No. 05-08-01390-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

GEORGIA-PACIFIC CORPORATION,

Appellant,

v.

SUSAN ELAINE BOSTIC, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF TIMOTHY SHAWN BOSTIC, DECEASED; HELEN DONNAHOE; AND KYLE ANTHONY BOSTIC,

Appellees.

BRIEF OF APPELLANT GEORGIA-PACIFIC CORPORATION

On Appeal from County Court at Law No. 1, Dallas County, Texas

DEBORAH G. HANKINSON
State Bar No. 00000020
RICK THOMPSON
State Bar No. 00788537
KATHERINE ROSS
State Bar No. 00788620

HANKINSON LEVINGER LLP
750 N. St. Paul St., Suite 1800
Dallas, Texas 75201
214.754.9190
214.754.9140 (fax)

COUNSEL FOR APPELLANT GEORGIA-PACIFIC CORPORATION

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

PARTIES TO THE TRIAL COURT'S JUDGMENT:

Appellant/Defendant:	Georgia-Pacific Corporation
Appellate Counsel for Georgia-Pacific Corporation:	Deborah G. Hankinson Rick Thompson Katherine Ross HANKINSON LEVINGER LLP 750 N. St. Paul St., Suite 1800 Dallas, Texas 75201
Trial Counsel for Georgia-Pacific Corporation:	Mel D. Bailey BAILEY CROWE & KUGLER, L.L.P. 4600 Bank of America Plaza 901 Main Street Dallas, Texas 75202 James B. Greer KANE RUSSELL COLEMAN & LOGAN, PC 1601 Elm Street, Suite 3700 Dallas, Texas 75201
Appellees/Plaintiffs:	Susan Elaine Bostic, Individually and as Representative of the Heirs and Estate of Timothy Shawn Bostic, Deceased; Helen Donnahoe; and Kyle Anthony Bostic
Additional Plaintiff:	Harold Bostic
Trial Counsel for Plaintiffs & Appellate Counsel for Appellees:	Kevin McHargue Denyse Clancy BARON & BUDD, P.C. 3102 Oak Lawn Ave., Suite 1100 Dallas, Texas 75219

Additional Trial Counsel for Plaintiffs:	D. Leanne Jackson Formerly with Baron & Budd, P.C. Chris Panatier SIMON, EDDINS & GREENSTONE, LLP 3232 McKinney Ave., Suite 610 Dallas, Texas 75204 Charla Aldous ALDOUS LAW FIRM 2305 Cedar Springs Rd., Suite 200 Dallas, Texas 75201
Additional Defendants:	**Trial Counsel for Defendants:**
Ametek, Inc.	Karen K. Maston Johnson Spalding Doyle West & Trent LLP-Houston 919 Milan St., Suite 1700 Houston, Texas 77002
Ametek, Inc. Champlain Cable Co.	Raul M. Calderon 700 Louisiana, Suite 1850 Houston, Texas 77002
Anchor Hocking, Inc.	Nancy M. Bell Jones Bill, LLP 6363 Woodway, Suite 1100 Houston, Texas 77057
Aqua-Chem Congoleum Corp.	Clay M. White White Shaver, P.C. Republic Center 325 N. St Paul Street, Ste 1865 Dallas, Texas 75201
Asten Johnson, Inc.	R. Mark Willingham Willingham, Fultz & Cougill LLP 808 Travis Street, Suite 1608 Houston, Texas 77002

Babcock Borsig Power, Inc. Certainteed Champlain Cable Co. Cooper Industries; Dana Corp. Hanson Permanente Cement, Inc. Hanson Aggregates West, Inc. Hanson Building Materials, Inc. Kelly Moore Paint Co. Kaiser Cement Corp. Kaiser Gypsum Co. Pneumo Abex Corp.	Gary D. Elliston Jennifer Judin Paul E. Hamilton Dehay & Elliston Bank of America Plaza Bldg. 901 Main St., Suite 3500 Dallas, Texas 75202-3736
Cooper Pneumo	Jim Zadeh 115 West 2nd Street, Suite 201 Fort Worth, Texas 76102
Bondex International Inc. Proko Industries	David D. Reynard Jenkins & Martin, L.L.P. 2615 Calder Ave., Suite 500 Beaumont, Texas 77702
Burns International Services, Corp. f/k/a Borg-Warner	Elizabeth Phifer Phifer & Colvin LLP 6029 Belt Line Rd., Suite 110 Dallas, Texas 75254
Colfax Corporation	J. Michael Jordan Steven C. Lockhart Gardere Wynne Sewell LLP 1601 Elm St., Suite 3000 Dallas, Texas 75201
Crane Co.	Michael John Ramirez Warren Westberg K & L Gates LLP 1717 Main St., Suite 2800 Dallas, Texas 75201

Crane Co.	Charles J. Blanchard Carrington Coleman Sloman & Blumenthal, LLP 901 Main Street, Suite 5500 Dallas, Texas 75202
Daimler Chrysler Corp.	Robert Thackston Hawkins Parnell & Thackston Highland Park Place 4514 Cole Avenue, Suite 500 Dallas, Texas 75205
Ford Motor Co. General Motors Corp.	Dawn Marie Wright Thompson & Knight LLP 1722 Routh Street, Suite 1500 Dallas, Texas 75201
Ford Motor Co.	Tammy M. Holt 2000 Trammel Crow Center 2001 Ross Ave., Dallas, Texas 75201
Foster Wheeler Garlock, Inc. IMO Industries, Inc. Metropolitan Life Ins. Co. Rapid American Corp.	James Old Germer Gertz 550 Fannin, Suite 400 Beaumont, Texas 77701
Rapid American Corp.	Joseph Blizzard 1717 Main St., Suite 3700 Dallas, Texas 75201
Garlock, Inc.	Raymond P. Harris, Jr. Schachter Harris LLP 2300 Plaza of the Americas 600 N. Pearl St. Dallas, Texas 75201

Garlock Sealing Technologies, LLC	Laurel A. Fay 2300 Plaza of the Americas 600 N. Peart St, LB 133 Dallas, Texas 75201
General Refractories	Neil Rambin Sedgwick, Detert, Moran & Arnold 1717 Main St., Suite 5400 Dallas, Texas 75201
Guard-Line, Inc.	Robert Wilkinson Dogan & Wilkinson PLLC 1010 Lamar, Suite 860 Houston, TX 77002
Henry Vogt Machine Co.	J. Frank Kinsel, Jr. Cantey & Hanger LLP 600 W. 6th St., Suite 300 Fort Worth, Texas 76102-3685
Ingersoll-Rand Co. Uniroyal Holding, Inc. Zurn Indus., Inc.	Kyle C. Steele Laura Frase Forman Perry Watkins Krutz & Tardy LLP 2001 Bryan St., Suite 1300 Dallas, Texas 75201
Johns-Manville	
3M Company	
Mid-Valley, Inc.	Jack Jamison Godwin Ronquillo PC 1201 Elm St., Suite 1700 Dallas, Texas 75270
The Maremont Corp.	Jill Arntz Jeffrey L. Larson Kasowitz Benson Torres & Friedman LLP 700 Louisiana St., Suite 2200 Houston, Texas 77002

Union Carbide Corporation

Sharla Frost
Powers & Frost
One Houston Center
1221 McKinney Street, Suite 2400
Houston, Texas 77010

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

CASES

RULES AND STATUTES

OTHER AUTHORITIES

APPENDIX INDEX

STATEMENT OF THE CASE

Nature of the Case: This case arises from Timothy Bostic's death from mesothelioma, which was allegedly caused by his exposure to asbestos from a variety of sources, including his alleged use of joint compound containing asbestos that was manufactured by Defendant Georgia-Pacific Corporation. CR 25-65. Plaintiffs brought wrongful death claims and a survival action against Georgia-Pacific and 47 other entities for negligence, strict liability, and gross negligence. *Id.* All of the defendants other than Georgia-Pacific either settled or were dismissed. *Compare* CR 25-65 *with* CR 159-71.

Trial Court, First Trial: Honorable Judge Sally Montgomery, County Court at Law No. 3 of Dallas County, Texas, first tried this case in 2005. The jury returned a verdict against Georgia-Pacific and awarded Plaintiffs $2.4 million in actual damages and $6.2 million in punitive damages. CR 110-20. Judge Montgomery required the Plaintiffs to elect between a new trial or remittitur. CR 147. Plaintiffs elected a new trial. CR 148-49.

Second Trial: During the second trial before Judge Montgomery in May and June 2006, the jury witnessed one of the Plaintiffs—Timothy Bostic's father—collapse in the hallway following his direct examination; the judge and a juror rendered emergency aid to him. 9 RR 160-72; 10 RR 4-6. Mr. Bostic died the next day.

Having had no opportunity to cross-examine Mr. Bostic and given the prejudice likely to arise from this incident, Georgia-Pacific moved for a mistrial. CR 172-91; 9 RR 162-72; 10 RR 4-27. Judge Montgomery refused to rule on the motion, 10 RR 16-27, 256-302; 11 RR 4-5. Instead, a week later, she instructed the jury to disregard the Plaintiff's live testimony in favor of his testimony from the first trial, 12 RR 12-13; *see also* 10 RR 16-28. That testimony, which was read into the record, 12 RR 13-144, included his statement that he "just wanted to die" because of his son's death, 12 RR 58. When Judge Montgomery refused to rule on the motion for mistrial until after the jury had returned its verdict, Georgia-Pacific filed a petition for writ of mandamus. This Court denied the petition. *See In re Georgia-*

Pacific Corp., No. 05-06-00758-CV, 2006 WL 1753079, at *1 (Tex. App.—Dallas June 2, 2006, orig. proceeding) (mem. op.).

Jury Verdict: The jury found Georgia-Pacific and Knox Glass, a nonparty and Timothy Bostic's former employer, negligent and Georgia-Pacific strictly liable for Timothy Bostic's injuries and awarded $7,554,907 in actual damages. CR 198-217. The jury found Georgia-Pacific 75% responsible for the injuries and Knox Glass 25% responsible. CR 205-06. The jury also found that Georgia-Pacific was grossly negligent and awarded $6,038,910 in punitive damages. CR 214-15; *see* Tab B.

Motion to Recuse: After the verdict, Georgia-Pacific was permitted to question the jury and court personnel. 16 RR 121-66. Georgia-Pacific then discovered evidence of questionable conduct by one juror, the bailiff, and the trial judge that further called the integrity of the trial into question. *See* 16 RR 121-66, 218-29, 231-60, 323-33, 336-76. Georgia-Pacific filed a motion to recuse Judge Montgomery. CR 218-29. On July 26, 2006, Judge M. Kent Sims granted the motion to recuse. CR 334.

Case Transferred: The case was transferred to Judge Russell H. Roden, County Court at Law No. 1, Dallas County. CR 335. Georgia-Pacific filed a supplemental motion for mistrial. CR 336-76. In December 2006, the court granted Georgia-Pacific's motion for mistrial and ordered a new trial. CR 439 (Tab C).

New Trial Court's Disposition: In January 2007, the Honorable D'Metria Benson was sworn in as the new judge of County Court of Law No. 1. In February 2008, Plaintiffs filed a motion for vacatur of Judge Roden's order granting the new trial and for entry of judgment. CR 440-647.

On July 18, 2008, Judge Benson granted Plaintiffs' motion to vacate, CR 1222-23 (Tab D), and, on July 23, 2008, signed a final judgment based on the two-year-old jury verdict from May 2006. CR 1224-29. On October 22, 2008, the court rendered its First Amended Final Judgment, awarding $7,554,907 in compensatory damages and $4,832,128 in punitive damages against Georgia-Pacific. SCR 5-9 (Tab A).

RECORD REFERENCES

The clerk's record will be referenced by page number, *e.g.*, "CR 1." The clerk's supplemental record will be referenced by page number, *e.g.*, "SCR 1." The reporter's record will be referenced by volume number followed by page number, *e.g.*, "4 RR 16." Plaintiffs' exhibits in volumes 20 through 34 of the reporter's record will be referenced by "PX" followed by exhibit number, *e.g.*, "PX-1." Defendants' exhibits in volumes 34 to 37 of the reporter's record will be referenced by "DX" followed by exhibit number, *e.g.*, "DX-1."

The trial court also admitted certain exhibits, labeled "Court Exhibits," solely for the trial court's consideration—*i.e.*, the exhibits were not admitted for consideration by the jury during deliberations. Plaintiffs' Court Exhibits will be referenced by "PCX" followed by exhibit number, *e.g.*, "PCX-1." Defendant's Court Exhibits will be referenced by "DCX" followed by exhibit number, *e.g.*, "DCX-1."

ISSUES PRESENTED

1. Whether there is any evidence that Georgia-Pacific's joint compound was the producing or proximate cause of decedent Timothy Bostic's mesothelioma.

2. Whether there is any clear and convincing evidence to support the jury's finding of gross-negligence against Georgia-Pacific.

3. Alternatively, whether the trial court abused its discretion by refusing to grant a new trial when Georgia-Pacific was denied its constitutional right to a fair and impartial jury trial.

INTRODUCTION

Without a doubt, Georgia-Pacific is entitled to a new trial as a result of the prejudicial events surrounding the second trial in this case: Plaintiff Harold Bostic—the father of the decedent—collapsed in front of the jury after his emotional direct testimony; the judge and a sitting juror rendered emergency aid to Mr. Bostic; the judge informed the jury that Mr. Bostic collapsed as a result of the stress of the trial; Mr. Bostic died without Georgia-Pacific having the opportunity to cross-examine him; the jury learned from outside sources that Mr. Bostic had died before they reached a verdict; the bailiff discussed questions from the jury regarding Mr. Bostic's health with Plaintiffs' counsel, but not counsel for Georgia-Pacific; and the trial judge instructed her staff not to disclose the juror's questions about Mr. Bostic to Georgia-Pacific. Georgia-Pacific moved for mistrial, but the trial court was determined to finish the second trial and render a final judgment—no matter what the consequences to Georgia-Pacific's right to a fair trial.

Fortunately, this Court does not need to slough through the events surrounding the second trial. The Court instead should render a judgment that Plaintiffs take nothing because Plaintiffs wholly failed to present any legally sufficient evidence of causation to support their claims against Georgia-Pacific. Instead of proving that exposure to Georgia-Pacific's asbestos-containing joint compound was the actual cause of Timothy Bostic's mesothelioma, Plaintiffs relied solely on their experts' opinions that "each and every exposure" to asbestos was the cause, hoping that this testimony would relieve them of their obligation of proving their case against Georgia-Pacific. But Texas law—set forth in *Havner*, *Flores*, and *Stephens*

—does not permit such unreliable expert opinions to serve as proof that Georgia-Pacific's joint compound caused Timothy Bostic's mesothelioma. As a result, there is no evidence to support an essential element of Plaintiffs' negligence and defective marketing claims against Georgia Pacific. This Court should reverse and render judgment that Plaintiffs take nothing.

STATEMENT OF FACTS

From his birth in 1961 to some unknown point in his adulthood, Timothy Bostic was exposed to asbestos from multiple sources. *See* 7 RR 165-99; 8 RR 15-42; 12 RR 24-93, 109-44; DX-33. As a result of one or more of these exposures, he developed mesothelioma, 11 RR 460, 47-51, 60-61, a relatively rare form of cancer whose only known environmental cause is asbestos exposure, 4 RR 99; 11 RR 23-25.[1] Timothy Bostic was diagnosed with mesothelioma in 2002 and died in 2003. DX-36; 11 RR 59-69.

A. Timothy Bostic Was Exposed to Asbestos From Multiple Sources Throughout His Life, Including His and His Father's Work at the Knox Glass Plant.

***Knox Glass*:** In all likelihood, the greatest source of Timothy's exposure to asbestos came from the Knox Glass Plant in Palestine, Texas.[2] Asbestos was used throughout this bottle plant to insulate against the heat of molten glass. 7 RR 171-73; 14 RR 11-81.

---

[1] Mesothelioma is a "dose-response" disease, meaning that the risk of developing the disease increases as the level of exposure to asbestos increases. 4 RR 94-95.

[2] Knox Glass is not a party to this suit. In 1989, Timothy and Harold Bostic were members of a class that filed suit against Knox Glass. *Roger Dale Aills v. Knox Glass, Inc.*, Cause No. 34,425, in the 3rd Judicial District Court of Anderson County, Texas. In 1995, long before Timothy was diagnosed with mesothelioma, both Timothy and Harold received settlements from, and executed full releases in favor of, Knox Glass. DCX-1. The trial court did not permit Georgia-Pacific to mention this lawsuit or the settlements received by the Plaintiffs in front of the jury. 15 RR 246-301.

Timothy's father, Harold Bostic, worked at Knox Glass as a welder from around 1960 until the plant closed in 1984. 12 RR 18, 67-68. Due to the presence of asbestos throughout the glass plant and his direct contact with asbestos products as a welder, Harold Bostic was regularly exposed to asbestos fibers, which were inadvertently carried home on his clothing —thereby exposing Timothy to asbestos fibers from birth. 12 RR 68-73; 7 RR 176-77. Plaintiffs' experts testified that secondary exposure to asbestos from Harold Bostic's work clothes could have contributed to the development of Timothy's mesothelioma. 4 RR 182-83; 10 RR 167-68; 11 RR 48, 105-08.

Timothy himself worked at Knox Glass for three summers between 1980 and 1982, 7 RR 171, where he cut raw asbestos sheets, swept up asbestos-containing dust, cleaned up after asbestos pipe coverings were repaired, and wore asbestos gloves. 7 RR 171-75; 8 RR 21-23, 26-35; DX-33.

In 1988, Timothy and Harold participated in a medical study of workers from the Knox Glass Plant, *see* DX-42; 8 RR 37-38; 12 RR 63-66. The study revealed that 27% of those workers had already developed asbestos-related illnesses. 7 RR 57-59. Tests showed that Timothy and Harold had asbestos fibers in their lungs at that time. DX-42; 12 RR 63-66.

