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

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUL 31 1970
JAMES R. COONEY, CLERK
BY DEPUTY Margaret Turner

CLARENCE BOREL, PLAINTIFF

V.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL., DEFENDANTS

CIVIL ACTION NO. 6449

SECOND AMENDED ORIGINAL ANSWER OF DEFENDANT, OWENS-CORNING FIBERGLAS CORPORATION TO PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT

COMES NOW Owens-Corning Fiberglas Corporation, one of the defendants in the above styled and numbered cause and answering plaintiffs' second amended original complaint on file herein respectfully says:

1.

Answering Paragraph 1, this defendant says that it does not know whether this Court has jurisdiction of this controversy inasmuch as it does not have knowledge as to the citizenship of certain of the parties plaintiff or of the parties defendant other than this defendant. Defendant admits that the amount in controversy herein exceeds the sum of Ten Thousand ($10,000.00) Dollars exclusive of interest and costs.

2.

Answering Paragraph 2, this defendant says that it does not know where the plaintiffs presently reside.

3.

Answering Paragraph 3, this defendant says that it does not have sufficient knowledge to either admit or deny the allegations of fact therein set forth except that it has been advised that Clarence Borel died on or about June 3, 1970.

4.

Answering Paragraph 4, this defendant denies that plaintiffs have any cause of action against this

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defendant by virtue of Article 4671, Revised Civil Statutes of Texas, or Article 5525, Revised Civil Statutes of Texas.

5.

Answering Paragraph 4-A, this defendant admits that it manufactured and sold insulation materials but denies that any of them caused any injury to Clarence Borel or his death.

6.

This defendant denies the facts stated in Paragraphs 5, 6, 7, 8, 8-A, 9, 10, 11, 12 and 14 of said complaint.

7.

Answering Paragraph 13, this defendant denies that it is in anywise legally liable or responsible for the death of Clarence Borel. As to all other matters of fact set forth in said paragraph this defendant says that it does not have sufficient knowledge to either admit or deny the same.

8.

This defendant denies that plaintiffs are entitled to the relief prayed for in the concluding paragraph of said complaint.

9.

For further affirmative defense herein, this defendant says that the products which this defendant manufactured and sold were at all times reasonable, fit and suitable for the purposes for which manufactured and sold, and this defendant denies that the same were in anywise defective for the use for which they were manufactured.

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10.

For further affirmative defense herein, this defendant denies that Clarence Borel either sustained any injury or died as the result of contact with or use of any product manufactured by this defendant, and denies that any product or products which it manufactured and sold in anywise caused or brought about any injury or illness or death to Clarence Borel and this defendant further says that any injury or illness or the death of Clarence Borel which plaintiffs complain of herein were in nowise caused or brought about by any product manufactured and sold by this defendant, and that such injury or illness or death were due solely to disease or other causes.

11.

For further affirmative defense herein, this defendant avers that if Clarence Borel did sustain any injury or died as the result of the use of any product manufactured by this defendant, which is not admitted but expressly denied, then such injury and death were sustained as a result of the occupation of Clarence Borel as an insulator or worker in the insulation field for a number of years; that at all times he knew he was working in dust laden air which contained asbestos dust and other dust particles created by his own work and the work of other insulators, and by the failure of his employers or the owners of the premises on which he was working to provide facilities and means for the elimination of dust laden air, and therefore any such injury as he may have sustained and his death was because of some occupational disease resulting from his continued occupation over a

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long period of time as an insulator, and not as a result of any isolated incident or contact with any product manufactured by this defendant, and this defendant is not legally liable therefor; that further this defendant denies that Clarence Borel worked with products manufactured by this defendant.

12.

For further affirmative defense herein, this defendant specially denies that Clarence Borel sustained any injury or died as a result of contact with or use 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 it or any of its agents, servants or employees were guilty of any negligence proximately causing or contributing to cause the alleged injuries and death of Clarence Borel and the plaintiffs' alleged damages, if any; but on the contrary, this defendant avers that Clarence Borel himself 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 death and plaintiffs' alleged damages, if any, or, in the alternative, were a proximate cause thereof.

13.

For further affirmative defense, and in the alternative, this defendant alleges that Clarence Borel's alleged injuries and death and plaintiffs' alleged 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 for whose act or actions

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this defendant is in nowise liable or responsible; or, in the alternative, Clarence Borel's alleged injuries and death and plaintiffs' alleged damages, if any, were solely due to causes other than any negligence, fault or breach of warranty, none of which are admitted, but denied, on the part of this defendant.

