

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 12, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-1064

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

HAROLD P. BETTINGER,

Plaintiff-Appellant,

S. DARLENE BETTINGER,

Plaintiff,

v.

THE ANCHOR PACKING COMPANY,
a Delaware corporation,

Defendant-Respondent,

THE A.P. GREEN REFRACTORIES CO.,
a Delaware corporation,
ARMSTRONG WORLD INDUSTRIES, INC.,
a Pennsylvania corporation,
BABCOCK & WILCOX, a Louisiana corporation,
CAREY CANADA, a Canadian corporation,
THE CELOTEX CORPORATION, a Delaware corporation,
CERTAINTEED CORPORATION, a Maryland corporation,
CLEAVER BROOKS CO., INC., a Wisconsin corporation,
COMBUSTION ENGINEERING, INC., a Delaware corporation,
EAGLEPICHER INDUSTRIES, INC., an Ohio corporation,

**FIBREBOARD CORPORATION, a Delaware corporation,
THE FLINTKOTE COMPANY, a Delaware corporation,
GAF CORPORATION, a Delaware corporation,
GARLOCK, INC., a New York corporation,
KEENE CORPORATION, a New York corporation,
NATIONAL GYPSUM COMPANY, a Delaware corporation,
OWENS-CORNING FIBERGLASS CORPORATION,
a Delaware corporation,
OWENS-ILLINOIS, INC., an Ohio corporation,
PITTSBURGH CORNING CORPORATION,
a Pennsylvania corporation,**

Defendants.

APPEAL from a judgment of the circuit court for Dane County:
WILLIAM D. JOHNSTON, Judge. *Affirmed.*

Before Gartzke, P.J., Sundby and Vergeront, JJ.

PER CURIAM. Harold P. Bettinger appeals from a judgment dismissing his personal injury complaint. We affirm.

Bettinger alleged that he was injured by asbestos contained in the defendants' products. The first question on the special verdict was: "Does Harold P. Bettinger have mesothelioma?" The jury answered "no." The special verdict then directed the jury to skip the next 103 questions if it answered "no" and determine what damages would compensate Bettinger. Based on the jury's answer to the first question, the trial court dismissed the complaint.

Bettinger argues that the trial court erred in asking the verdict question quoted above because it was unnecessary. He argues that the only evidence submitted showed that he did, in fact, suffer from mesothelioma and therefore the jury could have reached no other conclusion. While the defendants did not present expert medical evidence of their own, on cross-examination they elicited evidence suggesting that Bettinger actually suffered from adenocarcinoma, rather than mesothelioma. The parties agreed to give the

jury the standard instruction on expert testimony, which states that the jury is not bound by the opinion of any expert. WIS J I—CIVIL 260. Therefore, the jury could properly disregard the diagnosis of Bettinger's experts, even if not rebutted by a defense expert.

Bettinger argues that the special verdict was improperly phrased. He argues that the first question precluded the jury from finding that he had adenocarcinoma, which, like mesothelioma, may be caused by asbestos. Instead, Bettinger proposed at the instructions' conference that the question be: "Does Mr. Bettinger have an asbestos-related injury?" Bettinger does not point to any testimony by his expert witnesses stating that he suffered from adenocarcinoma, or that adenocarcinoma was an alternative diagnosis if the diagnosis of mesothelioma was incorrect. Such testimony would have been necessary to meet his burden of proof.¹ Without it, the jury could not properly have found that Bettinger had adenocarcinoma, regardless of whether it was so asked in the special verdict. Therefore, the phrasing of the question was not erroneous.

Bettinger argues that the trial court improperly limited his closing arguments. By his count, the court sustained fifty-seven out of sixty objections made during his closing argument and rebuttal. Several of these related to Bettinger's efforts to comment on the fact that the defendants did not produce any experts to counter the diagnosis of mesothelioma. Bettinger asserts that such argument was proper because a party may comment on the failure of the opposing party to produce evidence in its possession that would ordinarily be introduced. We reject the argument. The trial court did not erroneously exercise its discretion. The remainder of the closing argument issues are mooted by the jury's answer to the special verdict question.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

¹ See *Drexler v. All American Life & Cas. Co.*, 72 Wis.2d 420, 428, 241 N.W.2d 401, 406 (1976) (expert testimony required if the subject matter involved is outside the realm of the ordinary experience of humankind and requires special learning, study and experience).