Palestine Contractors: During 1977 and 1978, Timothy also worked as a welder's assistant for Palestine Contractors where he was exposed to asbestos gaskets and asbestos pipe insulation. 7 RR 170-71; 8 RR 18-20; DX-33.

Working on Cars and Remodeling: When Timothy was a child, he would often help his father with home remodeling jobs for family and friends on the weekends. 7 RR 178-85;

12 RR 24-93, 109-44. They worked on one job at a time, and each job took approximately a year to complete. 12 RR 83. As he got older, Timothy began to do remodeling on his own and to work on cars. 7 RR 185-89; 8 RR 17-18; 12 RR 37, 132-33. As part of these jobs, Timothy was exposed to a number of asbestos-containing products, including brake pads, gaskets, floor tiles, and roofing shingles. DX-33; 7 RR 178-89. He also worked with joint compound manufactured by several companies, including Georgia-Pacific. DX-33.[3]

B. Georgia Pacific Manufactured and Sold Asbestos-Containing Joint Compound from 1965 until 1977.

Due to its heat-resistant characteristics, asbestos has been used for centuries and was widely used in a variety of products in the United States until the 1980s. *See* 5 RR 63-67; 6 RR 104, 158. It was used for fireproofing Navy ships during World War II, as insulation in manufacturing plants using high heat processes, and in home construction products and auto parts, such as ceiling tiles, roofing shingles, insulation, and brake pads. 5 RR 63-67. During the 1950s and 1960s, asbestos was commonly used in household items such as irons, burner pads, toasters, and hair dryers. 6 RR 158. Due to this widespread use, there is a "background" level of asbestos present in the air in most urban areas of the world even today. *See Borg-Warner v. Flores*, 232 S.W.3d 765, 771 (Tex. 2007).

In 1965, Georgia-Pacific bought a gypsum wallboard manufacturing company called Bestwall Gypsum Company, which also manufactured a line of joint compound products that

---

[3] Joint compound, or drywall mud, is used to smooth seams and cover nail heads on sheets of drywall. 8 RR 153-55. It is sold as either a dry powder that is mixed with water or as a pre-mixed solution. 8 RR 162-65. After joint compound is prepared, it is spread in a thin coat on the wall and smoothed with a trowel or putty knife. 8 RR 153-57. After it dries, uneven areas are sanded. *Id.*

included a small percentage of chrysotile asbestos fibers as a binding agent. 8 RR 144.[4] The products were offered in a dry mix formula and as a pre-mixed formula called "Ready Mix." 8 RR 164-65. The Georgia-Pacific joint compound products at issue in this litigation contained approximately 2 to 5 percent chrysotile until 1973, when several products began to be offered in an asbestos-free form. 9 RR 26. Georgia-Pacific did not manufacture or sell joint compound containing chrysotile after 1977. 9 RR 25. Asbestos continued to be used in the United States for many years thereafter. 6 RR 196-98.

C. Plaintiffs Sued Georgia-Pacific, Alleging that Timothy Bostic's Exposure to Joint Compound Caused His Mesothelioma; After the First Trial, Plaintiffs Opted for a New Trial Rather Than Accept the Remittitur Suggested by the Trial Court.

At the time of his diagnosis, Timothy and his doctors believed that his mesothelioma was caused by his and his father's employment at the Knox Glass Plant in Palestine, Texas. DX-36-37. By the time this suit was filed, however, Plaintiffs had identified more than 45 other potential sources of Timothy Bostic's asbestos exposure, including joint compound manufactured by Georgia-Pacific and several other companies. CR 25-58. Following Timothy Bostic's death, his estate, his father Harold Bostic, his mother Helen Donnahoe, his wife Susan Bostic, and his son Kyle Bostic filed suit against 47 defendants and Georgia-

---

[4] "Asbestos" is a commercial term that includes two different families of materials: serpentine and amphibole fibers. 4 RR 88-89. Georgia-Pacific joint compound contained a form of serpentine asbestos called chrysotile. 10 RR 227-29. Although it is well accepted in the scientific community that exposure to amphibole asbestos can cause mesothelioma, whether exposure to chrysotile can cause mesothelioma is still the subject of heated scientific debate. 4 RR 99-100; 5 RR 95. It is Georgia-Pacific's position that chrysotile does not cause mesothelioma, but for purposes of this appeal only, given the number of other inadequacies in the causation evidence, Georgia-Pacific is not challenging the assumption that exposure to chrysotile can cause mesothelioma.

Pacific for negligence, strict liability, gross negligence, conspiracy, and fraud. CR 25-58. Because Timothy Bostic's claims against Knox Glass had been settled and released, Knox Glass was never a defendant in this suit. *See* DCX-1; 15 RR 246-301. All of the other defendants eventually settled with Plaintiffs or were dismissed from the suit, leaving Georgia-Pacific as the lone defendant in the first trial. *Compare* CR 25-58 *with* CR 159-71.

In March 2005, the jury returned a verdict against Georgia-Pacific, awarding actual damages of $3,127,000 and punitive damages of $6,200,000. CR 110-20. After considering Georgia-Pacific's post-verdict motions, however, Judge Sally Montgomery, County Court at Law No. 3, required Plaintiffs to elect between a new trial or remittitur. CR 147. Plaintiffs elected a new trial. CR 148-49.

D. Timothy and Harold Bostic Could Not Recall Whether Timothy Used Georgia-Pacific's Chrysotile-Containing Joint Compound on Any Remodeling Jobs Between 1967 and 1977.

The case went to trial a second time in May and June 2006 before Judge Montgomery. The only evidence at the second trial that Timothy Bostic worked with or around Georgia-Pacific's chrysotile-containing joint compound came from Timothy Bostic's deposition testimony and testimony by his father, Harold Bostic. According to the testimony, Timothy Bostic allegedly worked with Georgia-Pacific, U.S. Gypsum, and Bondex joint compounds while helping his father on the weekends with remodeling jobs for family and friends between 1967 (when he was five years old) and 1977 (the year that Georgia-Pacific stopped manufacturing or selling joint compound containing chrysotile). 12 RR 23-39, 77-78; 7 RR

178-82; 8 RR 17-18.[5] Although his deposition testimony reflected that he mixed and sanded joint compound from the age of five, Timothy did not provide the specifics of any drywall work that he did with his father before he graduated from high school in 1980. 7 RR 171-82; 8 RR 17-18. Timothy testified that he used Georgia-Pacific joint compound on numerous remodeling jobs after graduating from high school in 1980, 7 RR 166; 8 RR 17-18; 12 RR 39, but by that time, Georgia-Pacific no longer manufactured or sold chrysotile-containing joint compound. 9 RR 25.

Harold Bostic recalled only three instances between 1967 and 1977 when he and his son possibly did drywall work together. *See* 12 RR 78-93, 109-37. Although Harold testified that they used Georgia-Pacific joint compound the majority of the time that they did drywall work, 12 RR 33-34, 39, he remembered using Georgia-Pacific joint compound on only one of these three jobs. On that job, Timothy worked on the sewer; Harold could not recall if Timothy did any drywall work at all. 12 RR 24, 33-34, 122-25, 136-37; 8 RR 17-18. Harold asked his friends and family for help in recalling any other remodeling jobs he and his son did between 1967 and 1977, but neither he nor they could recall any other jobs. 12 RR 143.

E. Plaintiffs' Causation Experts Simply Opined That "Each and Every" Exposure to Asbestos Contributed to the Development of Timothy Bostic's Mesothelioma.

Plaintiffs presented four expert witnesses on causation at the second trial: Richard Lemen, Ph.D., an epidemiologist who testified regarding general causation and state of the

---

[5] In addition, in his sworn Work History Sheets, Timothy Bostic identified having worked "with" and "around" Durabond, Gold Bond, Paco, and Flintkote joint compounds. DX-33.

art knowledge, 5 RR 8-9; *see also* 6 RR 66-67 (not testifying regarding specific causation); Arnold Brody, M.D., a cell biologist and experimental pathologist who testified on general causation, 4 RR 80-81; *see also id.* (not testifying on specific causation); Samuel Hammar M.D., a pathologist who testified on specific causation and Timothy Bostic's diagnosis of mesothelioma, 11 RR 6-12, 45-48; and William Longo, Ph.D.,[6] an electron microscopist and material scientist testifying on how asbestos exposure occurs and the results of his testing of Bestwall/Georgia-Pacific joint compound, 10 RR 35-36; *see also* 10 RR 115 (not testifying on "who used what and when" or causation).

Dr. Hammar, the only expert who testified regarding the specific causation of Timothy Bostic's mesothelioma, testified that "each and every" exposure to friable asbestos fibers above background levels "had the potential to contribute to" the development of Timothy's mesothelioma—regardless of the source of the exposure. *See* 11 RR 38-39, 48-51. When asked whether *any* of Timothy's exposures to asbestos could be excluded as a cause of his mesothelioma, Dr. Hammar said "no." 11 RR 51, 106-11, 145-46, 151-52. And when asked if he could opine that, without any exposure to Georgia-Pacific's chrysotile-containing joint compound, Timothy would not have developed mesothelioma, Dr. Hammar again said "no." 11 RR 139. Plaintiffs' other three experts expressly disclaimed any ability to offer opinions on the cause of Timothy's mesothelioma. 4 RR 80-81; 5 RR 31; 10 RR 91-92, 106-07, 115.

---

[6]Although Dr. Longo admitted, outside the presence of the jury, that he was engaged to Leanne Jackson, one of Plaintiffs' attorneys and a shareholder in Baron & Budd, the trial court refused to permit Georgia-Pacific's counsel to cross-examine Dr. Longo regarding his relationship with Ms. Jackson or his potential bias. 10 RR 119-20, 181-99.

F. During the Second Trial, Plaintiff Harold Bostic Collapsed in Front of the Jury and Died the Next Day; the Jury Learned That He Died and Returned a Very Large Verdict Against Georgia-Pacific.

During a break following his direct testimony, Plaintiff Harold Bostic collapsed in the hallway in full view of the jurors. 9 RR 160. Judge Montgomery and one of the jurors—Courtney Jackson, an emergency medical technician—rendered emergency assistance. 9 RR 165-66. Upon return to the courtroom, Judge Montgomery told the jury that Mr. Bostic's collapse was due to "the stress of the testimony." 9 RR 162. Judge Montgomery then dismissed the jury for the Memorial Day weekend. 9 RR 162.

Georgia-Pacific moved for a mistrial, 9 RR 162-73, but Judge Montgomery delayed ruling on the motion until she knew Mr. Bostic's condition, stating her belief that his medical condition would not have much impact on the jury unless it was something really serious, "like a heart attack or something like that." 9 RR 170-71.

Although Mr. Bostic died the next day, Judge Montgomery refused to rule on the motion for mistrial until the jury returned a verdict. 10 RR 12-27. Judge Montgomery was convinced that the jurors were unaware that Mr. Bostic died, so she simply informed the jury that he was "not available" to return to court to be cross-examined, without any explanation. 12 RR 12-13. Exactly one week after Mr. Bostic's emotional testimony and collapse, the court finally instructed the jury to disregard his live trial testimony in favor of his testimony from the first trial, which was then read into the record, including Mr. Bostic's statement from the first trial that he "prayed to God to die" because of his son's death. 12 RR 12-13.

Unbeknownst to Georgia-Pacific, on the day the jury was instructed to disregard Mr. Bostic's live testimony, the jurors asked the bailiff about Mr. Bostic's medical condition and asked why Plaintiffs' counsel had been wearing all-black apparel since Mr. Bostic's collapse. 16 RR 155-60, 162; 17 RR 20-21. The bailiff discussed the jury's questions with Plaintiffs' counsel, but not counsel for Georgia Pacific. *Id.* When Judge Montgomery became aware of the jury's questions and her bailiff's response, she instructed her staff not to disclose this information to Georgia-Pacific's counsel until she deemed it "relevant." 17 RR 34-35.

In the meantime, one of the jurors, Courtney Jackson, the EMT who provided medical assistance to Mr. Bostic, contacted one of his co-workers at the hospital and learned that Mr. Bostic died after his collapse. 16 RR 123-24, 130-33, 137-40. Mr. Jackson then informed other jurors that Mr. Bostic had died. *Id.* The transmission of this information from the outside source was made before the jurors retired to deliberate. 12 RR 58.

Trial proceeded. After the close of evidence but before jury deliberations began, the trial court dismissed Courtney Jackson from the jury (instead of striking the entire jury as requested by Georgia-Pacific). 15 RR 231-37. On July 26, 2006, the jury returned its verdict, finding that Georgia-Pacific was negligent and strictly liable for defectively marketing its joint compound. CR 202-03. The jury awarded Plaintiffs $7,554,907 in actual damages and $6,038,910 in punitive damages, finding Georgia-Pacific responsible for 75% of the damages and Knox Glass responsible for 25%. CR 198-217.[7]

---

[7] The jury in the first trial awarded $3,127,000 in actual damages to the four wrongful death plaintiffs. By the time of the second trial, Susan Bostic was happily remarried, 7 RR 150-51, and Kyle Bostic had become an independent adult, 12 RR 148. Nevertheless, the jury in the second trial

Immediately after the verdict, the trial court permitted Georgia-Pacific to interview the jurors and court personnel. 16 RR 121-66. Georgia-Pacific discovered that the jury knew of Mr. Bostic's death from an outside source before deliberations had begun, that the bailiff conversed with Plaintiffs' counsel regarding the jury's questions, and that Judge Montgomery ordered her staff not to inform Georgia-Pacific of these events. 16 RR 123-24, 130-40. When the court reporter disputed the completeness and accuracy of Judge Montgomery's testimony, Judge Montgomery fired the court reporter, 17 RR 36-37.

G. Georgia-Pacific Moved to Recuse Judge Montgomery; Judge Kent Sims Granted the Motion to Recuse; Judge Russell Roden Granted the Motion for Mistrial and Ordered a New Trial.

Georgia-Pacific moved to recuse Judge Montgomery because she had knowledge of the events surrounding Mr. Bostic's collapse. CR 218-29. Judge M. Kent Sims granted the motion to recuse on that basis. CR 334. Following the recusal, the case was transferred to

---

awarded $7,554,907 in actual damages to the three wrongful death plaintiffs—*i.e.*, more than double the actual damages awarded to the four plaintiffs in the first trial. (Harold Bostic died and was not a wrongful death plaintiff in the second trial.) The difference was the noneconomic damages. For example, the first jury awarded $650,000 to Susan Bostic for pecuniary loss, loss of companionship and society, and mental anguish—as compared to $2,415,564 awarded by the second jury (almost four times the amount found by the first jury). CR 1460. The first jury awarded $350,000 to Kyle Bostic—as compared to $1,811,670 found by the second (more than five times the amount found by the first jury). CR 1461-62. The first jury awarded $140,000 to Helen Donnahoe—as compared to $1,207,782 found by the second (almost nine times the amount found by the first jury). CR 1461-62.

There is no legally sufficient evidence to support the jury's damage awards. For example, the jury awarded Plaintiffs $905,837 in future mental anguish damages; there is no evidence of a "reasonable probability" that Plaintiffs would suffer any mental anguish of any duration or severity in the future. *Adams v. YMCA of San Antonio*, 265 S.W.3d 915, 917 (Tex. 2008). Thus, the awards of future mental anguish damages to Plaintiffs fail as a matter of law. Georgia-Pacific, however, cannot challenge the legal sufficiency of the evidence supporting each award of damages to Plaintiffs in this 50-page brief because of its challenge to the jury's liability and gross negligence findings, and alternatively, to seek remand for a new trial based on juror, bailiff, and judicial misconduct.

Judge Russell H. Roden, Dallas County Court at Law No. 1. *See* CR 335. On December 22, 2006, after hearing argument and considering the parties' exhaustive filings, Judge Roden granted Georgia-Pacific's motion for mistrial and ordered a new trial. CR 439.[8]

H. A New Judge Took Office and Vacated the Order Granting the New Trial Signed Eighteen Months Earlier.

Judge Roden was not reelected in 2006, and in January 2007, the Honorable D'Metria Benson replaced him. More than a year after Judge Roden granted the mistrial, on February 11, 2008, Plaintiffs' filed a motion for vacatur of the order granting the new trial and for entry of judgment. CR 440-647. Judge Benson granted the motion on July 18, 2008. CR 1222-23. Then, without permitting Georgia-Pacific an opportunity to present its objections to the form of the judgment (and in violation of the local rules), Judge Benson signed the Final Judgment proposed by Plaintiffs on the same day that she received it—*i.e.*, July 23, 2008. CR 1224-29. In response to Defendant's Motion to Modify, Correct or Reform the Judgment, for New Trial, or for Remittitur, which among other things, challenged the sufficiency of the evidence to support the jury's findings, CR 1230-1470, Plaintiffs submitted an amended judgment for Judge Benson's signature that adjusted the damages awarded. The First Amended Final Judgment was signed on October 22, 2008. SCR 9. Defendant's post-trial motion challenging the sufficiency of the evidence was overruled by operation of law.

---

[8] A more detailed discussion of the prejudicial course of the trial proceedings is set forth in Georgia-Pacific's Motion for Mistrial, CR 172-91; Supplemental Motion for Mistrial, CR 336-76; Motion to Recuse Judge Montgomery, CR 218-29; and Supplemental Brief in Support of Its Motion to Recuse, CR 231-60. *See also infra* Part III.

