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

FILED
JUL 10 1970
James R. Cooley, Clerk, U. S. Court
By Margaret Driver DEPUTY

CLARENCE BOREL :

VS. : CIVIL ACTION NO. 6449

FIBREBOARD PAPER PRODUCTS :
CORPORATION, ET AL :

PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME THELMA FREIDA BOREL, in her own right as the surviving widow of Clarence Borel, deceased, and in behalf of her adult children, namely, MRS. SHERRY ANN BERSIN, MRS. PHYLLIS JEAN MARTINEZ, BRACY DAVID BOREL, MRS. SYLVIA SUE STEPHENS, MRS. BRENDA GAIL ANDERSON, and MRS. KATHELEEN MARIE DEAN, hereinafter called plaintiffs, leave of the Court having been first had and obtained, and file this their second amended original complaint, complaining of:

(1) FIBREBOARD PAPER PRODUCTS CORPORATION, a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(2) COMBUSTION ENGINEERING, INC., a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(3) JOHNS-MANVILLE PRODUCTS CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, Prentice-Hall Corporation System, Littlefield Building, Austin, Travis County, Texas;

(4) OWENS-CORNING FIBER GLASS CORPORATION, a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(5) EAGLE-PICHER INDUSTRIES, INC., a corporation duly organized, created and existing under and by virtue of

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the laws of the State of Ohio, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(6) PITTSBURGH CORNING CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the State of Pennsylvania, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(7) UNARCO INDUSTRIES, INC., a corporation duly organized, created and existing under and by virtue of the laws of the State of Illinois, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(8) PHILIP CAREY CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the State of Ohio, with an agent for service, to-wit, Prentice-Hall Corporation System, Littlefield Building, Austin, Travis County, Texas;

(9) STANDARD ASBESTOS MANUFACTURING AND INSULATING COMPANY, a corporation duly organized, created and existing under and by virtue of the laws of the State of Missouri, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(10) RUBEROID COMPANY, a Division of GAF CORPORATION, a corporation organized, created and existing under the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County,Texas;

(11) ARMSTRONG CORK COMPANY, a corporation organized, created and existing under and by virtue of the laws of the State of Pennsylvania, with an agent for service, to-wit, C. T. Corporation Syustem, Republic National Bank Building, Dallas, Dallas County, Texas;

hereinafter called Defendants; and for cause of action, plaintiffs allege:

1.

That the ground upon which jurisdiction of this Court depends is diversity of citizenship of the parties hereto; that the amount in controversy herein exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs.

2.

That all of the plaintiffs, with the exception of Bracy David Borel, reside in Jefferson County, Texas; that the said Bracy David Borel resides in Harris County, Texas.

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3.

That the said Thelma Freida Borel is the surviving wife of Clarence Borel, deceased; that the remaining plaintiffs are the adult surviving children of the deceased; that the said Clarence Borel died testate on the 3rd day of June, 1970, but that the will of the deceased has not yet been offered for probate; however, in this connection, the deceased will, devised and bequeathed unto his wife all of his estate; that the adult surviving children of the deceased were not dependent upon the deceased for their support and maintenance. That the parents of the deceased died prior to his death.

4.

That this action is brought under the Wrongful Death Statute, Article 4671, Revised Civil Statutes of the State of Texas, as well as Article 5525, Revised Civil Statutes of the State of Texas.

4-A.

That defendants during all the times herein mentioned and for a long time prior thereto, have been and now are engaged in the manufacture of materials used for insulation containing asbestos; that the products manufactured, compounded and prepared by defendants, acting through their servants, employees, agents and representatives were and are placed on the market to be purchased and used by the public.

5.

The plaintiffs say that during the years 1936 to 1969, inclusive, the deceased, Clarence Borel, was employed as an insulator, and that in the performance of his duties as an insulator, he was required to handle large quantities of the products manufactured and distributed by the above named defendants. That in addition to the fact that the deceased

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actually used the products manufactured by the above named defendants, and many more, as an insulator, and specifically many and various products containing asbestos, the plaintiffs say that on many of the jobs, while not using himself the specific products manufactured by the defendants, the deceased was nevertheless exposed to the dangerous materials and especially asbestos dust and fibers which were used by other workers in the same area at which the deceased was working.

6.