14.

For further affirmative defense, and in the alternative, this defendant would show unto the Court that all situations and conditions, and the danger, if any, arising from the continued use of such insulating material or materials w ere open and obvious to Clarence Borel and if any dangers existed as claimed by plaintiffs, which are not admitted but denied, same, if they existed, were apparent and were easily discernible to Clarence Borel, and he knew as much about same as did this defendant, and such matters were well known to him or should have been known to him; but, nevertheless, he continued to work as an insulator and continued to subject himself to air which was laden with insulation material and such conditions, if they existed, were not such that this defendant would be legally liable to either Clarence Borel or the plaintiffs therefor.

15.

For further affirmative defense, and in the alternative, this defendant avers that Clarence Borel at all times knew of the dangers involved with insulation materials containing asbestos and in working in dust laden air where insulation materials were in use, and he had actual notice and knowledge thereof, or, in the alternative, should have known of same, and he knew and appreciated

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the nature and extent of such dangers, if any, and he continued to use and to work with such materials and under such conditions with such knowledge, and therefore this defendant owed him no duty to warn him of any potential dangers involved, if any, and defendant pleads the doctrine of volenti non fit injuria herein.

16.

For further affirmative defense herein, this defendant says that any cause of action which the plaintiffs have or may ever have had against this defendant accrued more than two years prior to the commencement of this suit against this defendant and is barred by the Texas two year statute of limitations, Article 5526, Vernon's Civil Statutes of Texas, and defendant pleads same in bar to this suit.

17.

For further affirmative defense herein, this defendant says that any cause of action which the plaintiffs have or may ever have had against this defendant accrued more than four years prior to the commencement of this suit against this defendant and is barred by the Texas four year statute of limitations, Article 5529, Vernon's Civil Statutes of Texas, and defendant pleads same in bar to this suit.

18.

For further affirmative defense, and 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 happenings in question were brought about or caused by transitory conditions

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arising in the course of the work Clarence Borel was doing and ordinarily incident thereto, Clarence Borel and his own employers using their own manner, method and means of doing the work and defendant owed no duty with respect thereto.

19.

For further affirmative defense, and in the alternative, this defendant says that Clarence Borel's alleged injuries and death and plaintiffs' alleged damages, if any, were the result of an unavoidable accident.

20.

For further affirmative defense herein this defendant says that during the period of time that Clarence Borel is alleged to have been injuriously exposed to asbestos dust, he was an employee of this defendant in the State of Arizona, at which time this defendant was a subscriber under the Workmen's Compensation Law of Arizona and Occupational Disease Act of Arizona, and plaintiffs are, therefore, precluded thereunder from any recovery of actual damages herein against this defendant because of the alleged injuries and death of Clarence Borel.

21.

For further affirmative defense herein this defendant says that during the period of time that Clarence Borel is alleged to have been injuriously exposed to asbestos dust, he was an employee of this defendant in the State of Illinois, at which time this defendant was a subscriber under the Workmen's Compensation Law of Illinois and Occupational Disease Act of Illinois, and plaintiffs are, therefore, precluded thereunder from any recovery of actual damages herein against this

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defendant because of the alleged injuries and death of Clarence Borel.

22.

For further grounds of relief, this defendant says that if any judgment is incurred herein jointly and severally against it and other defendants, then, and in such event, this defendant is entitled to contribution against such other defendants according to the provisions of Article 2212 of Vernon's Civil Statutes of Texas.

WHEREFORE, this defendant prays judgment of the Court that plaintiffs take nothing against it by their said complaint and that it go hence and recover its costs in this behalf expended, or, in the alternative, that it have judgment for contribution as set forth above.

Respectfully submitted,

KING, SHARFSTEIN & RIENSTRA

BY: _____

707 Beaumont Savings Building
Beaumont, Texas 77701

ATTORNEYS FOR OWENS-CORNING FIBERGLAS CORPORATION

A true copy of the above and foregoing answer was on this the 30th day of July, 1970, served upon counsel for the plaintiffs by depositing the same in the United States Mail, postage prepaid, addressed to Honorable Ward Stephenson, Attorney at Law, Stephenson Building, Orange, Texas, and also a true copy was served on all other interested counsel of record.

_____

ATTORNEYS FOR DEFENDANT, OWENS-CORNING FIBERGLAS CORPORATION

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