SUMMARY OF THE ARGUMENT

This Court should reverse and render judgment that Plaintiffs take nothing on their negligence and defective marketing claims because there is no legally sufficient evidence of specific causation. Whether the Court reviews product identification, dose evidence, or epidemiological studies, the Court will find a total absence of proof. At trial, Plaintiffs relied wholly upon the theory that "each and every exposure" to asbestos caused, or contributed to cause, Timothy Bostic's mesothelioma—a theory flatly rejected by the Texas Supreme Court in *Borg-Warner v. Flores*, 232 S.W.3d 765 (Tex. 2007), and the First Court of Appeals in *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Plaintiffs' gross negligence claims also fail for want of evidentiary support.

There is, however, evidence of one thing—*i.e.*, that Georgia-Pacific was denied its constitutional right to a fair trial. It is difficult to understand how any trial court could have legitimately refused to grant a new trial when Plaintiff Harold Bostic collapsed in front of the jury and later died without Georgia-Pacific having the opportunity to cross-examine him. The fact that the jury learned from outside sources that Mr. Bostic had died before they began deliberations and that the court and court personnel concealed the jury's questions about his condition simply added to the prejudice against Georgia-Pacific. That is why Georgia-Pacific alternatively asks this Court to reverse and remand for a new trial.

ARGUMENT

The Plaintiffs sued Georgia-Pacific for negligence and on a strict products liability, marketing defect claim. Because "[a] fundamental principle of traditional products liability

law is that the plaintiff must prove that the defendant[] supplied the product which caused the injury," Plaintiffs were required to prove that Timothy Bostic was exposed to Georgia-Pacific joint compound that contained chrysotile. *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989). To support a finding that Georgia Pacific was negligent, Plaintiffs had to prove that Georgia-Pacific negligently failed to give adequate warnings of the risks known, or reasonably knowable, at the time it marketed its chrysotile-containing joint compound. *See Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 591 (Tex. 1986). To support a finding on their strict products liability, marketing defect claim, Plaintiffs had to prove that Georgia-Pacific's joint compound was unreasonably dangerous and that Georgia-Pacific failed to give adequate warnings of risks known, or reasonably knowable, at the time of marketing. *See Lucas v. Tex. Indus., Inc.*, 696 S.W.2d 372, 377 (Tex. 1984).

Causation is an essential element of both claims: proximate cause in negligence and producing cause in strict liability. *See Borg-Warner v. Flores*, 232 S.W.3d 765, 770 (Tex. 2007); *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007). Both proximate cause and producing cause require the plaintiff to show that use of a defendant's product was a cause in fact of the plaintiff's injuries. *See Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 357 (Tex. 1993) (proximate cause also requires foreseeability, producing cause does not). To show cause in fact, the plaintiff must prove that use of the product was a substantial factor in bringing about the injury and without which the injury would not have occurred. *See Flores*, 232 S.W.3d at 770; *Gaulding*, 772 S.W.2d at 38; *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304, 308-09 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). To recover in

an asbestos case, there must be reliable evidence of "dose"—*i.e.*, how much respirable asbestos a plaintiff was exposed to, whether those amounts were sufficient to cause the asbestos-related disease complained of, and the amount attributable to the defendant's product. *See Flores*, 232 S.W.3d at 771-72; *Stephens*, 230 S.W.3d at 312.

Applying this standard in *Borg-Warner v. Flores*, the Texas Supreme Court reviewed the plaintiff's testimony and that of his experts and ruled that evidence of his exposure to some respirable asbestos fibers while working with brake pads, even on a fairly regular basis over an extended period of time, was insufficient to establish causation because there was no proof of dose:

> Dr. Castleman testified that, despite the heat generated by braking, "some asbestos," in the form of respirable fibers, remained in the brake pads, and that brake mechanics could be exposed to those fibers when grinding the pads or blowing out the housings. Flores testified that grinding the pads generated dust, which he inhaled. Dr. Bukowski testified that every asbestos exposure contributes to asbestosis. There is no question, on this record, that mechanics in the braking industry could be exposed to respirable asbestos fibers. But ***without more*** this testimony is insufficient to establish that the Borg-Warner brake pads were a substantial factor in causing Flores's disease.
>
> * * * * *
>
> This record, however, reveals nothing about ***how much*** asbestos Flores might have inhaled. He performed about fifteen to twenty brake jobs a week for over thirty years, and was therefore exposed to "some asbestos" on a fairly regular basis for an extended period of time. Nevertheless, ***absent any evidence of dose***, the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts were sufficient to cause asbestosis. Nor did Flores introduce evidence regarding what percentage of that indeterminate amount may have originated in Borg-Warner products.

Flores, 232 S.W.3d at 771-72 (emphasis added).

When a plaintiff relies not on direct evidence, but on epidemiological studies as circumstantial evidence of causation, the Texas Supreme Court requires that more than dose be shown to raise a fact issue on causation:

> ***To raise a fact issue on causation*** and thus to survive legal sufficiency review, a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. A claimant must show that he or she is similar to those in the studies. This would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study. . . . Further, if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty.

Merrill Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706, 720 (Tex. 1997) (emphasis added); *see Flores*, 232 S.W.3d at 772; *Stephens*, 239 S.W.3d at 310. This kind of evidence is usually in the form of expert opinions. The expert must be qualified to give the opinions solicited, the testimony must be relevant to the contested issues in the action, and the expert's opinions must be based on a reliable foundation. *See Havner*, 953 S.W.2d at 711-14; *E.I. duPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995).[9]

Therefore, Plaintiffs here were required to show that exposure to Georgia-Pacific's chrysotile-containing joint compound caused Timothy Bostic to develop mesothelioma. *See*

---

[9] Toxic tort causation has two components: general causation and specific causation. *Havner*, 953 S.W.2d at 714. General causation requires a showing that the defendant's particular product is capable of causing the specific injury in the overall population. *See id.* Specific causation requires proof that the defendant's product caused the injury to the particular plaintiff in question. *Id.* It is Georgia-Pacific's position that there is no evidence to support a finding of either general or specific causation, but for purposes of this appeal only, given the number of other challenges to the causation evidence, Georgia-Pacific is not challenging general causation.

Havner, 953 S.W.2d at 711-14. Plaintiffs failed to meet this burden of proof on proximate and producing cause in four ways that each independently require this Court to reverse the jury's finding of negligence and marketing defect against Georgia-Pacific.[10]

First, there is no evidence that Timothy Bostic was ever exposed to Georgia-Pacific chrysotile-containing joint compound. *Gaulding*, 772 S.W.2d at 68. Second, even if there were evidence that Timothy had been exposed to Georgia-Pacific's chrysotile-containing joint compound, just as in *Flores* and *Stephens*, there is no evidence of dose. *Flores*, 232 S.W.3d at 770; *Stephens*, 230 S.W.3d at 312. Third, even if there were evidence of exposure and dose, there are no reliable epidemiological studies that show that persons similar to Timothy with exposure to asbestos-containing joint compound had an increased risk of developing mesothelioma. *See Stephens*, 239 S.W.3d at 310. And fourth, Plaintiffs' expert's theory that "each and every exposure" to asbestos caused Timothy's mesothelioma was flatly rejected by the Texas Supreme Court in *Flores*. *See* 232 S.W.3d at 773. For each of these reasons, Plaintiffs' negligence and defective marketing claims fail as a matter of law.

I. THERE IS NO LEGALLY SUFFICIENT EVIDENCE THAT GEORGIA-PACIFIC'S JOINT COMPOUND CAUSED TIMOTHY BOSTIC'S MESOTHELIOMA.

The test for legal sufficiency is "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168

---

[10] It is Georgia-Pacific's position that chrysotile-containing joint compound manufactured and sold between 1967 and 1977 was not unreasonably dangerous and that Georgia-Pacific did not fail to give adequate warnings of any risks known or reasonably knowable at the time of marketing. For purposes of this appeal, however, Georgia-Pacific is challenging only the causation element of the jury's findings of negligence and of a strict products liability marketing defect.

S.W.3d 802, 827 (Tex. 2005). In making this determination, the Court must credit favorable evidence if a reasonable fact-finder could, and disregard any contrary evidence unless a reasonable fact-finder could not. *Id.* There is no evidence, or legally insufficient evidence, when (1) there is a complete absence of evidence of a vital fact; (2) the court is barred by the rules of law and evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of the vital fact. *Id.* at 810.[11]

A. There Is No Evidence That Timothy Bostic Was Exposed to Georgia-Pacific's Joint Compound Between 1967 and 1977.

To prevail on their negligence claim and their defective marketing claim, Plaintiffs were required to "prove that the defendants supplied the product which caused the injury." *Gaulding*, 772 S.W.2d at 68. Plaintiffs completely failed to meet this initial burden. The only evidence of Timothy's use of, or exposure to, Georgia-Pacific's chrysotile-containing joint compound are statements by Timothy and his father Harold that they used Georgia-Pacific joint compound frequently, without mention of the year in which the product was used.

The year of use and type of joint compound used are key facts necessary to determine whether Timothy was exposed to chrysotile fibers from a Georgia-Pacific joint compound product, because not all Georgia-Pacific joint compounds contained chrysotile. Georgia-Pacific purchased Bestwall in 1965. 8 RR 144. Several Georgia-Pacific joint compounds

---

[11] Georgia-Pacific preserved error on these legal sufficiency issues by filing their Motion to Modify, Correct, or Reform the Judgment, for New Trial, or for Remittitur, CR 1230-1470; by moving for a directed verdict, 13 RR 13-24; and by objecting to the jury charge, 15 RR 310-11.

were offered in an chrysotile-free form from 1973 to 1977. 9 RR 25-26, 32-35. Georgia-Pacific did not make or sell chrysotile-containing joint compound after 1977. 9 RR 43, 77.

Timothy and Harold Bostic alleged that they used Georgia-Pacific joint compound while doing weekend remodeling jobs for friends and family members between 1967 (when Timothy was five years old) and 1977 (when Georgia-Pacific stopped making or selling any asbestos-containing joint compound). 9 RR 25, 43; 7 RR 178-82; 12 RR 78-143. Although he testified that he mixed and sanded joint compound from the age of five, Timothy could not recall whether he ever used Georgia-Pacific joint compound before 1980, though he believed he had, "but not with 100 percent certainty." 7 RR 178-82; 8 RR 17-18. He did not provide any details regarding this possible use. *Id.* Timothy testified that he used Georgia-Pacific joint compound on numerous remodeling jobs after graduating from high school in 1980, 8 RR 17-18, but by that time, Georgia-Pacific had stopped making or selling asbestos-containing joint compound, 9 RR 25, 43. Timothy's testimony that he *might* have used Georgia-Pacific's joint compound before 1980, 8 RR 17-18, in a form that *may or may not* have contained chrysotile, is pure speculation and constitutes no evidence. *See Frias v. Atl. Richfield Co.*, 104 S.W.3d 925, 930-31 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

Although Harold testified that they used Georgia-Pacific joint compound "98 percent of the time" that they did drywall work, 12 RR 39, he recalled only three instances between 1967 and 1977 when he and his son possibly did any drywall work at all, and he could not recall whether Timothy worked with Georgia-Pacific joint compound on any of those three jobs. *See* 12 RR 119-27, 130-31. Despite asking friends and family if they recalled any other

remodeling jobs that he and his son did for them between 1967 and 1977, neither he nor they remembered any others. 12 RR 142.

Given the complete lack of evidence regarding whether Timothy Bostic ever used Georgia-Pacific joint compound before 1980, there is no evidence that he was exposed to Georgia-Pacific's chrysotile-containing joint compound. Therefore, there is no evidence that Georgia-Pacific "supplied the product which caused" Timothy Bostic's mesothelioma, and Plaintiffs' negligence and defective marketing claims fail for want of essential evidence. *See Gaulding*, 772 S.W.2d at 68. And without proof of product identification, Plaintiffs also necessarily failed to prove that Timothy Bostic's alleged exposure to asbestos was frequent, regular, and in close proximity to Georgia-Pacific's joint compound as required to prove substantial factor causation. *See Flores,* 232 S.W.3d at 770; *Stephens*, 239 S.W.3d at 312.

This failure of proof alone requires that the trial court's judgment be reversed and judgment rendered that Plaintiffs take nothing on their claims against Georgia-Pacific, and the Court need not address the remaining issues presented in this brief. If, however, the Court feels obliged to consider the other deficiencies in Plaintiffs' causation proof, Plaintiffs' claims fall for three additional reasons.

B. There Is No Evidence of the "Dose" of Asbestos from Georgia-Pacific Joint Compound to Which Timothy Bostic Was Exposed.

Assuming that Plaintiffs had proven that Timothy Bostic was exposed to asbestos from Georgia-Pacific joint compound and that this exposure was sufficiently frequent, regular, and in close proximity to establish substantial factor causation, Plaintiffs were also

required to present reliable and quantitative evidence of "dose"—*i.e.*, how much respirable asbestos Timothy Bostic was exposed to, whether that amount was sufficient to cause his mesothelioma, and the percentage of his total asbestos exposure attributable to Georgia-Pacific's joint compound. *See Flores*, 232 S.W.3d at 771-72; *Stephens*, 230 S.W.3d at 312. Absent any dose evidence, legally sufficient evidence of substantial factor causation is not possible because dose is the foundation of this inquiry.

Under the rationale announced by the First Court of Appeals in *Georgia-Pacific Corp. v. Stephens*, there is no evidence of dose in this case. *See* 239 S.W.3d at 320-21. In that case, Stephens claimed that his exposure to Georgia-Pacific joint compound while working as a painter caused his mesothelioma. *Id.* at 306. Stephens testified that he used Georgia-Pacific joint compound "quite a bit" on jobs during the 1960s and 1970s. *Id.* at 313. He not only applied Georgia-Pacific joint compound to sheetrock on a number of small jobs, but also swept up after other workers applied and sanded Georgia-Pacific joint compound, which "put dust up into the air where you could see it." *Id.* His co-workers testified that Stephens was often no more than twenty to thirty feet away from workers who mixed dry joint compound with water and were "generally pretty close" to, and in the room with, workers who sanded joint compound. *Id.* His coworkers also testified that they stood a maximum of six feet away from the wall when they spray painted the walls, a process that raised "clouds of dust." *Id.*

Stephens' experts included an industrial hygienist, a board-certified pulmonary disease specialist, and Dr. Hammar (who is Plaintiffs' expert in this case). *Id.* at 314. The industrial hygienist testified that Stephens' exposures to Georgia-Pacific joint compound were "at a

level and of the type that are known by industrial hygienists to contribute to the development of asbestos-related disease." *Id.* However, the industrial hygienist admitted that he "could not come up with a range of likely doses that Mr. Stephens would have had to joint compound asbestos." *Id.* The pulmonary disease specialist admitted that she had "no information about the particular asbestos-containing products to which [Stephens] was exposed" and did not express any opinion regarding causation. *Id.* Dr. Hammar testified, as he does in this case, that "each and every exposure" to asbestos causes mesothelioma. *Id.*

The First Court of Appeals concluded that these facts constituted no evidence of dose:

> [Stephens] . . . painted interior walls about seven to twelve percent of the time, and other workers were doing sheetrock work on about fifty to seventy-five percent of these jobs. They worked in close proximity to sheetrock workers, who mixed and sanded joint compound, both of which were dusty processes. Before [Stephens] and his crew could paint, they had to sweep dust off the floor. Moreover, the spray painting process itself stirred up asbestos dust. The record does not reveal, however, how frequently this dust came from Georgia-Pacific's joint compound, as opposed to one of the other joint compound products [Stephens'] coworkers recalled seeing on their job sites. . . .
>
> In this record, there is no evidence concerning the percentage of Georgia-Pacific joint compound used in comparison to the quantity of other products used on [Stephens'] job sites, nor any quantitative estimate of the number of times Georgia-Pacific joint compound was used on [his] job sites. . . . Thus, although there was evidence that [Stephens] was exposed to asbestos-containing joint compound generally, there was no quantitative evidence presented upon which [Stephens'] experts could rely to determine that he was exposed to Georgia-Pacific's product in sufficient quantities to have increased his risk of developing mesothelioma.

Id. at 319. Thus, the court of appeals concluded that "the evidence of [Stephens'] exposure to Georgia-Pacific's joint compound is legally problematic because it lacks the quantitative element that . . . [*Flores*] require[s]." *Id.* at 320.

The same is true in this case, except that Plaintiffs introduced even less evidence of exposure to chrysotile-containing joint compound than did the plaintiff in *Stephens*. In *Stephens*, there was evidence of exposure to Georgia-Pacific joint compound "generally." *Id.* at 319. There is no such evidence here. *See supra* Part I(A). And while there is some evidence that Timothy Bostic used or was present during the use of joint compound generally between 1967 and 1977, neither Timothy nor Harold Bostic or anyone else testified to the number of times that he was exposed to chrysotile-containing joint compound, the amount of respirable asbestos that he was exposed to on any particular occasion, or the duration of his alleged exposures. Not surprisingly, since Plaintiffs offered no evidence of exposure to Georgia-Pacific asbestos-containing joint compound, they did not—nor could they—offer any evidence of the percentage of Timothy Bostic's overall exposure that came from Georgia-Pacific. *See Flores*, 232 S.W.3d at 771-72. Therefore, there is no evidence of dose.

Plaintiffs' experts admitted that there is no evidence of the dose, duration, or intensity of Timothy's alleged exposure to asbestos from use of Georgia-Pacific's joint compound and that they did not attempt to make any quantitative assessment of his actual dose. 4 RR 80-81; 5 RR 31-32; 10 RR 73-74, 106-07, 115; 11 RR 48-51, 87-88, 151-53. These experts further failed to determine what percentage of Timothy's exposure to asbestos resulted from his use of Georgia-Pacific joint compound versus his other known sources of asbestos exposure, like at Knox Glass. 4 RR 172-75; 5 RR 31; 10 RR 164-80; 11 RR 106-08, 131-37, 151-52.

