

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**LOIS J. WAGNER, ROBIN G. WAGNER AND WENDE L. WAGNER, INDIVIDUALLY  
AND AS WRONGFUL DEATH BENEFICIARIES OF ROBERT WAGNER,  
APPELLANT-RESPONDENT  
vs.**

**BONDEX INTERNATIONAL INC., and SIMPSON TIMBER COMPANY,  
RESPONDENT-APPELLANT**

**CONWED CORPORATION,  
DEFENDANT**

---

DOCKET NUMBER WD72474 (Consolidated with WD72482, WD72619)

DATE: JUNE 19, 2012

---

Appeal from:

The Circuit Court of Clay County, Missouri  
The Honorable Kathryn E. Davis, Judge

---

Appellate Judges:

Division Two: Lisa White Hardwick, C.J., Joseph M. Ellis and Victor C. Howard, JJ.

---

Attorneys:

Brent Rosenthal, for Appellant-Respondent

Kyle Roehler, for Respondent-Appellant Bondex International, Inc.

Mark Arnold, for Respondent-Appellant Simpson Timber Company

Clayton Dickey, for Conwed Corporation

---

**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**LOIS J. WAGNER, ROBIN G. WAGNER and WENDE L. WAGNER, Individually and  
as Wrongful Death Beneficiaries of ROBERT WAGNER  
Appellant-Respondent,  
v.**

**BONDEX INTERNATIONAL, INC., SIMPSON TIMBER COMPANY,  
Respondent-Appellants,**

**CONWED CORPORATION, INC.,  
Defendant.**

WD72474 (Consolidated with WD72482, WD72619) Clay County, Missouri

Before Division Four Judges: Lisa White Hardwick, C.J., Joseph M. Ellis and Victor C. Howard, JJ.

In 2006, Robert Wagner was diagnosed with malignant mesothelioma. Wagner had worked as carpenter installing ceiling tile on construction sites in the Kansas City area throughout the 1960s and 70s. Following his death in 2007, Lois, Robin, and Wendé Wagner (“Plaintiffs”), as wrongful death beneficiaries, brought a wrongful death suit against Bondex International, Inc., Conwed Corporation, and Simpson Timber Company (“Defendants”). In the petition, Plaintiffs alleged that Wagner’s mesothelioma resulted from exposure to the asbestos-containing products manufactured by Defendants. At trial, the jury returned a verdict in favor of Plaintiffs in the amount of \$4.5 million. The jury apportioned fault as follows: 20% to Bondex, 35% to Simpson Timber, and 45% to Conwed. The verdict was reduced by settlements Plaintiffs entered into with manufacturers of other asbestos-containing products. Bondex and Simpson Timber appeal from that judgment. Plaintiffs cross-appeal from the judgment being reduced by \$900,000.00 pursuant to a settlement with another asbestos manufacturer, T.H. Agriculture & Nutrition, LLC (“THAN”).

**AFFIRMED IN PART, REVERSED IN PART, and REMANDED.**

**Division Four holds:**

- (1) The trial court erred in denying Simpson Timber’s motions for directed verdict and JNOV because there was a complete absence of evidence to support Plaintiffs’ contention that Simpson Timber’s asbestos-containing products caused Wagner’s mesothelioma in that Simpson Timber always manufactured ceiling tile

that did not contain asbestos during the timeframe in which Wagner was exposed to Simpson Timber products and Plaintiffs' evidence that Wagner installed Simpson Timber ceiling tile at a high school and schools typically requested asbestos-containing ceiling tile was too speculative to provide a sufficient evidentiary basis to form the inference that Wagner was ever actually exposed to Simpson Timber ceiling tile that contained asbestos.

- (2) The trial court did not err in denying Bondex's motions for directed verdict and JNOV because a juror could reasonably conclude that the asbestos in Bondex joint compound contributed to cause Mr. Wagner's mesothelioma and subsequent death given the evidence that Bondex joint compound contained asbestos during the relevant timeframe during which Wagner was exposed to it, Wagner's co-workers' testimony that Wagner was exposed to Bondex joint compound, and Plaintiffs' experts' testimony regarding the cumulative nature of mesothelioma and the causative effect of Wagner's exposure to Bondex joint compound.
- (3) The trial court did not err in denying Bondex's motions for directed verdict and JNOV because Plaintiffs presented sufficient evidence from which a reasonable juror could conclude that the asbestos in Bondex's joint compound was a proximate cause of Mr. Wagner's mesothelioma in that it is not surprising, unexpected, or freakish, nor is it an unreasonable or improbable consequence that Wagner developed mesothelioma from his exposure to Bondex given the testimony that Wagner was regularly subjected to clouds of Bondex joint compound asbestos dust that fell like "snow" over a period of many years in addition to the expert testimony regarding the nature and development of mesothelioma.
- (4) The trial court did not err in submitting instructions 7A and 8A to the jury because those instructions contained the exact language found in the appropriate MAI instructions for products liability cases, and Plaintiffs' argument that the instructions assume a disputed fact is without merit in that nothing in the verdict required the jury to assume that Wagner's exposure to Bondex was of such a dose, frequency or long duration to cause his mesothelioma.
- (5) This Court cannot review Bondex's arguments concerning whether the trial court erred in refusing to submit a withdrawal instruction regarding post-exposure exhibits and Julius Nemeth's related testimony because Bondex failed to provide us with Julius Nemeth's testimony or the post-exposure exhibits introduced into evidence at trial and, thus, there is nothing for this Court to review with respect to the trial court's refusal to submit a withdrawal instruction.
- (6) The trial court did not err in failing to reduce the judgment by the amounts available from the asbestos bankruptcy trusts created by other manufacturers of asbestos-containing products not involved in this action because Bondex is not

entitled to such an offset under § 537.060 and Plaintiffs had the right to sue and seek settlement from the tortfeasors of their choosing.

- (7) The trial court did not err in reducing the judgment by the amount of \$900,000.00 because the trial court's determination that a \$900,000.00 settlement agreement existed between Plaintiffs and THAN is not against the weight of the evidence in that Defendants presented a sworn declaration by Plaintiffs' counsel to a federal bankruptcy court that Plaintiffs' counsel had obtained a settlement agreement on Plaintiffs' behalf for \$900,000.00 with THAN and, contrary to Plaintiffs' assertions, the bankruptcy court never made any findings as to whether a settlement existed between THAN and Plaintiffs.

Opinion by Joseph M. Ellis, Judge

Date: June 19, 2012

**This summary is *UNOFFICIAL* and should not be quoted or cited.**