That during the period of time in which the deceased was employed as an insulator, from the year 1936 to 1969, inclusive, in the course of his employment, due to the negligence and carelessness of the defendants, he was caused to come in contact with the insulation produced and manufactured and distributed by the defendants, and its chemical compounds, deleterious substances and matter, and directly in consequence of said negligence and carelessness of the defendants, did sustain severe, permanent and disabling injuries, resulting in his death on June 3, 1970, as hereinafter set forth.

7.

That the injuries and resulting death of Clarence Borel and damages complained of herein were directly and proximately caused by the negligence and carelessness of the defendants in the following additional particulars:

(a) That the defendants knew, or in the exercise of ordinary or reasonable care ought to have known, that the insulation they so prepared, manufactured and distributed were deleterious, poisonous and highly harmful to the deceased's body, lungs, respiratory system, skin and health, and that the deceased would not know of such danger to his health, notwithstanding which, defendants negligently failed to take any reasonable precautions or exercise reasonable care to warn

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the deceased of the danger and harm to which he was exposed while handling the defendants' said insulation.

(b) That the defendants knew or in the exercise of ordinary care ought to have known that their said insulation was deleterious, poisonous and highly harmful to the deceased's body, lungs, respiratory system, skin and health, and that the deceased would not know of such dangerous character, notwithstanding which defendants failed and omitted to provide the deceased with the knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances, if in truth there was any, to protect him from being poisoned and disabled as he was by exposure to such deleterious and harmful compound substances and other material contained in said defendants' insulation.

(c) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that their insulation was deleterious, poisonous and highly harmful to the deceased's body, lungs, respiratory system, skin and health, notwithstanding which defendants negligently and carelessly packaged said insulation so that in the ordinary handling for installation thereof, the deceased would come in contact with such deleterious, poisonous and highly harmful compound substances and other material contained in said defendants' insulation.

(d) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that the insulation they produced contained deleterious, poisonous and highly harmful substances to the human body, lungs, respiratory system, skin and health, notwithstanding which defendants negligently failed to take any reasonable precautions or exercise reasonable care by placing any warnings on their containers of said insulation to warn the handlers thereof of the dangers to health in coming in contact with said insulation.

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(e) That the defendants knew or in the exercise of reasonable care ought to have known that their insulation contained deleterious and highly harmful substances to the deceased's health, body, lungs, respiratory system and skin, and defendants knew or in the exercise of ordinary or reasonable care should have known that the deceased would not know the dangerous characteristics of their said insulation, notwithstanding which defendants negligently failed to take reasonable precautions or exercise reasonable care to warn the deceased of said danger and to instruct the deceased in the proper handling of their said insulation, or to take any reasonable precautions or exercise any reasonable care to protect the deceased from harm and negligently failed to adopt and enforce a reasonable safe plan and method of handling and installing said insulation.

8.

In addition, plaintiffs say that the defendants breached their warranties to the deceased in the following respects:

(a) That the defendants knew or in the exercise of reasonable care ought to have known that their insulation was defective and that such insulation was not suitable for the purposes for which it was intended.

(b) That the defendants should have tested their products, especially those containing asbestos, to ascertain the safe or dangerous nature of such products before offering them for sale, or in the alternative, should have removed such products from the market upon ascertaining that such products would cause asbestosis.

(c) That the defendants should have devised a method of application of their products, especially those containing asbestos, that would have kept those using such products from contracting asbestosis if the defendants would not remove such

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products from sale to the public.

(d) That the products of the defendants, especially those containing asbestos, were warranted, either expressly or implied, to be merchantable, when in truth they were not, and therefore, the defendants breached to the deceased, as well as to others, the warranty of merchantability.

8-A.

In addition, plaintiffs say that the defendants, and each of them, knew that their insulating products containing asbestos would be sold to the public and would be used by persons such as the deceased and would be relied on by such persons to safely do the job for which they were manufactured; that the defendants and each of them knew that the insulating products containing asbestos manufactured and distributed by them would cause harm to the deceased, and the defendants, because of their positions as manufacturers, owed a strict duty to the deceased not to harm the deceased through the use of defendants' products; that the defendants placed on the market products in a defective condition that were unsafe for their intended use or which were unreasonably dangerous; that the defendants placed the products on the market knowing that they would be used without inspection for defects; that the deceased used the defendants' insulating products containing asbestos in a manner that was reasonably foreseeable; that the defects in the products of the defendants were a proximate cause of the injuries and resulting death of the said Clarence Borel; that as a result of the use of the defendants' products by the deceased, he suffered serious, severe, disabling and permanent injuries, resulting in his death, and as a result thereof, defendants and each of them are strictly liable to the plaintiffs for their failure to deliver a product to the deceased that would not cause the

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deceased harm.