Instead, Plaintiffs instructed their material scientist expert, Dr. Longo, to conduct tests to determine the amounts of asbestos released during the mixing, sanding, and sweeping of

Georgia-Pacific's joint compound in a controlled environment. *See* 10 RR 63-91; PX-67-69. Despite admitting that quantification of an actual dose for Timothy Bostic was "impossible" in his opinion and admitting that his tests were not designed to show actual exposure levels for any particular person, including Timothy Bostic, 10 RR 73-74, 90-91, 106-07, Dr. Longo nevertheless proceeded to testify that he could "quantify" the "type of exposure" Timothy may have had to Georgia-Pacific's joint compound "in a general sense" based on Harold Bostic's deposition testimony, 10 RR 106. Although the deposition testimony provided Dr. Longo with no information regarding the frequency, regularity, or proximity of Timothy's use of Georgia-Pacific chrysotile-containing joint compound, Dr. Longo nevertheless claimed that Timothy Bostic's "type of exposure" to chrysotile from Georgia-Pacific joint compound was "significant." 10 RR 106-07. Thus, there are no facts to support his opinion.

Dr. Longo's opinion is no evidence of dose for four reasons: (1) as discussed above, his opinions are not supported by any facts; (2) Dr. Longo admitted at trial that his use of the term "significant" did not mean that the alleged exposure was sufficient to cause asbestos-related diseases because that was "not his area," 10 RR 91-92; (3) though Dr. Longo defined "significant" exposure as ten to twenty times "background" level, he was unable to quantify what the "background" level was for Timothy Bostic, thereby providing no benchmark for calculating dose, 10 RR 92-94; and (4) Dr. Longo admitted that he "[didn't] really do product ID. I mean I don't testify who used what and when." 10 RR 115. By his own admission, Dr. Longo's tests were designed to show no more than how much asbestos was released from a product during certain types of activities in a controlled environment without factoring in

any of the variables that could raise or lower a person's actual exposure dose. *See* 10 RR 73-74, 90-91, 106-07. In reality, his opinion regarding a "significant" dose is nothing more than the *ipse dixit* of an expert, *see Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 257-58 (Tex. 2004), and is not the type of quantitative evidence that *Flores* and *Stephens* require. *Flores*, 232 S.W.3d at 770; *Stephens*, 239 S.W.3d at 320. In the absence of any evidence of dose, there is not—and cannot be—any evidence regarding whether that unknown dose was sufficient to increase the risk of injury. *Flores*, 232 S.W.3d at 771-72. This absence of evidence of dose and increased risk of injury is fatal to Plaintiffs' claims.

C. There Is No Evidence That Timothy Bostic's Exposure to Asbestos from Georgia-Pacific Joint Compound Was Similar to the Subjects in Reliable Epidemiological Studies Showing A Link Between Mesothelioma and Joint Compound Similar to Georgia-Pacific's Joint Compounds.

This case was not tried on direct evidence of causation. Because Plaintiffs rely upon circumstantial evidence to prove causation, *Havner* standards control. In *Havner*, the Texas Supreme Court held that, in a case in which there is no direct evidence of specific causation, a plaintiff may rely upon epidemiological studies showing more than a doubling of the risk of their particular injury resulting from exposure to the substance at issue to create a fact issue on causation. 953 S.W.2d at 714-15.[12] When a plaintiff relies on epidemiological

---

[12] Under *Havner*, an epidemiological study must show that a person's exposure to the particular toxic substance and type of product at issue in the suit more than doubled the risk that the person would develop the specific injury over the risk of an unexposed person—*i.e.*, it must show a relative risk greater than 2.0 at a confidence level of 95%, with a confidence interval that does not include 1.0. *Havner*, 953 S.W.2d at 714-15. The 95% confidence level "means that if the study were repeated numerous times," the relative risk would fall with the confidence interval 95% of the time. *Id.* A confidence interval that does not include 1.0 means that the results are statistically significant and likely not due to chance. *Id.* at 723.

studies to prove specific causation, he must show that he is "similar" to the individuals in the study —*i.e.*, the plaintiff must present "proof that [he] was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study." *Id.* at 720. Without this showing, "epidemiological studies are without evidentiary significance, as is expert opinion based on them." *Flores*, 232 S.W.3d at 770.

Dr. Lemen was Plaintiffs' only expert who discussed specific epidemiological studies that purportedly showed that exposure to chrysotile from joint compound increases the risk of mesothelioma. He discussed six studies specifically related to asbestos-containing joint compound.[13] All of the studies that Dr. Lemen relied upon fail to satisfy *Havner*.[14]

Of these six studies, five are *Havner* deficient because they are not epidemiological studies. The first four studies are no more than reports of levels of asbestos released from the use of joint compounds manufactured by unidentified companies. *See* 5 RR 128-32, 7

---

[13] Dr. Lemen also discussed epidemiological studies purporting to establish generally that exposure to asbestos causes mesothelioma and more specifically that exposure to chrysotile asbestos increases the risk of developing mesothelioma. *See* 5 RR 108-27. These studies, however, relate only to general causation, which is disputed but not challenged for purposes of this brief only.

[14] Five of the six studies were not admitted into evidence. Instead, Plaintiffs offered a summary of those studies authored by Dr. Lemen. *See* PCX-3 (Lemen, *Asbestos Timetables – A guide for policymakers* (Feb. 3, 2005)). An expert must identify the specific studies on which he relies, have those studies admitted into evidence, and explain how the methodology of the studies is scientifically reliable. *Minn. Min. and Mfg. Co. v. Atterbury*, 978 S.W.2d 183, 198 (Tex. App.—Texarkana 1998, pet. denied) (citing *Havner*, 953 S.W.2d at 725); *see Frias*, 104 S.W.3d at 929-30 (determining reliability of studies supporting experts' general causation opinion and noting that certain studies were not in the record and thus could not be reviewed for compliance with the *Havner* standards). Therefore, these five studies constitute no evidence.

RR 23-24 (Rohl, *et al.*, *Exposure to Asbestos in the Use of Consumer Spackling, Patching and Taping Compounds*, SCIENCE, vol. 189, no. 4204, at 551 (Aug. 15, 1975)); 5 RR 132-34, 6 RR 25-27, 7 RR 25-26 (Fischbein, *et al.*, *Drywall Construction & Asbestos Exposure,* AM. INDUS. HYG. ASSOC. J., vol. 40, no. 5, at 402-07 (1979)); 5 RR 135-37, 6 RR 85, 7 RR 27-33 (Verma & Middleton, *Occupational Exposure to Asbestos in the Drywall Taping Process*, AM. INDUS. HYG. ASSOC. J., vol 41, no. 4, at 264-69 (1980)); 6 RR 85-86 (Gypsum Ass'n, *Evaluation of Exposure to Asbestos During Mixing & Sanding of Joint Compound* (Nov. 19, 1973); PX-27.[15] Dr. Lemen admitted that these studies did not identify Georgia-Pacific's joint compound as among the joint compounds being studied and did not attempt to correlate any reported exposure levels with any incidence of mesothelioma or asbestos-related diseases. *See* 6 RR 85-86.[16] For these reasons, the first three studies failed to pass muster with the Houston Court of Appeals in *Stephens*. 239 S.W.3d at 316-17.[17] The fourth study suffers from the same faults. Thus, these studies should fare no better with this Court.

The fifth study Dr. Lemen relied on, a 1975 study of x-ray abnormalities among drywall workers, fails for the same reason, *see* PCX-3 (Nicholson, *Occupational and*

---

[15] Dr. Lemen mentioned other "exposure tests" conducted by various trade associations and companies in the 1970s, *see, e.g.*, 6 RR 35-36, but the results of the tests were neither discussed nor included in the record.

[16] Dr. Longo admitted that the Georgia-Pacific Bestwall joint compound released the lowest amount of asbestos fibers during his testing of different brands of joint compound. 10 RR 150-52. He testified that the amounts of asbestos fibers released by other joint compounds could release up to 1000% more fibers. 10 RR 151-55.

[17] *Stephens* does not recite the names and authors of the three studies; however, it is apparent from a comparison of the court's opinion and the various studies that the court was referring to the *Rohl*, *Fischbein*, and *Verma & Middleton* studies.

Community Asbestos Exposure from Wallboard Finishing Compounds, BULL. N.Y. ACAD. MED., vol. 51, no. 10, at 1180 (1975)). The study did not attempt to correlate the alleged exposure to the incidence of mesothelioma among those workers. *See* PCX-3; 7 RR 23-25.

The sixth study is a 2001 "mortality analysis" of members of the Operative Plasterers' and Cement Masons' International Association. Stern, *et al.*, *Mortality Among Unionized Construction Plasterers and Cement Masons*, AM. J. IND. MED., vol. 39, no. 4, at 373 (Apr. 2001)); 5 RR 138-40. This 2001 study, which was similarly relied upon by the plaintiffs in *Stephens*, was no evidence of specific causation for two reasons. *Stephens*, 239 S.W.3d at 317-18. First, the *Stephens* court found that although the study investigated the incidence of mesothelioma among its subjects, the subjects included plasterers exposed to amphibole asbestos from a variety of sources, *e.g.*, plastering, spray insulation, taping, asbestos removal during demolition projects, and fireproofing mixture. *Id.* at 317. Thus, the subjects of the study were not "similar" to Mr. Stephens. (Nor are they similar to Timothy Bostic.). Second, although the risk of mesothelioma was elevated, the proportionate mortality ratio was "not statistically significant." *Id.* at 318 & n.9. The *Stephens* court also specifically disapproved of the study's "data reanalysis" because it failed to identify a significance level or a confidence interval. *Id.* at 318 n.10 (citing *Havner*, 953 S.W.2d at 726). Finally, Dr. Lemen himself admitted that "there's a lot of problems with that study" and that he "wouldn't really rely that heavily" on it. 6 RR 214. The study thus fails to show that persons exposed to chrysotile from joint compound have more than double the risk of developing mesothelioma as compared to those who are unexposed. *See Havner*, 953 S.W.2d at 717. Just as the Stern

study failed to pass muster in *Stephens*, so too should it fail here.

In the absence of any epidemiological studies showing more than a doubling of the risk of mesothelioma from exposure to joint compounds similar to Georgia-Pacific's joint compound or any proof of similarity between Timothy Bostic and the study subjects, including that the study subjects were exposed to joint compound at comparable dose levels, none of the six studies is evidence supporting specific causation. *Havner*, 953 S.W.2d at 720. Thus, Plaintiffs wholly failed to prove causation based on circumstantial evidence.

D. Expert Testimony That "Each and Every Exposure" to Georgia-Pacific Asbestos-Containing Joint Compound Caused or Contributed to Timothy Bostic's Mesothelioma Is No Evidence of Specific Causation.

Texas law is clear: expert testimony that "each and every exposure" to asbestos causes, or contributes to causing, an asbestos-related disease is no evidence supporting a finding of specific causation. In *Flores*, the Texas Supreme Court expressly rejected the "each and every exposure" theory of liability:

> [Plaintiff's expert] acknowledged that asbestos is "plentiful" in the ambient air and that "everyone" is exposed to it. If a single fiber could cause asbestosis, however, "everyone" would be susceptible. No one suggests this is the case. Given asbestos's prevalence, therefore, some exposure "threshold" must be demonstrated before a claimant can prove his asbestosis was caused by a particular product. . . . In analyzing the legal sufficiency of Flores's negligence claim, then, the court of appeals erred in holding that "[i]n the context of asbestos-related claims, if there is sufficient evidence that the defendant supplied *any* of the asbestos to which the plaintiff was exposed, then the plaintiff has met the burden of proof."

Flores, 232 S.W.3d at 773 (emphasis in original). Rather, the Supreme Court required the plaintiff to prove "that the defendant's product was a substantial factor in causing the alleged

harm." *Id.* And two months later, the Fourteenth Court of Appeals at Houston reached the same conclusion in a mesothelioma case. *See Stephens*, 239 S.W.3d at 320-21. In *Stephens*, Dr. Hammar—the same expert in this case—testified that "each and every exposure that an individual has in a bystander occupation setting causes their mesothelioma." *Id.* at 315. The court of appeals rejected this testimony as legally insufficient evidence of causation:

> Without quantitative evidence of exposure and any scientific evidence of the minimum exposure level leading to an increased risk of development of mesothelioma, we hold that the opinions offered by the Stephenses' experts in this case lack the factual and scientific foundation required by [*Flores*] and thus are legally insufficient to support the jury's causation finding.

Id. at 321. The same is true here, and this Court should follow *Flores* and *Stephens*.

Dr. Hammar, the Plaintiffs' only expert witness regarding the causation of Timothy Bostic's mesothelioma, testified that "each and every" exposure to friable asbestos fibers above background levels "had the potential to contribute to" the development of Timothy Bostic's mesothelioma—regardless of the source of the exposure. *See* 11 RR 38-39, 48-51. When asked whether any of Timothy Bostic's exposures to asbestos could be excluded as a cause of his mesothelioma, Dr. Hammar said "no." 11 RR 40-41, 51, 106-11, 151-52. And when asked if he could opine that, without any exposure to Georgia-Pacific's chrysotile-containing joint compound, Timothy Bostic would not have developed mesothelioma, Dr. Hammar again said "no." 11 RR 139. Plaintiffs' other three experts expressly disclaimed any ability to offer opinions on the specific cause of Timothy Bostic's mesothelioma. 5 RR 31; 4 RR 80-81; 10 RR 91-92, 106-07, 115. Thus, Dr. Hammar's "each and every" exposure theory is the only evidence supporting the jury's finding of causation, and the Supreme Court

has determined that his testimony is legally insufficient to support a finding of causation.

Plaintiffs alleged two claims: negligence and strict liability. Because both claims require proof of substantial causation, both fail for want of evidence of proximate cause and producing cause respectively. The trial court's judgment should be reversed and judgment rendered that Plaintiffs take nothing on their claims.

II. THERE IS NO EVIDENCE TO SUPPORT A FINDING OF GROSS NEGLIGENCE.

To prove their claim for gross negligence under Texas law, Plaintiffs were required to show by clear and convincing evidence (1) that when viewed from Georgia-Pacific's standpoint from 1967 through 1977, its manufacturing of chrysotile-containing joint compound involved "an extreme degree of risk, considering the probability and magnitude of the potential harm to others" (the objective prong), and (2) that Georgia-Pacific had "actual, subjective awareness of the risk involved, but nevertheless proceed[ed] with conscious indifference to the rights, safety, or welfare of others" (the subjective prong). *See* TEX. CIV. PRAC. & REM. CODE §§ 41.001(2), 41.003; *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994); *Exxon Mobil Corp. v. Altimore*, 256 S.W.3d 415, 418 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Plaintiffs did not meet this burden.

In proving gross negligence, a plaintiff's burden is not satisfied by evidence of ordinary negligence. *Universal Servs. Corp. v. Ung*, 904 S.W.2d 638, 641 (Tex. 1995). The evidence to prove gross negligence must be clear and convincing. *Moriel*, 879 S.W.2d at 23. "Requiring only '[a]nything more than' a mere scintilla of evidence does not equate to clear and convincing evidence." *In re J.F.C.*, 96 S.W.3d 256, 264-65 (Tex. 2002). Clear and

convincing evidence is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. *Id.* at 265-66. In making this determination, the Court must review all of the record evidence. *See Southwestern Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 627 (Tex. 2004).

The Texas Supreme Court has given clear guidelines of the kind of evidence that satisfies both the objective and subjective prongs of the gross-negligence standard. *See Lee Lewis Constr., Inc. v. Harrison,* 70 S.W.3d 778, 786 (Tex. 2001) (objective prong); *La. Pac. Corp. v. Andrade*, 19 S.W.3d 245, 248 (Tex. 1999) (subjective prong); *Mobil Oil Corp. v. Ellender,* 968 S.W.2d 917, 924 (Tex. 1998) (objective prong); *Ung,* 904 S.W.2d at 641 (objective prong). These cases make clear that in this case there is no evidence, and certainly no clear and convincing evidence, that satisfies either the objective or subjective prong.

A. There Is No Evidence Satisfying the Objective Prong.

Medical and scientific literature regarding the risks of asbestos exposure in any and every possible form under a whole host of exposure scenarios does not satisfy the objective prong of the gross-negligence test. At best, this literature, which comprises Plaintiffs' proof, shows "a general risk of harm." The Supreme Court, however, has repeatedly made clear that evidence of a general risk of harm does not support a finding on the objective prong.

In *Ung*, for example, the Court noted that evidence showing that working along a busy highway is a potentially dangerous activity did not satisfy the objective prong. *Ung*, 904 S.W.2d at 642. Similarly, in *Lee Lewis Construction*, the Court noted that the general risk of working on multi-story buildings would not have been enough. *Lee Lewis Constr.*, 70

S.W.3d at 786. Nor can knowledge of the general risk of asbestos exposure in this case be enough. The only evidence that would satisfy the objective prong is evidence that there was knowledge of an extreme risk of the specific harm (mesothelioma) resulting from the use of the specific product (Georgia-Pacific's or similar chrysotile-containing joint compound) during the 1967-1977 timeframe. There is no such evidence.

The objective prong is also not satisfied by conduct that "merely creates a remote possibility of serious injury." Instead, the conduct must "create the *'likelihood* of serious injury.'" *Ung,* 904 S.W.2d at 641 (quoting *Moriel,* 879 S.W.2d at 22) (emphasis added). In *Ung,* the plaintiff worked on a cleaning crew alongside a major highway, which the Court found was an inherently dangerous activity, when he was struck by a trailer that came off a truck after the truck hit a pothole. *Id.* at 639, 642. The Court found that the objective prong was not satisfied even though: (1) plaintiff's supervisor knew about the pothole and that a trailer had previously come loose on another truck after hitting the same pothole; (2) the company did not properly position its trucks to act as barriers; (3) no additional barriers were placed; and (4) no flagpersons or signs warned of the pothole. *Id.* at 641-64. The defendant's knowledge of the general hazards of roadside work was simply not enough without a showing that there was a *likelihood* of injury from the particular situation. *Id.* at 642; *see Lee Lewis Constr.*, 70 S.W.3d at 786; *Ellender*, 968 S.W.2d at 924.

