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

CLARENCE BOREL)
)
VS.) CIVIL ACTION NO. 6449
)
FIBREBOARD PAPER PRODUCTS)
CORPORATION, ET AL)

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUL 30 1970
JAMES R. COONEY, CLERK
BY DEPUTY Margaret Driver

FIRST AMENDED ANSWER OF THE DEFENDANT UNARCO INDUSTRIES, INC. TO PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Unarco Industries, Inc., one of the Defendants herein, and files this its First Amended Answer to Plaintiffs' Second Amended Original Complaint and would respectfully show unto the Court and Jury the following:

I.

Assuming that the domicile and place of incorporation of the various corporate defendants is correctly alleged, it is admitted that this Court has jurisdiction based on diversity of citizenship of the parties. It is admitted that the claim asserted by Plaintiffs exceeds the jurisdictional amount.

II.

This Defendant can neither admit nor deny the allegations as to the residence of the various Plaintiffs for lack of knowledge.

III.

This Defendant does not have sufficient knowledge or information on which to base an admission or denial of the allegations in Paragraph 3, except that it is admitted that Clarence Borel died on June 3, 1970.

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IV.

In answer to the allegations contained in Paragraph 4, this Defendant denies that Plaintiffs have any cause of action for wrongful death under Art. 4671, R.C.S. of Texas. It is further denied that Art. 5525, R.C.S. of Texas creates any cause of action. It is denied that this Defendant caused the deceased any personal injury during his lifetime.

IV-A.

In answer to the allegations contained in Paragraph 4-A of the Complaint, this Defendant admits that during certain and limited periods of time mentioned herein, but not at all times referred to by Plaintiff, this Defendant has been engaged in the manufacture of materials used for insulation which were placed on the market to be purchased, but denies that such was true at all times mentioned in the Complaint or for the long period of time prior thereto as stated in the Complaint. This Defendant denies that insulation products manufactured by it are placed on the market to be purchased and used by the public generally, but to the contrary, this Defendant sells its products to insulation contractors who employ experienced insulation workers in the application of the products.

V.

With reference to the allegations contained in Paragraph 5 of the Complaint, this Defendant states that it does not have any knowledge or information as to the employment of the Deceased, the products allegedly handled by him or the jobs on

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which he was employed and, therefore, does not have sufficient knowledge or information upon which to base an admission or denial as to Deceased's employment or the details of such employment. Defendant does deny that it manufactured or sold any insulation material which was dangerous material.

VI.

This Defendant denies the allegations contained in Paragraph 6 of Plaintiffs' Complaint.

VII.

This Defendant denies the allegations contained in Paragraph 7 and all subdivisions thereunder, Sub-Paragraphs (a) through (e) inclusive.

VIII.

This Defendant denies the allegations contained in Paragraph 8 and all subdivisions thereunder, Sub-Paragraph (a) through (d) inclusive.

VIII-A.

This Defendant denies the allegations contained in Paragraph 8-A of Plaintiffs' Second Amended Complaint.

IX.

This Defendant denies the allegations contained in Paragraph 9 of Plaintiffs' Complaint. For further answer, this Defendant says that the doctrine of res ipsa loquitur has no application under the facts alleged by Plaintiffs.

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X.

In answer to Paragraph 10 of Plaintiffs' Complaint, this Defendant denies that the deceased sustained any injury as a result of any act or omission on the part of this Defendant or that the deceased was injured as a result of any alleged breach of warranty of this Defendant. This Defendant is without sufficient knowledge or information as to the cause or causes of deceased's alleged disability and death, but denies that the same was caused or brought about as a result of any act or omission of alleged negligence and carelessness of this Defendant or from the use of any product manufactured by this Defendant.

XI.

This Defendant denies the allegations contained in Paragraph 11 of Plaintiffs' Complaint.

XII.

In answer to Paragraph 12 of Plaintiffs' Complaint, this Defendant says that it has insufficient knowledge or information as to any medical treatment Deceased may have received and, therefore, cannot admit nor deny the allegations as to the truth or inaccuracy thereof, but does specifically deny that any such medical treatment was for injury or disease caused or brought about by any negligence or breach of warranty of this Defendant and further denies that Plaintiffs are entitled to recover any such alleged medical expense against this Defendant.