9.

Plaintiffs would further show unto the Court that at all the times material hereto, over a period of years in which deceased was employed as an insulator, the manufacture, sale and distribution of insulation materials with which deceased came in contact, was under the exclusive control of the defendants, their agents, servants and employees, and that had the defendants herein not been guilty of negligence as hereinabove set forth, the deceased would not have sustained his injuries which resulted in his death, and plaintiffs would not have sustained their damages as herein set forth, and therefore, plaintiffs say that they are entitled to recover from the defendants under the doctrine of res ipsa loquitur.

10.

That as a direct and proximate cause of the aforesaid occurrence and circumstances, and the negligence and carelessness of the defendants, and the defendants' breach of warranties and breach of strict liability, the deceased was permanently and severely injured; that he sustained very serious and permanent injuries to his lungs and respiratory system, which affected other parts of his body; that prior to his death, he suffered from shortness of breath, inability to breathe, clubbing of the fingers and toes; that he underwent surgery in which one of his lungs was removed; that he suffered excruciating pain prior to his death; that it was necessary that the deceased be given injections of narcotics to relieve the pain; that prior to the deceased's death, it was necessary that he have available to him at all times a container of oxygen in order that he might be able to breathe; that he had difficulty sleeping, tired easily, and constantly coughed. That the deceased's condition was diagnosed as asbestosis, and although he sought

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the services of physicians in an effort to cure or arrest the condition, his condition steadily worsened, and he died on the 3rd day of June, 1970, while confined in a hospital.

11.

That by reason of the negligence and carelessness of the defendants, and each of them, and their breach of warranties as above alleged, and their breath of strict liability, and because of the injuries to the deceased's health and the resulting disability therefrom, the deceased suffered a total loss of wages and earnings from about the 17th day of January, 1969, to the date of death on the 3rd day of June, 1970, a period of approximately sixteen months. That prior to this period of total disability, the deceased had earned from Seven Thousand to Eleven Thousand ($11,000.00) Dollars per year.

12.

That in an effort to treat, relieve and heal himself of his injuries and to regain his health, the deceased was obliged to incur and did incur expenses amounting to a considerable sum of money for medical and hospitalization care, expenses for medicines, supplies, and so forth, the amount of which the plaintiffs are unable to accurately estimate at this time.

13.

Further, plaintiffs say that the deceased at the time of his death was 57 years of age, and had a life expectancy of at least 18.0 years, according to the Life Expectancy Tables of the United States Department of Health, and was making at least Seven Hundred ($700.00) Dollars per month prior to the period of total disability. That the deceased and plaintiff Thelma Freida Borel were lawfully married, and had lived

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together from the date of their marriage continuously to and until his death, and that the deceased had never failed to care for and support his wife. That the death of the said Clarence Borel has placed the said Thelma Freida Borel upon her own resources, as she was entirely dependent upon the deceased for her support and maintenance; that because of the death of the deceased, the said plaintiff Thelma Freida Borel has been deprived of his support and has suffered damages in the amount of Five Hundred Thousand ($500,000.00) Dollars.

14.

Plaintiffs further say that the deceased's injuries and resulting death were directly and proximately caused by the gross negligence, omission, conscious indifference and utter disregard for the welfare of the deceased on the parts of the defendants herein, their agents, servants, employees, managers, superintendents, supervisors and officers; that the award for this count should be in such an amount that it would act as a deterrent to the defendants and others from the future commission of like offenses and wrongs; and plaintiffs further say that if each of the acts of negligence alleged above did not independently and of themselves constitute gross negligence, then certainly all of said acts of negligence combined and in the aggregate constituted gross negligence, and the proximate cause of the deceased's injuries and resulting death, and the proximate cause of the damages suffered by plaintiffs; that as a result of deceased's injuries and resulting death, the plaintiffs have suffered actual damages as herein shown, for which plaintiffs are entitled to recover exemplary damages in the sum of Five Hundred Thousand ($500,000.00) Dollars.

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WHEREFORE, plaintiffs demand judgment against the defendants and each of them in the sum of Five Hundred Thousand ($500,000.00) Dollars general and special damages, together with the sum of Five Hundred Thousand ($500,000.00) Dollars exemplary damages, together with their costs and disbursements herein, and interest on said judgment from the date thereof until paid at the rate of six (6%) per cent per annum, and such other and further relief, in law and in equity, to which they may be entitled to receive.

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