Knowledge of the general dangers of asbestos exposure is similarly not enough. In *Altimore*, the Fourteenth Court of Appeals recently reviewed Dr. Lemen's state of the art testimony (the same state of the art expert as in this case) and concluded that his opinions and

the studies that he relied upon to demonstrate a general knowledge of the dangers of asbestos exposure did not constitute legally sufficient evidence that there existed an extreme risk of serious injury to the plaintiff between 1944 and 1977. *See* 256 S.W.3d at 420-25. In this case, Dr. Lemen cited many of the same studies that he relied upon in *Altimore* and again testified extensively about the progression of general scientific knowledge about asbestos-related diseases, *see* 5 RR 6-159; 6 RR 9-217; 7 RR 4-134. But his testimony and the studies he relied upon do not constitute any evidence that there existed an extreme degree of risk that a person could develop mesothelioma from exposures to Georgia-Pacific's chrysotile-containing joint compound between 1967 and 1977. *See Altimore*, 256 S.W.3d at 425.

This Court must review all of the evidence of objective awareness from the viewpoint of Georgia-Pacific at the time the injury occurred, without the benefit of hindsight. *See Moriel*, 879 S.W.2d at 23; *Altimore*, 256 S.W.3d at 417. Only information from the time period in which exposure allegedly occurred (in this case, 1967-77) can satisfy the objective prong. *Moriel*, 879 S.W.2d at 23. This record shows, as did the record in *Altimore*, that during the relevant time period, "there was a consensus within the scientific community that there was a measurably safe level of exposure to asbestos," *Altimore*, 925 S.W.3d at 422, 425, which was the basis for exposure regulations dating back to 1946, 10 RR 55; and for the 1972 and 1978 OSHA permissible exposure limit standards for workers based on an eight-hour, five day a week, 45 year average, *see* 6 RR 152-64. This consensus lasted well past the relevant time period in this case, as OSHA promulgated regulations in 1976 and 1986 for

permissible asbestos exposure limits until finally banning its use entirely in 1994.[18] *See* 6 RR 196-98. The only epidemiological study that Dr. Lemen relied upon to show any potential risk of disease from asbestos-containing joint compound was published in 2001, 24 years *after* Georgia-Pacific stopped manufacturing or selling joint compound with chrysotile (and even this study did not deal with mesothelioma). 7 RR 25; PCX-3. As in *Altimore*, there is no evidence that "a reasonable trier of fact could form a firm belief or conviction, when viewed objectively from [Georgia-Pacific's] standpoint, there was an extreme degree of risk of serious injury to [Timothy Bostic] during the relevant period of time." 256 S.W.3d at 425.

B. There Is No Evidence Satisfying the Subjective Prong.

Neither the general information about the dangers of asbestos exposure dating back to the 1930s nor the Georgia-Pacific and joint-compound industry documents cited by the Plaintiffs constitute any evidence that Georgia-Pacific had actual awareness of an extreme risk of developing mesothelioma from the use of its chrysotile-containing joint compound between 1965 and 1977. *See Moriel*, 879 S.W.2d at 21-22 (defining subjective prong). Merely being a manufacturer of an asbestos-containing product does not equate with the "actual awareness" of an "extreme risk" of harm necessary to satisfy the subjective prong, which is defendant- and product-specific. Thus, a manufacturer of one type of product is not held to have actual knowledge of risk stemming from a completely different product. *See In re R.O.C.*, 131 S.W.3d 129, 136 (Tex. App.—San Antonio 2004, no pet.). For example,

---

[18] As even Dr. Lemen acknowledged, the Public Health Service, which was the government agency that studied asbestos more than any other, did not even suggest a ban on asbestos until 1976. 6 RR 151-52.

in *Migues v. Fibreboard Corp.*, 662 F.2d 1182, 1188 (5th Cir. 1981), the Fifth Circuit made clear that a defendant's subjective awareness is not based on all asbestos-related knowledge, but only on the scientific literature concerning that particular defendant's products. Similarly, in *Altimore*, the court of appeals rejected the contention that "purported awareness of extreme risk to refinery employees equates with awareness of extreme risk to their spouses" and found that a defendant's knowledge of a risk to employees was no evidence of knowledge of an extreme degree of risk to employees' family members. 256 S.W.3d at 423. Consequently, none of the studies, articles, tests, or memos about the risks of asbestos generally that Plaintiffs' introduced at trial were any evidence satisfying the subjective prong.

In reality, there can be no evidence of actual awareness of the risk of mesothelioma from joint compound from 1967 to 1977 because there were no epidemiological reports connecting the use of joint compound and mesothelioma during that time period. *See* 7 RR 23-33; PCX-3. Even today there are no epidemiological studies showing more than a doubling of the risk with a 95% confidence interval that does not include 1.0 for people with mesothelioma who were routinely exposed to asbestos from joint compound—much less multiple such studies or studies of subjects, like Timothy Bostic, who used asbestos-containing joint compound on an occasional, non-professional basis. Rather, the evidence at trial showed that there was a widespread belief in the scientific and governmental communities that there was a safe level at which one could be exposed to asbestos for eight hours a day, five days a week, for forty-five years, without undue risk of developing an asbestos-related disease. That belief was the basis for the OSHA exposure regulations. 6 RR

158-64. The Georgia-Pacific and joint-compound industry documents included in the record in this case do not show that Georgia-Pacific believed any differently than the scientific and governmental communities at that time. PX-5-29, 31-45, 71-77. There simply is no evidence demonstrating that, between 1967 and 1977, Georgia-Pacific was aware that use of its chrysotile-containing joint compound created an extreme risk of developing mesothelioma even when used by professional drywallers, much less when used infrequently.[19]

There is no clear and convincing evidence of both the objective and subjective elements of Plaintiffs' gross negligence claim.

III. ALTERNATIVELY, THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT A NEW TRIAL AND BY LATER VACATING AN ORDER GRANTING A NEW TRIAL TO GEORGIA-PACIFIC.

If the Court does not reverse and render judgment that Plaintiffs take nothing on their claims against Georgia-Pacific, the Court should, at a minimum, reverse and remand for a new trial. The conduct of the trial court, the bailiff, and the jury resulted in a trial setting so prejudicial to Georgia-Pacific that a fair trial was impossible. Judge Montgomery's refusal to grant Georgia-Pacific's motion for mistrial and Judge Benson's vacatur of Judge Roden's order granting a new trial constitute abuses of discretion.

---

[19] Alternatively, the trial court erred in reapportioning the $6,038,910 in punitive damages awarded by the jury. The jury apportioned the award of punitive damages to Susan Bostic (50%), Kyle Bostic (30%), and Helen Donnahoe (20%). CR 214-15. Plaintiffs, however, did not move for the entry of a judgment awarding punitive damages to Helen Donnahoe. *See* CR 624. Rather, the judgment drafted by Plaintiffs and signed upon receipt by the trial court reapportioned the 20% of punitive damages awarded to Helen Donnahoe between Susan Bostic and Kyle Bostic. *See* CR 624, SCR 7. This reapportionment was error. *See* TEX. R. CIV. P. 301 ("The judgment of the court shall conform to the pleadings, the nature of the case proved and the [jury's] verdict . . . .").

A. It Was an Abuse of Discretion Not to Grant a Mistrial After the Jury Saw Plaintiff Harold Bostic Collapse Outside the Courtroom, the Judge and a Juror Rendered Aid, and Judge Montgomery Improperly Instructed the Jury That the Trial Caused His Collapse.

This Court reviews the trial court's denial of Georgia-Pacific's motion for mistrial for an abuse of discretion. *Lopez v. La Madeleine of Tex., Inc.*, 200 S.W.3d 854, 860 (Tex. App. —Dallas 2006, no pet.). A trial court abuses its discretion if it rules arbitrarily, unreasonably, or without regard to guiding legal principles. *Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004). The trial court's decision not to grant a mistrial in this extraordinary case was unreasonable and amounted to a clear abuse of discretion.

During his direct testimony, Harold Bostic testified about his son's death and its emotional impact on him. 9 RR 117-59. After two hours of his testimony, crying throughout, the court took a brief recess. 9 RR 170-71. Mr. Bostic left the witness stand, proceeded into the hallway, and in full view of Judge Montgomery and a majority of jurors, collapsed. 9 RR 160. Judge Montgomery directed one of the jurors, Courtney Jackson, an emergency medical technician, to assist her in placing Mr. Bostic on a hall bench. 9 RR 165-66. Mr. Bostic was rushed to the hospital, but he died the next day. Shortly after his collapse, the judge informed the jury that Mr. Bostic collapsed due to "the stress of the testimony." 9 RR 161-62.

The jury was then dismissed for the Memorial Day weekend. 9 RR 162. Georgia-Pacific moved for a mistrial at that time. 9 RR 162-73. Judge Montgomery delayed ruling on the motion for mistrial until she knew what Mr. Bostic's condition was, stating that she did not believe his collapse would have much impact on the jury unless it was "something

which really is injurious to his health, like a heart attack or something like that." 9 RR 170-71. The judge stated, "there won't be grounds for a mistrial if, in fact, he has no medical condition that's come out of this such as a stroke or heart attack." 9 RR 170-71.

Simply witnessing Mr. Bostic's collapse following his emotional testimony certainly prejudiced the jury against Georgia-Pacific to some extent,[20] but the combination of seeing Mr. Bostic's sudden collapse coupled with Judge Montgomery's comment as to its cause—*i.e.*, the suit against Georgia-Pacific—tipped the balance so far against Georgia-Pacific that a mistrial was mandated to ensure a fair trial. Judge Montgomery's comment was improper and exceedingly harmful, as it was made right after Mr. Bostic's emotional testimony.

Texas law prohibits "in substance any comment by the judge upon the weight of the evidence." *City of Houston v. Pillot*, 105 S.W.2d 870, 871 (Tex. 1937). It is the role of the judge in a jury trial to "preside with impartiality, . . . be[ing] especially careful to say or do nothing which would be calculated to influence [the jurors'] minds in regard to facts in issue, the solution of which it is their duty to determine." *Murray v. Morris*, 17 S.W.2d 110, 112 (Tex. Civ. App.—Amarillo 1928, writ dism'd w.o.j.) (quoting *Hargrove v. Fort Worth Elevator Co.*, 276 S.W. 426, 428 (Tex. Comm'n App. 1925, holding approved)).

The Texas Constitution provides that the right of trial by jury shall remain "inviolate."

---

[20] Judge Montgomery acknowledged that witnessing his collapse would have a prejudicial impact on the jury: "I know you're going to be somewhat biased or prejudiced a bit by the EMTs showing up. I know that." 10 RR 6. Plaintiffs' counsel also acknowledged that witnessing Mr. Bostic's collapse had a prejudicial impact on the jury: "All you have to do is acknowledge that what happened in the hallway was upsetting. . . . I don't think [the instruction to disregard is] going to be up played because the jury knows the man was taken away by EMTs. That's an upsetting event." *See* 10 RR 22-23, 21.

TEX. CONST. art. I, § 15. Improper comments by a trial court are therefore unconstitutional and cannot be cured by instruction. *See Am. Express Co. v. Chandler*, 231 S.W. 1085, 1087-88 (Tex. Comm'n App. 1921, holding approved). "If a court may comment upon the weight of the evidence and thereafter withdraw such comment, the very purpose of the law may be circumvented, and the statute and Constitution rendered of no force and effect . . . ." *Id.*

Judge Montgomery's conduct "was clearly an interference with the right of a litigant to have the jury pass on issues of fact without being influenced by prejudicial statements made by the judge in their presence or hearing." *Hargrove*, 276 S.W.2d at 428. Her remarks, particularly in view of Plaintiffs' mental anguish claims, were "clearly in violation of the rule against the trial court commenting on the weight of the testimony, and [were] reversible error." *Commercial Standard Ins. Co. v. Billings*, 114 S.W.2d 709, 712 (Tex. Civ. App.—Amarillo 1938, writ dism'd w.o.j.). Thus, the only cure for Judge Montgomery's improper comment on the weight of the evidence was a new trial. *See Pillot*, 105 S.W.2d at 871.

B. Georgia-Pacific Was Denied Its Constitutional Right to Cross-Examine Mr. Bostic and the Trial Court's Instruction to Disregard Hours of His Live Testimony Did Not Cure the Error.

The sequence of events at the second trial—Mr. Bostic's emotional direct testimony; his collapse immediately thereafter in full view of the jury; Judge Montgomery's improper comment that his collapse was the result of "the stress of his testimony"; Mr. Bostic's death; the revelation to the jury from an outside source that Mr. Bostic had died; the lapse of a week between Mr. Bostic's testimony and collapse and Judge Montgomery's instruction to the jury to disregard Mr. Bostic's live testimony; and, finally, the reading of Mr. Bostic's emotional

testimony from the first trial, which differed in several material respects from his testimony in the second trial and included the statement that he "just wanted to die" because of his son's death—denied Georgia-Pacific its constitutional right to cross-examine Mr. Bostic.

1. Georgia-Pacific was denied its fundamental due-process right to cross-examine Mr. Bostic.

The right to effective cross-examination is a fundamental due-process right, protected by both the Fourteenth Amendment to the United States Constitution and Article 1, Section 19 of the Texas Constitution. *See* U.S. CONST. amend. XIV, § 1; TEX. CONST. art. I, § 19; *Goldberg v. Kelly*, 397 U.S. 254, 260 (1970); *Davidson v. Great Nat'l Life Ins. Co.*, 737 S.W.2d 312, 314 (Tex. 1987). Thus, this Court must review a denial of the right to cross-examination with the utmost scrutiny. *Nat'l Family Life Ins. Co. v. Fletcher*, 57 S.W.3d 662, 666 (Tex. App.—Beaumont 2001, pet. denied). In this case, Georgia-Pacific was denied its due process rights because it was unable to cross-examine Mr. Bostic regarding his live testimony at the second trial, which differed materially from his testimony in the first trial.

In both trials, Harold Bostic's testimony was offered in support of the survival action of Timothy Bostic's estate and the wrongful death claims brought by himself and other family members. Harold provided the only testimony on the alleged nature, duration, and proximity of Timothy's exposure to Georgia-Pacific's chrysotile-containing joint compound, 12 RR 34-39, 78-143, and Timothy's exposure to asbestos from Harold's work clothes and Timothy's own work at the Knox Glass Plant. 12 RR 40, 67-76. Harold's live testimony in the second trial conflicted with his original testimony regarding several key areas such as the

formulation of Georgia-Pacific joint compound that he used (dry mix or pre-mixed, which affects the probability that they used an chrysotile-free formula since the dry mix was sold in the chrysotile-free formula earlier than the pre-mixed formula), *compare* 9 RR 130-31 (dry mix only) *with* 12 RR 36 (pre-mixed); and the age at which Timothy Bostic allegedly used or was exposed to Georgia-Pacific joint compounds for the first time, *compare* 9 RR 123-24 (10 to 12 years old in the first trial) *with* 12 RR 83, 116-17 (4 or 5 years old in the second trial). Georgia-Pacific was never able to address these changes in Mr. Bostic's testimony because it was deprived of its right to cross-examine Mr. Bostic on these critical issues.

2. The instruction to disregard Mr. Bostic's live testimony did not cure the error.

A week after Mr. Bostic testified, Judge Montgomery instructed the jury to disregard his live testimony from the second trial in favor of a reading of his testimony from a transcript of the first trial. But even without all the other improper events that occurred, the emotional nature of Mr. Bostic's live testimony on critical liability and damages issues (and his subsequent collapse) was so highly prejudicial to Georgia-Pacific that his testimony could not be withdrawn from the minds of the jurors by simple instruction or cured by Judge Montgomery's instruction to disregard the testimony. *See Bruton v. United States*, 391 U.S. 123, 137 (1968) ("Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all."). His

live testimony was not the type of stray remark or single hearsay statement that can easily be corrected by instruction. The reading of his prior testimony aggravated the situation when the jury—after all that had happened and with all that it knew—heard his statement from the first trial that he "prayed to God to die" because of his son's death. 12 RR 58. The prejudice to Georgia-Pacific resulting from its inability to cross-examine Mr. Bostic was incurable and warranted a new trial; the trial court's failure to so order was an abuse of discretion.

C. The Prejudice to Georgia-Pacific Was Further Compounded When the Jury Learned of Harold Bostic's Death from an Outside Source Before the Jury Deliberated and Delivered Its Verdict.

Juror misconduct occurs whenever "any outside influence [is] improperly brought to bear upon any juror." TEX. R. CIV. P. 327b. To be entitled to a new trial for jury misconduct, a party must establish (1) the misconduct occurred, (2) it was material, and (3) it probably caused injury. *See* TEX. R. CIV. P. 327(a); *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000); *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 660-61 (Tex. App.—Dallas 2002, pet. denied). A new trial was mandated in this case because the juror misconduct was proven, the misconduct was material, and from the record as a whole, it is evident that injury resulted to Georgia-Pacific. *See Golden Eagle Archery*, 24 S.W.3d at 372.

When trial resumed the week after Mr. Bostic's collapse, one of the jurors, Courtney Jackson, the EMT who provided assistance to Mr. Bostic, contacted one of his co-workers at the hospital and learned that Mr. Bostic died after his collapse. 16 RR 123-24, 130-33, 137-40. Jackson then informed other jurors that Mr. Bostic had died. *Id.* The transmission of this information from the outside source was made before the jurors retired to deliberate

and consider the evidence, including Mr. Bostic's testimony from the first trial that he "prayed to God to die" because of his son's death. 12 RR 58. Jackson's injection of this information for the jury's consideration constitutes an "outside influence"—which is defined by the Texas Supreme Court as something that "originates from sources other than the jurors themselves"—and amounts to jury misconduct. *Golden Eagle Archery*, 24 S.W.3d at 370.