XIII.

This Defendant denies the allegations contained in Paragraph 13 of the Plaintiffs' Complaint and further denies

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that Plaintiffs are entitled to any recovery sought against this Defendant.

XIV.

This Defendant denies the allegations contained in Paragraph 14 of the Plaintiffs' Complaint and denies that Plaintiffs are entitled to any recovery sought herein against this Defendant.

XV.

This Defendant further denies the allegations contained in the last unnumbered paragraph and prayer of the Complaint and would specifically deny that the Plaintiffs are entitled to any recovery herein or to any relief sought by them in this action against this Defendant.

AFFIRMATIVE DEFENSES

First Affirmative Defense

(a) If deceased did sustain any injury as a result of the use of any product manufactured by this Defendant, which is denied, then such occurred more than two (2) years prior to the filing of this suit on the 20th day of October, 1969, and such cause of action is barred by the two (2) year statute of limitation of the State of Texas.

(b) If deceased did sustain any injury as the result of the use in the State of California of any product manufactured by this Defendant, which is denied, then such occurred more than one (1) year prior to the filing of this suit on the 20th day of October, 1969, and such cause of action is barred by the one (1) year statute of limitation of the State of California. The law of California provides for a one (1) year statute of limitation

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as to actions for personal injury, and further provides that the filing of a claim for workmen's compensation does not toll or suspend the running of the statute of limitation. Defendant gives notice that it will rely upon the law of the State of California.

(c) If Deceased did sustain any injury as the result of the use in the State of Louisiana of any product manufactured by this Defendant, which is denied, then such occurred more than one (1) year prior to the filing of this suit on the 20th day of October, 1969, and such cause of action is barred by the one (1) year statute of limitation of the State of Louisiana. The law of Louisiana provides for a one (1) year statute of limitation as to actions for personal injury, and further provides that the filing of a claim for workmen's compensation does not toll or suspend the running of the statute of limitation. Defendant gives notice that it will rely upon the law of the State of Louisiana.

(d) If deceased did sustain any injury as the result of the use of any product manufactured by this Defendant in any other state of the union, then this defendant gives notice and pleads each and all of the statutes of limitation of the respective states where the alleged cause of action arose as to said alleged cause of action. Defendant likewise pleads the statute of limitation of the State of Texas as to each and all of said alleged causes of action.

Second Affirmative Defense

If Deceased did sustain any injury as a result of the use of any product manufactured by this Defendant, which is denied, then such occurred more than four (4) years prior to the filing

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of this suit on the 20th day of October, 1969, and such cause of action is barred by the four (4) year statute of limitation of the State of Texas.

Third Affirmative Defense

For further answer, and by way of affirmative defense, this Defendant says that the products which this Defendant manufactured and sold were at all times reasonably fit and suitable for the purpose for which manufactured and sold and this Defendant denies that the same were in anywise defective for the intended use.

Fourth Affirmative Defense

This Defendant denies that any product which it manufactured or sold in any manner caused or brought about any injury or illness, if any, to Deceased and further that the physical conditions of which Plaintiffs now complain were in nowise caused or brought about by the product manufactured and sold by this Defendant and that such conditions were due solely to disease and other causes or to the acts or omissions of third parties and the acts of the Deceased and is in nowise connected with this Defendant.

Fifth Affirmative Defense

Answering still further, if such be necessary, and by way of further affirmative defense, this Defendant specially denies that Deceased sustained any injury or disease as a result of contact or use with or of any product manufactured by this Defendant and specially denies any fault or breach of warranty on the part of this Defendant and specially denies that this Defendant was guilty of any negligence proximately causing or

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contributing to cause the alleged injuries and damages, but to the contrary, this Defendant alleges that the Deceased was guilty of various acts, wrongs and omissions, each and all amounting to negligence, which, acting together or separately, were the sole proximate cause of his alleged injuries and damages, if any, or in the alternative, were a proximate cause thereof.

