel, in his closing speech to the jury in open Court, stated in legal effect that the Plaintiff had no evidence, or had insufficient evidence, against Pittsburgh Corning Corporation, to implicate it in the cause to be submitted to the jury. Said statement was a judicial admission in open Court which was intentional, clear and deliberate, and was never retracted or withdrawn by Plaintiff's counsel, as a result of which this Defendant, Pittsburgh Corning Corporation, is entitled to a Judgment Notwithstanding The Verdict of the Jury, Under Rule 50-B.

WHEREFORE, PREMISES CONSIDERED, this Defendant, Pittsburgh Corning Corporation, moves and prays that the Court enter Judgment on the Verdict of the Jury in favor of this Defendant, Pittsburgh Corning Corporation, and that the Plaintiff herein, Mrs. Thelma Borel, and each of the Cross-Plaintiffs, do have and recover nothing herein against this Defendant, Pittsburgh Corning Corporation, and that this Defendant, Pittsburgh Corning Corporation be discharged with its costs. This Defendant prays for such other and further relief to which it may be entitled in the premises, either at law or in equity.

Respectfully submitted,

WELLS, DUNCAN, BEARD,
GREENBERG AND HUNT

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion was served on Mr. Ward Stephenson, Stephenson & Thompson, Stephenson Building, Orange, Texas, 77630, Attorney for Plaintiff, and to all attorneys of record for the remaining Defendants, by mailing a copy to their respective addresses, on the 15th day of October, 1971.

George E. Duncan

George E. Duncan

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