The second requirement for a new trial based on jury misconduct is evidence that the misconduct was material. TEX. R. CIV. P. 327(a). The materiality of the jury misconduct in this case is obvious. For example, Plaintiffs asserted claims for mental anguish, which were unavoidably bolstered when the jurors learned of Mr. Bostic's death. One juror even testified that he felt sympathy for the Bostic family (*i.e.*, Plaintiffs) because of Mr. Bostic's death and believed the family "was going through more" as a result. 16 RR 130-33.

This materiality is also evidenced by the great lengths to which the trial court went to keep the jury from learning that Mr. Bostic had died and to finish the trial.[21] To achieve this goal, Judge Montgomery conducted the remainder of trial in a way that prejudiced Georgia-Pacific: (1) Georgia-Pacific was not permitted to question the jurors regarding Mr. Bostic's collapse until after deliberations, 10 RR 12-13; (2) the trial court refused to rule on Georgia-Pacific's motion for mistrial until after the jury returned its verdict, 10 RR 18-19 ("You will not get a ruling if it's going to jeopardize this trial."); (3) Judge Montgomery originally intended to keep Harold Bostic's claims on the verdict form to avoid tipping off the jury that

---

[21] Judge Montgomery believed the jurors were unaware of Mr. Bostic's death because she witnessed Mr. Bostic's collapse alongside the jury, so that she knew "what they know" and that "they do not know they saw [Mr. Bostic's] last hour of consciousness." 10 RR 11, 10-22.

he died, 10 RR 14, 19-20; (4) the trial court refused to dismiss juror Jackson—the EMT who provided aid to Bostic following his collapse and spread the outside information regarding Mr. Bostic's death to the other jurors—until immediately before the jury began deliberations, 10 RR 18; and (5) Judge Montgomery initially resisted Georgia-Pacific's attempts to present its motion for mistrial or to make a record of the events surrounding Mr. Bostic's collapse because a lengthy delay on the first day of trial after Mr. Bostic's death might arouse the jury's suspicions that something was seriously wrong with Mr. Bostic. 10 RR 16, 18-19, 24-27. If knowledge of Mr. Bostic's death had not been material, Judge Montgomery need not have engaged in this elaborate ruse.

The third and final requirement for a new trial based on jury misconduct is closely related to the materiality requirement and demands a showing that the misconduct "probably caused injury." *See* TEX. R. CIV. P. 327a. "To show probable injury, there must be some indication in the record that the . . . misconduct most likely caused a juror to vote differently than he would otherwise have done on one or more issues vital to the judgment." *Rosell,* 89 S.W.3d at 661. Ironically, testimony from jurors regarding what effect the misconduct may have had on their decisions is not allowed under Texas law. *See* TEX. R. CIV. P. 327(b); TEX. R. EVID. 606(b). The existence of "probable injury" is a question of law for the Court. *See Pharo v. Chambers County*, 922 S.W.2d 945, 950 (Tex. 1996).

The following facts are some indication that the injection of the information regarding Mr. Bostic's death from outside sources into the jury deliberation process likely caused jurors to vote differently than they would otherwise have done had they been unaware of his death:

(a) Judge Montgomery's comment to the jury that Mr. Bostic's collapse was caused by the stress of his testimony, 9 RR 162, was indelibly linked to his subsequent death in the minds of the jury. As Mr. Bostic's testimony was highly emotional and centered around the illness and death of his son from alleged exposure to Georgia-Pacific products and the resulting mental anguish to Plaintiffs, the conclusion that his death should be laid at Georgia-Pacific's door could have been made by the jurors. At least one juror expressly acknowledged her belief in the link between Mr. Bostic's testimony and his collapse. 16 RR 135.

(b) Even before Mr. Bostic's death, Judge Montgomery acknowledged the prejudicial impact Mr. Bostic's death would have on Georgia-Pacific's defense in the case. 9 RR 170-71.

(c) Judge Montgomery instructed the jury to disregard Mr. Bostic's prior direct testimony because he was "not available to be cross-examined by the Defendant." 12 RR 12-13. The jury misconduct resulted in the jury knowing that his death was the reason Mr. Bostic was unavailable. The jury then heard Mr. Bostic's testimony a second time when it was read into the record from the first trial, thereby improperly emphasizing the only testimony on product identification and exposure. 12 RR 12-144. In fact, Judge Montgomery herself noted that Mr. Bostic's testimony from the first trial was equally emotional and agreed that the witness was "as emotional as you'll ever see a witness" in both trials. 10 RR 9. This testimony included his statements that he "prayed to God to die" and that he "just wanted to die." 12 RR 58. The prejudicial impact of this testimony in light of his actual death immediately thereafter is patently obvious and probably caused at least one juror to answer the verdict differently than he otherwise would have done.

These facts clearly provide "some indication" that the juror misconduct most likely led one or more jurors to conclude that Mr. Bostic's death was the result of his testimony regarding his distress over the death of his son, which Plaintiffs allege was caused by Georgia-Pacific.

The prejudicial impact of the juror misconduct on Georgia-Pacific is evidenced most clearly by a comparison of the damages awarded in the first and second trials. In the first trial, the jury awarded Plaintiffs approximately $3.1 million in compensatory damages and

$6.2 million in punitive damages. CR 110-20. The first trial was closer to Timothy's death, Plaintiff Susan Bostic had not yet remarried, and Plaintiff Kyle Bostic was still a minor. The first jury awarded damages to four wrongful death plaintiffs; given Mr. Bostic's death, the second jury only awarded damages to three wrongful death plaintiffs. Nevertheless, the jury in the second trial awarded Plaintiffs approximately $7.5 million in compensatory damages and $6 million in punitive damages. *See* CR 198-217. The compensatory damages—which include mental anguish damages—more than doubled in the second trial even though the damages evidence presented in the second trial was less compelling. The only explanation for the exponentially higher damage awards is that the jury in the second trial was influenced by their sympathy for the Bostic family (*i.e.*, Plaintiffs) in the wake of Mr. Bostic's death. Given the obvious injury to Georgia-Pacific resulting from the juror misconduct, the trial court was obligated to grant a new trial. *See* TEX. R. CIV. P. 327(a); *Golden Eagle Archery*, 24 S.W.3d at 372. Its failure to do so was an abuse of discretion that should be corrected.

D. The Bailiff and the Trial Court Compounded the Prejudice to Georgia-Pacific by Violating the Texas Rules of Civil Procedure Regarding Communications with the Jury.

Texas Rule of Civil Procedure 283 prohibits the officer in charge of the jury, *i.e.*, the bailiff, from making any communication to the jury "except to inquire if they have agreed upon a verdict, unless by order of the court." TEX. R. CIV. P. 283. Thus, Rule 283 prohibits a bailiff from discussing the particulars of the case with the jury. Likewise, Rule 283 prohibits a bailiff from instructing the jury regarding evidence to be considered as part of its deliberations. *See Logan v. Grady*, 482 S.W.2d 313, 322 (Tex. Civ. App.—Fort Worth 1972,

no writ). The bailiff's conduct in this case clearly violated Rule 283.

On the very day that Judge Montgomery instructed the jury to disregard Mr. Bostic's live testimony and his testimony from the first trial was read to the jury, the jury questioned the bailiff regarding Mr. Bostic's condition and juror Courtney Jackson specifically asked him why Plaintiffs' counsel had been wearing black for several days (following Mr. Bostic's death). 16 RR 155-60, 162; 17 RR 20-21. Without informing Judge Montgomery, the bailiff instructed the jury that he "could not tell them the condition or how Mr. Bostic was doing" but that "they were not to consider anything that happened in this hall, that they were to consider only the stuff that happened in the courtroom." 16 RR 156. The bailiff then approached Plaintiffs' counsel, advised her of the juror's questions regarding her clothing, and instructed her to wear a different color. 16 RR 157-59. The bailiff did not tell Georgia-Pacific about the jury's questions or of his communications with Plaintiffs' counsel.

To determine whether these violations of Rule 283 entitled Georgia-Pacific to a new trial, Georgia-Pacific is required to establish that (1) the misconduct occurred, (2) it was material, and (3) it probably caused injury. *See* TEX. R. CIV. P. 327(a); *Pharo*, 922 S.W.2d at 950 (noting that Rule 327(a) applies to the misconduct of "the officer in charge" of jurors). The misconduct of the bailiff was admitted and is undisputed; its materiality—given that Mr. Bostic was a Plaintiff asserting claims for mental anguish—cannot be questioned. And this misconduct—whether considered alone or in conjunction with the juror misconduct—was prejudicial. It not only prevented Georgia-Pacific from timely discovering information material to its motions for mistrial, but also stripped the trial court of another chance to

remove juror Courtney Jackson before he contacted outside sources to check on Mr. Bostic's condition and shared that information with his fellow jurors. As a result, the bailiff interfered with the course and outcome of this case, and a new trial is the only remedy.

In addition, Judge Montgomery violated Texas Rule of Civil Procedure 285:

> The jury may communicate with the court by making their wish known to the officer in charge, who shall inform the court, and they may then in open court, and through their presiding juror, communicate with the court, either verbally or in writing.

TEX. R. CIV. P. 285. Rule 285 contemplates communications made "in open court"—*i.e.*, before counsel for both parties. When Judge Montgomery learned of the jury's questions to the bailiff and the bailiff's instructions to the jury and Plaintiffs' counsel, rather than disclose those facts to counsel for both parties in open court, she instructed her bailiff and staff not to inform Georgia-Pacific's counsel of the communications until she deemed it "relevant." 17 RR 20-21, 34-35. The court's failure to address the juror's questions in open court or attempt to remedy the bailiff's misconduct in open court violated Rule 283 and was itself misconduct.

E. The Second Trial Was Not Fairly Conducted.

In the face of this juror and bailiff misconduct, Judge Montgomery nevertheless resolved to conclude this trial at any cost—including that of her own impartiality. On the day Mr. Bostic collapsed, Judge Montgomery gave the parties a clear baseline for a mistrial—if Mr. Bostic's medical condition was serious and he was not able to return to court—and then disregarded her own guidelines when Mr. Bostic died. 9 RR 170-72. Similarly, she stated

that she would ensure that the jury did not learn of Mr. Bostic's death before they deliberated and would not permit the parties to do anything that might "tip off" the jury to his death. 10 RR12. And yet Judge Montgomery again disregarded this standard when she learned what the jury had asked the bailiff about Plaintiffs' counsel's conduct and the bailiff's misconduct. 17 RR 20-21, 34-35. Instead of acknowledging that the bailiff had committed misconduct and correcting the error, Judge Montgomery simply pressed ahead despite the indication from the jurors' questions that the jury was still thinking about the events in the hallway and quite possibly knew that Mr. Bostic was dead. Even when Judge Montgomery informed Georgia-Pacific of the jurors' questions, she failed to mention the bailiff's statements to Plaintiffs' counsel regarding the jury's concerns. 17 RR 28-29. When asked if she had instructed her staff not to tell Georgia-Pacific about the jury inquiries and the bailiff's misconduct, Judge Montgomery was untruthful with Georgia-Pacific's counsel, 17 RR 31-32, and when the court reporter disputed the completeness and accuracy of her statements, Judge Montgomery fired the court reporter. 17 RR at 36-37. Obviously, as this trial spiraled out of control, the trial court deprived Georgia-Pacific of a "just, fair, equitable and impartial adjudication of [its] rights under established principles of substantive law." TEX. R. CIV. P. 1.

PRAYER

For these reasons, Appellant Georgia-Pacific Corporation respectfully requests that this Court reverse the trial court's judgment and render judgment that Appellees take nothing. Alternatively, Appellant requests that this Court grant a new trial to Appellant. Appellant additionally prays for any further relief at law or in equity to which he may be justly entitled.

Respectfully submitted,

By: /s/ Deborah G. Hankinson

DEBORAH G. HANKINSON
State Bar No. 00000020
RICK THOMPSON
State Bar No. 00788537
KATHERINE ROSS
State Bar No. 00788620

HANKINSON LEVINGER LLP
750 N. St. Paul, Suite 1800
Dallas, Texas 75201
214.754.9190
214.754.9140 (fax)

COUNSEL FOR APPELLANT
GEORGIA-PACIFIC CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2009, a true and correct copy of this brief was served on the following counsel of record via hand delivery:

Counsel for Appellees

Denyse Clancy
BARON & BUDD, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, Texas 75219

/s/ Deborah G. Hankinson
Deborah G. Hankinson

No. 05-08-01390-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

GEORGIA-PACIFIC CORPORATION,

Appellant,

v.

SUSAN ELAINE BOSTIC, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF TIMOTHY SHAWN BOSTIC, DECEASED; HELEN DONNAHOE; AND KYLE ANTHONY BOSTIC,

Appellees.

BRIEF OF APPELLANT GEORGIA-PACIFIC CORPORATION

On Appeal from County Court at Law No. 1, Dallas County, Texas

DEBORAH G. HANKINSON
State Bar No. 00000020
RICK THOMPSON
State Bar No. 00788537
KATHERINE ROSS
State Bar No. 00788620

HANKINSON LEVINGER LLP
750 N. St. Paul St., Suite 1800
Dallas, Texas 75201
214.754.9190
214.754.9140 (fax)

COUNSEL FOR APPELLANT GEORGIA-PACIFIC CORPORATION

ORAL ARGUMENT REQUESTED

APPENDIX INDEX

TAB A

NO. CC-03-01977-A

SUSAN ELAINE BOSTIC, Individually and as Personal Representative of the Heirs and Estate of TIMOTHY SHAWN BOSTIC, Deceased; HELEN DONNAHOE; and KYLE ANTHONY BOSTIC,	§	IN THE COUNTY COURT
Plaintiffs,	§	AT LAW # 1
VS.	§	
GEORGIA-PACIFIC CORPORATION,	§	
Defendant.	§	DALLAS COUNTY, TEXAS

FIRST AMENDED FINAL JUDGMENT

CAME ON FOR TRIAL BY JURY in the County Court at Law No. 3 for Dallas County, Texas, the claims of Plaintiffs **SUSAN ELAINE BOSTIC, Individually and as Personal Representative of the Heirs and Estate of TIMOTHY SHAWN BOSTIC, Deceased; HELEN DONNAHOE;** and **KYLE ANTHONY BOSTIC** against Defendant **GEORGIA-PACIFIC CORPORATION**. All claims of these Plaintiffs against all other Defendants have been severed or settled and dismissed before verdict.

After a jury was impaneled and sworn, it heard the evidence and arguments of counsel. In response to the jury charge, the jury made findings that the Court received, filed, and entered of record. The questions submitted to the jury and the jury's findings are attached as Exhibit 1 and incorporated herein by reference. After due deliberation, the jury returned a verdict awarding a total of $7,554,907.00 in compensatory damages and $6,038,910.00 in exemplary damages on or about June 8, 2006. The case was transferred to this Court on August 10, 2006. Plaintiffs filed a motion for judgment on the verdict.

The Court hereby RENDERS judgment for Plaintiffs as against Defendant GEORGIA-PACIFIC CORPORATION.

Based on the verdict of the jury, the Court's rulings during trial, the applicable law, and taking into account the prior settlements received by Plaintiffs it is

ORDERED, ADJUDGED and DECREED:

WITH REGARD TO COMPENSATORY DAMAGES:

1. That Plaintiff **SUSAN ELAINE BOSTIC**, as Personal Representative of the Estate of **TIMOTHY SHAWN BOSTIC**, shall have and recover from Defendant **GEORGIA-PACIFIC CORPORATION**, after an offset for settlements in the amount of $275,994.12 calculated pursuant to *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005), compensatory damages in the amount of **$1,240,005.88.**

2. That Plaintiff **SUSAN ELAINE BOSTIC**, Individually, shall have and recover from Defendant **GEORGIA-PACIFIC CORPORATION**, after an offset for settlements in the amount of $219,863.33 calculated pursuant to *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005), compensatory damages in the amount of **$2,799,591.67.**

3. That Plaintiff **KYLE ANTHONY BOSTIC** shall have and recover from Defendant **GEORGIA-PACIFIC CORPORATION**, after an offset for settlements in the amount of $164,809.43 calculated pursuant to *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005), compensatory damages in the amount of **$1,646,860.57.**

4. That Plaintiff **HELEN DONNAHOE** shall have and recover from Defendant **GEORGIA-PACIFIC CORPORATION**, after an offset for settlements in the amount of $110,104.80 calculated pursuant to *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005), compensatory damages in the amount of **$1,097,677.20.**

WITH REGARD TO PUNITIVE DAMAGES:

5. That Plaintiff **SUSAN ELAINE BOSTIC**, Individually, shall have and recover from Defendant **GEORGIA-PACIFIC CORPORATION** punitive damages in the amount of **$3,019,455.00**.

6. That Plaintiff **KYLE ANTHONY BOSTIC** shall have and recover from Defendant **GEORGIA-PACIFIC CORPORATION** punitive damages in the amount of **$1,811,673.00**.

WITH REGARD TO PREJUDGMENT INTEREST:

7. That Plaintiff **SUSAN ELAINE BOSTIC**, as Personal Representative of the Estate of **TIMOTHY SHAWN BOSTIC**, shall have and recover from Defendant **GEORGIA-PACIFIC CORPORATION**, after offsets for settlements calculated pursuant to *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005), prejudgment interest on past damages pursuant to TEX. FIN. CODE ANN. Ch. 304 at the rate of FIVE PERCENT (5.0%) per annum, simple, already accrued from February 19, 2003 (the day this lawsuit was filed) through October 21, 2008 (the day before this judgment was signed) in the amount of **$183,122.97**.