Sixth Affirmative Defense

For further answer, pleading in the alternative, this Defendant would show that Deceased's alleged injuries, death and damages, if any, were caused solely, or in the alternative, were proximately caused by acts, wrongs, omissions and negligence of third parties or a third party, in nowise connected with this Defendant and for whom this Defendant is in nowise liable or responsible; or, in the alternative, if Deceased sustained any injury from the use of any product, or from breach of warranty, then such was the result of the negligence, fault or breach of warranty of third parties other than this Defendant.

Seventh Affirmative Defense

Answering still further, if such be necessary, and in the alternative, this Defendant would show that the Deceased's injuries and Plaintiffs' damages, if any, were the result of an unavoidable accident as that term is defined in law.

Eighth Affirmative Defense

For further answer, and pleading in the alternative, this Defendant would show that all situations and conditions of

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which Plaintiffs complain, and the danger or dangers, if any, arising from the continued use of insulation material of which they complain, were open and obvious to the Deceased and if any dangers existed as claimed by them, which are not admitted, then the same, if existing, were apparent and easily discernible, and Deceased knew as much about the same as did this Defendant and the same were well known to the Deceased, or should have been known to him, and he appreciated any dangers arising therefrom, but nevertheless he continued to work as an insulator and continued to subject himself to air which was laden with insulation materials and other conditions.

Ninth Affirmative Defense

For further affirmative answer herein, this Defendant would show that the Deceased with full knowledge of the fact that he was working in dust and creating dust from the insulation products knew that he would be subject to injury and that such working conditions and any risks attendant thereto were open and obvious to him and this Defendant here and now invokes the doctrine of volenti non fit injuria as that term is known and defined in law, showing unto the Court that the Deceased knew and appreciated any dangers or risks attendant thereto and nevertheless voluntarily exposed himself to any such alleged risks, and therefore this Defendant owed the Deceased no duty to warn him of any potential dangers.

Tenth Affirmative Defense

Answering still further, if such be necessary, this Defendant would show that the Deceased voluntarily assumed the

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risk of performing the work in which he was engaged on the occasions in question, and he had actual notice and knowledge of all conditions and situations surrounding the work which he was performing and of any dangers, if any existed, arising therefrom, fully appreciated the same, but nevertheless the Deceased voluntarily proceeded and continued over a period of years to work with and around insulating materials and voluntarily exposed himself to all such conditions, dangers or hazards incident to such work and for these additional grounds this Defendant invokes the doctrine of volenti non fit injuria as that term is known and defined in law.

Eleventh Affirmative Defense

Answering still further, in the alternative, this Defendant would show that there is and was no legal liability on the part of this Defendant because of the fact that the alleged occurrences or happenings in question were brought about or caused by transitory conditions arising in the course of the work the Deceased was doing, and ordinarily incident thereto, the Deceased using his and his employers' own manner, method and means of doing the work and this Defendant owed no duty with respect thereto, nor was there any relationship as between the Deceased and this Defendant which created any duty on the part of this Defendant as to the method, manner or means in which the work was done or the conditions under which the Deceased performed such work.

Twelfth Affirmative Defense

Further answering, this Defendant says that Deceased was an experienced insulation worker according to his allegations and knew at all times that he was working with asbestos and products

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containing asbestos, as well as other products, which were harmful to him; or in the alternative, if he did not know this, his employers at all times knew that they were working with insulation materials which contained some asbestos, and said employers had knowledge of the fact that particles of said products could enter the air when said product was cut or applied, and his employers likewise had knowledge that if blowers or fans were not used in the area that their employees would be subject to the dust hazard and inhalation of dust; and further, it is common knowledge that if an individual works in an area where the air is laden with dust, that the individual will breathe the dust into his nose and body system unless the employee uses some mask, respirator or some protective device, or unless the employer provides some means whereby the dust is removed from the air as a safety measure.