8. That Plaintiff **SUSAN ELAINE BOSTIC**, Individually, shall have and recover from Defendant **GEORGIA-PACIFIC CORPORATION**, after offsets for settlements calculated pursuant to *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005), prejudgment interest on past damages pursuant to TEX. FIN. CODE ANN. Ch. 304 at the rate of FIVE PERCENT (5.0%) per annum, simple, already accrued from February 19, 2003 (the day this lawsuit was filed) through October 21, 2008 (the day before this judgment was signed) in the amount of **$145,894.95**.

9. That Plaintiff **KYLE ANTHONY BOSTIC** shall have and recover from Defendant **GEORGIA-PACIFIC CORPORATION**, after offsets for settlements calculated pursuant to *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005), prejudgment interest on past damages pursuant

to TEX. FIN. CODE ANN. Ch. 304 at the rate of FIVE PERCENT (5.0%) per annum, simple, already accrued from February 19, 2003 (the day this lawsuit was filed) through October 21, 2008 (the day before this judgment was signed) in the amount of **$109,434.00**.

10. That Plaintiff **HELEN DONNAHOE** shall have and recover from Defendant **GEORGIA-PACIFIC CORPORATION**, after offsets for settlements calculated pursuant to *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005), prejudgment interest on past damages pursuant to TEX. FIN. CODE ANN. Ch. 304 at the rate of FIVE PERCENT (5.0%) per annum, simple, already accrued from February 19, 2003 (the day this lawsuit was filed) through October 21, 2008 (the day before this judgment was signed) in the amount of **$72,921.91**.

AND IT IS FURTHER ORDERED:

11. That post-judgment interest on all amounts owed by Defendant **GEORGIA-PACIFIC CORPORATION** to Plaintiffs shall accrue at the rate of FIVE PERCENT (5.0%) per annum, compounded annually, from the day this Judgment is signed until satisfaction of Judgment, pursuant to TEX. FIN. CODE ANN. Ch. 304.

13. That costs of suit shall be taxed against Defendant **GEORGIA-PACIFIC CORPORATION**, and that Plaintiffs are entitled to post-judgment interest on such court costs at the rate of FIVE PERCENT (5.0%) per annum, compounded annually, pursuant to TEX. FIN. CODE §§ 304.003(a), 304.006.

14. This judgment is final, disposes of all claims and all parties, and is appealable.

The Court orders execution to issue for this judgment.

SIGNED this 22nd day of October, 2008.

THE HONORABLE JUDGE BENSON PRESIDING

APPROVED AS TO FORM AND SUBSTANCE:

DENYSE CLANCY
State Bar No. 24012425
JED J. BORGHEI
State Bar No. 24059473

ATTORNEYS FOR PLAINTIFFS

BARON & BUDD, P.C.
3102 Oak Lawn, Suite 1100
Dallas, Texas 75219
214-521-3605 (telephone)
214-520-1181 (facsimile)

APPROVED AS TO FORM ONLY:

DEBORAH G. HANKINSON
State Bar No. 00000020
RICK THOMPSON
State Bar No. 00788537

ATTORNEYS FOR DEFENDANT GEORGIA-PACIFIC CORPORATION

HANKINSON LEVINGER LLP
2305 Cedar Springs Road, Suite 230
Dallas, Texas 75201
214-754-9190 (telephone)
214-754-9140 (facsimile)

NO. CC-03-01977-C

SUSAN ELAINE BOSTIC, Individually and as Personal Representative of the Heirs and Estate of TIMOTHY SHAWN BOSTIC, Deceased; HELEN DONNAHOE; and KYLE ANTHONY BOSTIC,	§	IN THE COUNTY COURT
Plaintiffs,	§	AT LAW # 3
VS.	§	
GEORGIA-PACIFIC CORPORATION,	§	
Defendants.	§	
	§	DALLAS COUNTY, TEXAS

COURT'S JURY INSTRUCTIONS

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss what is not represented by the evidence in this case.

EXHIBIT
tabbies
1
000011

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect ofyour answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of five or more members of the jury. The same five or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than five jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence unless otherwise instructed. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible evidence admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence unless otherwise instructed.

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

"NEGLIGENCE" means failure to use ordinary care, that is, failing to do that which a person or entity of ordinary prudence would have done under the same or similar circumstances or doing that which a person or entity of ordinary prudence would not have done under the same or similar circumstances.

"ORDINARY CARE" means that degree of care that would be used by a person or entity of ordinary prudence under the same or similar circumstances.

"PROXIMATE CAUSE" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person or entity using ordinary

care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

"SOLE PROXIMATE CAUSE." There may be more than one proximate cause of an event, but if an act or omission of any person not a party to the suit was the "sole proximate cause" of an occurrence, then no act or omission of any other person could have been a proximate cause.

"PRODUCING CAUSE" means an efficient, exciting, or contributing cause that, in a natural sequence, produces the injury. There may be more than one producing cause.

QUESTION NO. 1:

Did the negligence, if any, of those named below proximately cause the asbestos-related injury, if any, to TIMOTHY SHAWN BOSTIC that resulted in his death?

Answer "YES" or "NO."	YES	NO
Allied-Signal	___	X
Borg-Warner	___	X
Bondex International	___	X
Celotex	___	X
Certainteed Corporation	___	X
Daimler Chrysler Corporation	___	X
Ford Motor Company	___	X
Garlock	___	X
General Motors Corporation	___	X
Georgia Pacific	X	___
H. K. Porter	___	X
Ingersoll-Rand	___	X
Johns-Manville	___	X
Kaiser Aluminum And Chemical	___	X
Knox Glass	X	___
Narco	___	X
Pneumo Abex Corporation	___	X
Union Carbide Company	___	X
Uniroyal	___	X

QUESTION NO. 2:

Was there a defect in the marketing of the asbestos-containing products at the time they left the possession of those named below that was a producing cause of the injury, if any, to TIMOTHY SHAWN BOSTIC that resulted in his death?

A "marketing defect" with respect to the product means the failure to give adequate warnings of the product's dangers that were known or by the application of reasonably developed human skill and foresight should have been known or failure to give adequate instructions to avoid such dangers, which failure rendered the product unreasonably dangerous as marketed.

"Adequate" warnings and instructions mean warnings and instructions given in a form that could reasonably be expected to catch the attention of a reasonably prudent person in the circumstances of the product's use; and the content of the warnings and instructions must be comprehensible to the average user and must convey a fair indication of the nature and extent of the danger and how to avoid it to the mind of a reasonably prudent person.

An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge common to the community as to the product's characteristics.

Answer "YES" or "NO".	YES	NO
Allied-Signal	___	X
Borg-Warner	___	X
Bondex International	___	X
Celotex	___	X
Certainteed Corporation	___	X
Daimler Chrysler Corporation	___	X
Ford Motor Company	___	X
Garlock	___	X
General Motors Corporation	___	X

Georgia Pacific	X	
H. K. Porter		X
Ingersoll-Rand		X
Johns-Manville		X
Kaiser Aluminum And Chemical		X
Narco		X
Pneumo Abex Corporation		X
Union Carbide Company		X
Uniroyal		X

If you have answered Question Nos. 1 or 2 "YES" with respect to more than one company, then answer Question No. 3 as to those Companies only; otherwise, do not answer Question No. 3.

QUESTION 3:

For each of those named below found by you to have caused the injury to TIMOTHY SHAWN BOSTIC that resulted in his death, find the percentage of responsibility.

The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of causation attributable to those named below is not necessarily measured by the number of acts, omissions, or product defects found.

Assign a percentage only to those Companies you have answered "Yes" to in Question No. 1 or 2:

a. Allied-Signal Ø %

b. Borg-Warner Ø %

c. Bondex International Ø %

d. Celotex Ø %

e. Certainteed Ø %

f. Daimler Chrysler Ø %

g. Ford Motor Ø %

h. Garlock Ø %

i. General Motors Ø %

j. Georgia Pacific 75 %

k. H. K. Porter Ø %

l. Ingersoll-Rand Ø %

m. Johns-Manville Ø %

n. Kaiser Aluminum And Chemical	Ø	%
o. Knox Glass	25	%
p. Narco	Ø	%
q. Pneumo Abex	Ø	%
r. Union Carbide	Ø	%
s. Uniroyal	Ø	%
TOTAL:	100	%

If you have answered Question No. 1 or 2 "YES" with respect to any one or more Companies, answer Question No. 4 as to those Companies; otherwise, do not answer Question No. 4.

QUESTION 4:

Do you find by clear and convincing evidence that the injury resulting in the death of TIMOTHY SHAWN BOSTIC resulted from malicet?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means an act or omission by the Defendant,

(i) which, when viewed objectively from the standpoint of the Defendant at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which the Defendant had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Answer "YES" or "NO".	YES	NO
Georgia Pacific	X	

If you have answered Questions Nos. 1 or 2 "YES" with respect to any one or more Defendants, then answer Question No. 5; otherwise, do not answer Question No. 5.

QUESTION NO. 5:

What sum of money would have fairly and reasonably compensated TIMOTHY SHAWN BOSTIC for his asbestos-related injuries from the time of his injury until his death?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

a. Pain and Mental anguish.

"Pain and mental anguish" means the conscious physical pain and emotional pain, torment, and suffering experienced by TIMOTHY SHAWN BOSTIC before his death as a result of his asbestos-related injuries.

Answer in dollars and cents for damages, if any.

Amount $ 753,000.00

b. Disfigurement.

"Disfigurement" means that which, as a result of his asbestos-related injuries, impaired the beauty, symmetry, or appearance of TIMOTHY SHAWN BOSTIC and that rendered him unsightly, misshapen, imperfect, or deformed in some manner.

Answer in dollars and cents for damages, if any.

Amount $ 351,000.00

c. Physical impairment.

"Physical impairment" means the restriction of physical activities experienced by TIMOTHY SHAWN BOSTIC as a result of his asbestos-related injuries. Loss of enjoyment of life is a factor to consider in determining physical impairment. The effect of any physical impairment must be substantial and extend beyond any pain, suffering, or mental anguish.

Answer in dollars and cents for damages, if any.

Amount $ 251,000.00

d. Medical expenses.

"Medical expenses" means the reasonable expense of the necessary medical and hospital care received by TIMOTHY SHAWN BOSTIC for treatment of injuries sustained by him as a result of his asbestos-related injuries.

Answer in dollars and cents for damages, if any.

Amount $ 251,000.00

e. Funeral and burial expenses.

"Funeral and burial expenses" means the reasonable amount of expenses for funeral and burial of TIMOTHY SHAWN BOSTIC reasonably suitable to his station in life.

Answer in dollars and cents for damages, if any.

Amount $ 10,000.00

If you have answered Questions Nos. 1 or 2 "YES" with respect to any one or more Defendants, then answer Question No. 6; otherwise, do not answer Question No. 6.

QUESTION NO. 6:

What sum of money, if paid now in cash, would fairly and reasonably compensate SUSAN ELAINE BOSTIC for her injuries, if any, that resulted from the death of TIMOTHY SHAWN BOSTIC?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

a. Pecuniary loss.

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, excluding loss of addition to the estate, that SUSAN ELAINE BOSTIC, in reasonable probability, would have received from TIMOTHY SHAWN BOSTIC had he lived.

Answer in dollars and cents for damages, if any, that —

were sustained in the past;	Answer	$ 402,594.00
in reasonable probability will be sustained in the future.	Answer	$ 402,594.00

b. Loss of companionship and society.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that SUSAN ELAINE BOSTIC, in reasonable probability, would have received from TIMOTHY SHAWN BOSTIC had he lived.

Answer in dollars and cents for damages, if any, that —

were sustained in the past;	Answer	$ 402,594.00
in reasonable probability will be sustained in the future.	Answer	$ 402594.00

c. Mental anguish.

"Mental anguish" means the emotional pain, torment, and suffering experienced by SUSAN ELAINE BOSTIC because of the death of TIMOTHY SHAWN BOSTIC.

Answer in dollars and cents for damages, if any, that -

were sustained in the past; Answer $ 402,594.00

in reasonable probability will be sustained in the future. Answer $ 402,594.00

In determining damages for elements b and c, you may consider the relationship between SUSAN ELAINE BOSTIC and TIMOTHY SHAWN BOSTIC, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

d. Loss of addition to the estate.

"Loss of addition to the estate" means the loss of the present value of assets that the deceased, in reasonable probability, would have added to the estate existing at the end of his natural life and left to SUSAN ELAINE BOSTIC.

Answer in dollars and cents for damages, if any.

Answer $ 603,891.00

If you have answered Questions Nos. 1 or 2"YES" with respect to any one or more Defendants, then answer Question No. 7; otherwise, do not answer Question No. 7.

QUESTION NO. 7:

What sum of money, if paid now in cash, would fairly and reasonably compensate KYLE ANTHONY BOSTIC for his injuries, if any, that resulted from the death of his father TIMOTHY SHAWN BOSTIC?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That

is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

a. Pecuniary loss.

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that KYLE ANTHONY BOSTIC, in reasonable probability, would have received from TIMOTHY SHAWN BOSTIC had he lived.

Answer in dollars and cents for damages, if any, that -

were sustained in the past; Answer $ 301,945.00

in reasonable probability will be sustained in the future. Answer $ 301,945.00

b. Loss of companionship and society.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that KYLE ANTHONY BOSTIC, in reasonable probability, would have received from TIMOTHY SHAWN BOSTIC had he lived.

Answer in dollars and cents for damages, if any, that -

were sustained in the past; Answer $ 301,945 00

in reasonable probability will be sustained in the future. Answer $ 301,945.00

c. Mental anguish.

"Mental anguish" means the emotional pain, torment, and suffering experienced by KYLE ANTHONY BOSTIC because of the death of TIMOTHY SHAWN BOSTIC.

Answer in dollars and cents for damages, if any, that -

were sustained in the past; Answer $ 301,945.00

in reasonable probability will be sustained in the future. Answer $ 301,945.00

In determining damages for elements b and c, you may consider the relationship between TIMOTHY SHAWN BOSTIC and his son KYLE ANTHONY BOSTIC, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

QUESTION NO. 8:

What sum of money, if paid now in cash, would fairly and reasonably compensate HELEN DONNAHOE for her injuries, if any, that resulted from the death of TIMOTHY SHAWN BOSTIC, her son ?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

a. Pecuniary loss.

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that HELEN DONNAHOE in reasonable probability, would have received from TIMOTHY SHAWN BOSTIC had he lived.

Answer in dollars and cents for damages, if any, that -

were sustained in the past: Answer $201,297.00

that in reasonable probability will be sustained in the future: Answer $201,297.00

b. Loss of companionship and society.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that HELEN DONNAHOE in reasonable probability, would have received from TIMOTHY SHAWN BOSTIC had he lived.

Answer in dollars and cents for damages, if any, that -

were sustained in the past: Answer $201,297.00

that in reasonable probability will be sustained in the future: Answer $201,297.00

c. Mental anguish.

"Mental anguish" means the emotional pain, torment, and suffering experienced by HELEN DONNAHOE because of the death of TIMOTHY SHAWN BOSTIC.

Answer in dollars and cents for damages, if any, that -

were sustained in the past: Answer $201,297.00

in reasonable probability will be sustained in the future: Answer $201,297.00

In determining damages for elements b and c, you may consider the relationship between TIMOTHY SHAWN BOSTIC and his mother, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

If you have answered Question No. 4 "YES" with respect to any one or more Defendants, then answer Question No. 8 as to those Defendants; otherwise, do not answer Question No. 8.

QUESTION NO. 8:

What sum of money, if any, should be assessed against the Defendant as exemplary damages for the death of TIMOTHY SHAWN BOSTIC?

"Exemplary damages" means any damages awarded as a penalty or by way of punishment. Exemplary damages includes punitive damages.

In determining the amount of exemplary damages, you shall consider evidence, if any, relating to --

a. The nature of the wrong.

b. The character of the conduct involved.

c. The degree of culpability of the wrongdoer.

d. The situation and sensibilities of the parties concerned.

e. The extent to which such conduct offends a public sense of justice and propriety.

f. The net worth of the defendant.

Answer in dollar and cents, if any.

Georgia Pacific Answer: $ 6,038,910.00

If, in your answer to Question No. 8, you have entered any amount of exemplary damages as to any Defendant, then answer Question No. 9. Otherwise, do not answer Question No. 9.

QUESTION NO. 9:

How do you apportion the exemplary damages between SUSAN ELAINE BOSTIC, KYLE ANTHONY BOSTIC and HELEN DONNAHOE?

Answer by stating a percentage for each person named below. The percentages you find must total 100 percent.

SUSAN ELAINE BOSTIC	50 %
KYLE ANTHONY BOSTIC	30 %
HELEN DONNAHOE	20 %
Total	100 %

After you return to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror --

1. to preside during your deliberations,
2. to see your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,
3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,
4. to vote on the questions,
5. to write your answers to the questions in the spaces provided, and
6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with the other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into Court with your verdict.

JUDGE PRESIDING

We, the jury, have answered the above and foregoing questions as indicated, and return these answers to the Court as our verdict.

(To be signed by the Presiding Juror only, if unanimous).

David J Jones
PRESIDING JUROR

(To be signed by the five or more jurors who agree to the answers, if not unanimous).

_____ MEOCHA BERRYMAN

_____ SUSIE BARBOSA

_____ LOLA MOSLEY

_____ DIANNA WOITAS

_____ TESSIE BROWN

David J Jones 07J DAVID JONES

TAB B

NO. CC-03-01977-C

SUSAN ELAINE BOSTIC, Individually and as Personal Representative of the Heirs and Estate of TIMOTHY SHAWN BOSTIC, Deceased; HELEN DONNAHOE; and KYLE ANTHONY BOSTIC,	§	IN THE COUNTY COURT
Plaintiffs,	§	
VS.	§	
GEORGIA-PACIFIC CORPORATION,	§	
Defendants.	§	DALLAS COUNTY, TEXAS

COURT'S JURY INSTRUCTIONS

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss what is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of five or more members of the jury. The same five or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than five jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the judge. If it should be found that you have disregarded any of these instructions, it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other who observes a violation of the court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in this charge in a sense that varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

(A)

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence unless otherwise instructed. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible evidence admitted in this case. Whenever a question requires an answer other than "Yes" or "No," your answer must be based on a preponderance of the evidence unless otherwise instructed.