Thirteenth Affirmative Defense

For further answer herein, in the alternative, this Defendant would show that its products were reasonably fit and safe for the purpose for which they were made, manufactured and sold, and that if Deceased was in fact injured as Plaintiffs allege and claim as a result of the use of any of the products of this Defendant, then such injury was the result of the negligence of the Deceased's employers or contractors and not this Defendant in failing to adopt and enforce safe working practices and methods; or alternatively, Deceased failed to use and utilize any safety devices, such as blowers, fans, mask and respirators for breathing and thus Plaintiffs are not entitled to recover against this Defendant.

Fourteenth Affirmative Defense

If Deceased did sustain anyinjury as a result of the use

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of any product manufactured by this Defendant, which is expressly denied, then such injury was sustained as a result of the occupation of the Deceased, in that he had been engaged as an insulator or worker in the insulation field for a number of years (alleged to be 33 years), and at all times knew that he was working in dust-laden air which contained asbestos dust, as well as other dust particles, part of which were created by his own work and the work of other insulators, and by the failure of his employer or the owner of the premises on which he was working to provide facilities for the elimination of dust-laden air, and therefore any such injury as he may have sustained was some occupational disease resulting from his long continued occupation a an insulator and not as a result of any isolated incident or contact with any product manufactured by this Defendant. This Defendant says that it is not legally liable or responsible for any occupational disease which was suffered or sustained by Deceased in the course of his employments over a number of years; and further, this Defendant denies that the Deceased worked with products manufactured by this Defendant.

Fifteenth Affirmative Defense

Further answering herein, and while denying that the Deceased sustained any injury as a result of contact with or use of any product manufactured by this Defendant, if he did sustain injury or did sustain an occupational disease as a result of the use of any insulation product manufactured by this Defendant, separately, or in conjunction with products manufactured by other Defendants, then this Defendant says that Deceased was guilty of various acts, wrongs

and omissions, each and all of which amounted to negligence in the performance of his work and occupation, which acting together or separately was a proximate cause of his injury. In this connection, this Defendant would show that Deceased failed to use and utilize any safety devices such as masks and respirators for breathing; that he failed to request the use of such masks and respirators; that he failed to request his employer to furnish blowers and other equipment to remove the dust-laden air and he worked in dust-laden air with full knowledge that he was inhaling such dust-laden air; and he continued to work with insulation materials containing some asbestos after he knew, or in the exercise of ordinary care should have known, that it was affecting his health.

Sixteenth Affirmative Defense

Further answering herein, this Defendant says that during the period of time for which the Deceased is asserting a claim and injury that the State of Texas had enacted a workmen's compensation law which provided that the disease of asbestosis is an occupational disease for which a person engaged in the occupation of an asbestos worker or working with asbestos products can claim workmen's compensation disability benefits against his last employer at the time the disease is discovered. According to the Plaintiffs' pleadings, the Deceased worked with asbestos and asbestos products over a period of some 33 years, and if Deceased had asbestosis, such was due to the nature of his occupation and was acquired over a long period of time and was not the result of working with any particular product or products, but was due to the nature of his employment.

Further, the Texas Workmen's Compensation Act provides

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workmen's compensation benefits for the death of any employee if the death resulted from an injury or occupational disease incurred or sustained in the course of his employment and such death benefits accrue to the widow of the deceased employee.

Seventeenth Affirmative Defense

For further grounds of relief, this Defendant says that if any judgment is entered herein jointly and severally against this Defendant and the other Defendants herein, then in such event, this Defendant is entitled to contribution over and against such other Defendants in accordance with the provisions of Article 2212 of Vernon's Civil Statutes of Texas.

WHEREFORE, this Defendant having fully answered herein prays judgment of the Court that Plaintiffs take nothing against this Defendant by their suit and that this Defendant go hence without day for its cost, or in the alternative, that this Defendant have judgment for contribution as set forth above.

Respectfully submitted,

VINSON, ELKINS, SEARLS & CONNALLY

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing has been served upon counsel for Plaintiff and counsel for the Defendants by mailing a copy of the same to the address shown below on each counsel of record by depositing the same in the United States Mail, properly addressed, with postage paid, on the 29th day of July, 1970.

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