(B)

A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

"NEGLIGENCE" means failure to use ordinary care, that is, failing to do that which a person or entity of ordinary prudence would have done under the same or similar circumstances or doing that which a person or entity of ordinary prudence would not have done under the same or similar circumstances.

"ORDINARY CARE" means that degree of care that would be used by a person or entity of ordinary prudence under the same or similar circumstances.

"PROXIMATE CAUSE" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person or entity using ordinary

care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

"SOLE PROXIMATE CAUSE." There may be more than one proximate cause of an event, but if an act or omission of any person not a party to the suit was the "sole proximate cause" of an occurrence, then no act or omission of any other person could have been a proximate cause.

"PRODUCING CAUSE" means an efficient, exciting, or contributing cause that, in a natural sequence, produces the injury. There may be more than one producing cause.

QUESTION NO. 1:

Did the negligence, if any, of those named below proximately cause the asbestos-related injury, if any, to TIMOTHY SHAWN BOSTIC that resulted in his death?

Answer "YES" or "NO."	YES	NO
Allied-Signal	___	X
Borg-Warner	___	X
Bondex International	___	X
Celotex	___	X
Certainteed Corporation	___	X
Daimler Chrysler Corporation	___	X
Ford Motor Company	___	X
Garlock	___	X
General Motors Corporation	___	X
Georgia Pacific	X	___
H. K. Porter	___	X
Ingersoll-Rand	___	X
Johns-Manville	___	X
Kaiser Aluminum And Chemical	___	X
Knox Glass	X	___
Narco	___	X
Pneumo Abex Corporation	___	X
Union Carbide Company	___	X
Uniroyal	___	X

QUESTION NO. 2:

Was there a defect in the marketing of the asbestos-containing products at the time they left the possession of those named below that was a producing cause of the injury, if any, to TIMOTHY SHAWN BOSTIC that resulted in his death?

A "marketing defect" with respect to the product means the failure to give adequate warnings of the product's dangers that were known or by the application of reasonably developed human skill and foresight should have been known or failure to give adequate instructions to avoid such dangers, which failure rendered the product unreasonably dangerous as marketed.

"Adequate" warnings and instructions mean warnings and instructions given in a form that could reasonably be expected to catch the attention of a reasonably prudent person in the circumstances of the product's use; and the content of the warnings and instructions must be comprehensible to the average user and must convey a fair indication of the nature and extent of the danger and how to avoid it to the mind of a reasonably prudent person.

An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge common to the community as to the product's characteristics.

Answer "YES" or "NO".	YES	NO
Allied-Signal	___	X
Borg-Warner	___	X
Bondex International	___	X
Celotex	___	X
Certainteed Corporation	___	X
Daimler Chrysler Corporation	___	X
Ford Motor Company	___	X
Garlock	___	X
General Motors Corporation	___	X

Georgia Pacific	X	
H. K. Porter		X
Ingersoll-Rand		X
Johns-Manville		X
Kaiser Aluminum And Chemical		X
Narco		X
Pneumo Abex Corporation		X
Union Carbide Company		X
Uniroyal		X

If you have answered Question Nos. 1 or 2 "YES" with respect to more than one company, then answer Question No. 3 as to those Companies only; otherwise, do not answer Question No. 3.

QUESTION 3:

For each of those named below found by you to have caused the injury to TIMOTHY SHAWN BOSTIC that resulted in his death, find the percentage of responsibility.

The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The percentage of causation attributable to those named below is not necessarily measured by the number of acts, omissions, or product defects found.

Assign a percentage only to those Companies you have answered "Yes" to in Question No. 1 or 2:

a. Allied-Signal	Ø %
b. Borg-Warner	Ø %
c. Bondex International	Ø %
d. Celotex	Ø %
e. Certainteed	Ø %
f. Daimler Chrysler	Ø %
g. Ford Motor	Ø %
h. Garlock	Ø %
i. General Motors	Ø %
j. Georgia Pacific	75 %
k. H. K. Porter	Ø %
l. Ingersoll-Rand	Ø %
m. Johns-Manville	Ø %

n. Kaiser Aluminum And Chemical Ø %

o. Knox Glass 25 %

p. Narco Ø %

q. Pneumo Abex Ø %

r. Union Carbide Ø %

s. Uniroyal Ø %

TOTAL: 100 %

If you have answered Question No. 1 or 2 "YES" with respect to any one or more Companies, answer Question No. 4 as to those Companies; otherwise, do not answer Question No. 4.

QUESTION 4:

Do you find by clear and convincing evidence that the injury resulting in the death of TIMOTHY SHAWN BOSTIC resulted from malicet?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means an act or omission by the Defendant,

(i) which, when viewed objectively from the standpoint of the Defendant at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which the Defendant had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Answer "YES" or "NO".	YES	NO
Georgia Pacific	X	

000206

If you have answered Questions Nos. 1 or 2 "YES" with respect to any one or more Defendants, then answer Question No. 5; otherwise, do not answer Question No. 5.

QUESTION NO. 5:

What sum of money would have fairly and reasonably compensated TIMOTHY SHAWN BOSTIC for his asbestos-related injuries from the time of his injury until his death?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

a. Pain and Mental anguish.

"Pain and mental anguish" means the conscious physical pain and emotional pain, torment, and suffering experienced by TIMOTHY SHAWN BOSTIC before his death as a result of his asbestos-related injuries.

Answer in dollars and cents for damages, if any.

Amount $ 753,000.00

b. Disfigurement.

"Disfigurement" means that which, as a result of his asbestos-related injuries, impaired the beauty, symmetry, or appearance of TIMOTHY SHAWN BOSTIC and that rendered him unsightly, misshapen, imperfect, or deformed in some manner.

Answer in dollars and cents for damages, if any.

Amount $ 251,000.00

c. Physical impairment.

"Physical impairment" means the restriction of physical activities experienced by TIMOTHY SHAWN BOSTIC as a result of his asbestos-related injuries. Loss of enjoyment of life is a factor to consider in determining physical impairment. The effect of any physical impairment must be substantial and extend beyond any pain, suffering, or mental anguish.

Answer in dollars and cents for damages, if any.

Amount $ 251,000.00

d. Medical expenses.

"Medical expenses" means the reasonable expense of the necessary medical and hospital care received by TIMOTHY SHAWN BOSTIC for treatment of injuries sustained by him as a result of his asbestos-related injuries.

Answer in dollars and cents for damages, if any.

Amount $ 251,000.00

e. Funeral and burial expenses.

"Funeral and burial expenses" means the reasonable amount of expenses for funeral and burial of TIMOTHY SHAWN BOSTIC reasonably suitable to his station in life.

Answer in dollars and cents for damages, if any.

Amount $ 10,000.00

If you have answered Questions Nos. 1 or 2 "YES" with respect to any one or more Defendants, then answer Question No. 6; otherwise, do not answer Question No. 6.

QUESTION NO. 6:

What sum of money, if paid now in cash, would fairly and reasonably compensate SUSAN ELAINE BOSTIC for her injuries, if any, that resulted from the death of TIMOTHY SHAWN BOSTIC?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

a. Pecuniary loss.

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, excluding loss of addition to the estate, that SUSAN ELAINE BOSTIC, in reasonable probability, would have received from TIMOTHY SHAWN BOSTIC had he lived.

Answer in dollars and cents for damages, if any, that —

were sustained in the past; Answer $ 402,594.00

in reasonable probability will be sustained in the future. Answer $ 402,594.00

b. Loss of companionship and society.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that SUSAN ELAINE BOSTIC, in reasonable probability, would have received from TIMOTHY SHAWN BOSTIC had he lived.

Answer in dollars and cents for damages, if any, that —

were sustained in the past; Answer $ 402,594.00

in reasonable probability will be sustained in the future. Answer $ 402,594.00

c. Mental anguish.

"Mental anguish" means the emotional pain, torment, and suffering experienced by SUSAN ELAINE BOSTIC because of the death of TIMOTHY SHAWN BOSTIC.

Answer in dollars and cents for damages, if any, that -

were sustained in the past; Answer $ 402,594.00

in reasonable probability will be sustained in the future. Answer $ 402,594.00

In determining damages for elements b and c, you may consider the relationship between SUSAN ELAINE BOSTIC and TIMOTHY SHAWN BOSTIC, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

d. Loss of addition to the estate.

"Loss of addition to the estate" means the loss of the present value of assets that the deceased, in reasonable probability, would have added to the estate existing at the end of his natural life and left to SUSAN ELAINE BOSTIC.

Answer in dollars and cents for damages, if any.

Answer $ 603,891.00

If you have answered Questions Nos. 1 or 2"YES" with respect to any one or more Defendants, then answer Question No. 7; otherwise, do not answer Question No. 7.

QUESTION NO. 7:

What sum of money, if paid now in cash, would fairly and reasonably compensate KYLE ANTHONY BOSTIC for his injuries, if any, that resulted from the death of his father TIMOTHY SHAWN BOSTIC?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That

is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

a. Pecuniary loss.

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that KYLE ANTHONY BOSTIC, in reasonable probability, would have received from TIMOTHY SHAWN BOSTIC had he lived.

Answer in dollars and cents for damages, if any, that -

were sustained in the past; Answer $ 301,945.00

in reasonable probability will be sustained in the future. Answer $ 301,945.00

b. Loss of companionship and society.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that KYLE ANTHONY BOSTIC, in reasonable probability, would have received from TIMOTHY SHAWN BOSTIC had he lived.

Answer in dollars and cents for damages, if any, that -

were sustained in the past; Answer $ 301,945.00

in reasonable probability will be sustained in the future. Answer $ 301,945.00

c. Mental anguish.

"Mental anguish" means the emotional pain, torment, and suffering experienced by KYLE ANTHONY BOSTIC because of the death of TIMOTHY SHAWN BOSTIC.

Answer in dollars and cents for damages, if any, that -

were sustained in the past; Answer $ 301,945.00

in reasonable probability will be sustained in the future. Answer $ 301,945.00

000211

In determining damages for elements b and c, you may consider the relationship between TIMOTHY SHAWN BOSTIC and his son KYLE ANTHONY BOSTIC, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

QUESTION NO. 8:

What sum of money, if paid now in cash, would fairly and reasonably compensate HELEN DONNAHOE for her injuries, if any, that resulted from the death of TIMOTHY SHAWN BOSTIC, her son ?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

a. Pecuniary loss.

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value that HELEN DONNAHOE in reasonable probability, would have received from TIMOTHY SHAWN BOSTIC had he lived.

Answer in dollars and cents for damages, if any, that -

were sustained in the past: Answer $201,297.00

that in reasonable probability will be sustained in the future: Answer $201,297.00

b. Loss of companionship and society.

"Loss of companionship and society" means the loss of the positive benefits flowing from the love, comfort, companionship, and society that HELEN DONNAHOE in reasonable probability, would have received from TIMOTHY SHAWN BOSTIC had he lived.

Answer in dollars and cents for damages, if any, that -

were sustained in the past: Answer $201,297.00

that in reasonable probability will be sustained in the future: Answer $201,297.00

c. Mental anguish.

"Mental anguish" means the emotional pain, torment, and suffering experienced by HELEN DONNAHOE because of the death of TIMOTHY SHAWN BOSTIC.

Answer in dollars and cents for damages, if any, that -

were sustained in the past: Answer $201,297.00

in reasonable probability will be sustained in the future: Answer $201,297.00

In determining damages for elements b and c, you may consider the relationship between TIMOTHY SHAWN BOSTIC and his mother, their living arrangements, any extended absences from one another, the harmony of their family relations, and their common interests and activities.

000213

If you have answered Question No. 4 "YES" with respect to any one or more Defendants, then answer Question No. 8 as to those Defendants; otherwise, do not answer Question No. 8.

QUESTION NO. 8:

What sum of money, if any, should be assessed against the Defendant as exemplary damages for the death of TIMOTHY SHAWN BOSTIC?

"Exemplary damages" means any damages awarded as a penalty or by way of punishment. Exemplary damages includes punitive damages.

In determining the amount of exemplary damages, you shall consider evidence, if any, relating to --

a. The nature of the wrong.

b. The character of the conduct involved.

c. The degree of culpability of the wrongdoer.

d. The situation and sensibilities of the parties concerned.

e. The extent to which such conduct offends a public sense of justice and propriety.

f. The net worth of the defendant.

Answer in dollar and cents, if any.

Georgia Pacific Answer: $ 6,038,910.00

If, in your answer to Question No. 8, you have entered any amount of exemplary damages as to any Defendant, then answer Question No. 9. Otherwise, do not answer Question No. 9.

QUESTION NO. 9:

How do you apportion the exemplary damages between SUSAN ELAINE BOSTIC, KYLE ANTHONY BOSTIC and HELEN DONNAHOE?

Answer by stating a percentage for each person named below. The percentages you find must total 100 percent.

SUSAN ELAINE BOSTIC	50 %
KYLE ANTHONY BOSTIC	30 %
HELEN DONNAHOE	20 %
Total	100 %

000215

After you return to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror --

1. to preside during your deliberations,
2. to see your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge,
3. to write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge,
4. to vote on the questions,
5. to write your answers to the questions in the spaces provided, and
6. to certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with the other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into Court with your verdict.

JUDGE PRESIDING

We, the jury, have answered the above and foregoing questions as indicated, and return these answers to the Court as our verdict.

(To be signed by the Presiding Juror only, if unanimous).

David J Jones
PRESIDING JUROR

(To be signed by the five or more jurors who agree to the answers, if not unanimous).

_____ MEOCHA BERRYMAN

_____ SUSIE BARBOSA

_____ LOLA MOSLEY

_____ DIANNA WOITAS

_____ TESSIE BROWN

David J Jones DJ DAVID JONES

TAB C

D131

CAUSE NO. CC-03-01977-C

SUSAN ELAINE BOSTIC, Individually and as Personal Representative of the Heirs and Estate of TIMOTHY SHAWN BOSTIC, Deceased; HAROLD BOSTIC; HELEN DONNAHOE; and KYLE ANTHONY BOSTIC	§	IN THE COUNTY COURT
Plaintiffs,	§	AT LAW NO. 11
vs.	§	
GEORGIA-PACIFIC CORPORATION,	§	
Defendant.	§	DALLAS COUNTY, TEXAS

K. P. COURTS

ORDER GRANTING GEORGIA-PACIFIC CORPORATION'S MOTION FOR MISTRIAL AND SUPPLEMENTAL MOTION FOR MISTRIAL

On October 19, 2006, this Court heard Defendant Georgia-Pacific Corporation's Motion for Mistrial and Supplemental Motion for Mistrial. After considering Defendant's motion, the response filed by the Plaintiffs, and the arguments of counsel, the Court GRANTS Defendant's Motion for Mistrial and Supplemental Motion for Mistrial and ORDERS a New Trial.

SIGNED on this 22nd day of ~~October~~ December, 2006.

JUDGE RUSSELL H. RODEN

000439

TAB D

POSTED

CAUSE NO. CC-03-01977-A

SUSAN ELAINE BOSTIC, Individually and as Personal Representative of the Heirs and Estate of TIMOTHY SHAWN BOSTIC, Deceased; HAROLD BOSTIC; HELEN DONNAHOE; and KYLE ANTHONY BOSTIC	§	**IN THE COUNTY COURT**
Plaintiff's,	§	**AT LAW NO. 1**
v.	§	
GEORGIA-PACIFIC CORPORATION	§	
Defendant.	§	**DALLAS COUNTY, TEXAS**

ORDER REGARDING PLAINTIFF'S MOTION FOR VACATURE AND IN THE ALTERNATIVE MOTION FOR ENTRY OF JUDGMENT ON THE VERDICT

Came on to heard, on the 20th day of June 2008, Plaintiffs' Motion for Vacatur of the Court's December 22, 2006 Order Granting a New Trial and Motion for Entry of Judgment. This is a case of longstanding initially filed in 2003 which has twice been tried to jury and subject to a motion to recuse, granted against the original trial judge and subject to Application for Writ of Mandamus. It has additionally, been the subject of a Motion for Mistrial and Supplemental Motion for Mistrial, granted by the predecessor judge of this Court.

Although this Court did not participate in the previous trials on the merits or in the hearing on the Defendant's Motion for Mistrial and Supplemental Motion for Mistrial, in hearing Plaintiff's Motion for Vacatur of the Court's December 22, 2006 Order Granting a New Trial and Motion for Entry of Judgment; the Court was presented with exceptional oral advocacy, detailed and extensive briefing and well articulated and reasoned arguments by counsel for each party. As such, the Court recognizes that not

206 0925

001222

only were the arguments and issues presented pertinent to the request for vacatur, but were implicitly and explicitly a request for reconsideration of the previous Motion for Mistrial and Supplemental Motion for Mistrial.

The Court, being mindful that its obligation in ruling on matters pending before it must look to the substance as well as the form in which such matters are presented, and after considering the motion, responses and arguments of counsel, hereby GRANTS Plaintiff's Motion for Vacatur of the Court's December 22, 2006 Order Granting a New Trial and Motion for Entry of Judgment in all respects and hereby VACATES in all respects the Court's Order Granting Georgia-Pacific Corporation's Motion for Mistrial and Supplemental Motion for Mistrial.

SIGNED this 31 day of July, 2008.

JUDGE PRESIDING

206 0926

001223