GED:MB 1/27/71 0-f-1

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JAN 29 1971
JAMES R. COONEY, CLERK
BY DEPUTY Hazel E. Studdard

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 :

FIRST AMENDED ORIGINAL ANSWER OF PITTSBURGH CORNING CORPORATION TO PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now PITTSBURGH CORNING CORPORATION, named as the sixth Defendant in the above-styled and numbered cause, subject to its Motion to Dismiss, and files this its First Amended Original Answer in reply to Plaintiffs' Second Amended Original Complaint, respectfully representing unto the Court as follows:

1.

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 upon diversity of citizenship of the parties. It is admitted that the claim asserted by Plaintiffs exceeds the jurisdictional amount.

2.

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

3.

Answering the allegations in Paragraph 3, this Defendant is without knowledge as to each and all of said allegations, except it is admitted that Clarence Borel died on the 3rd day of June, 1970.

4.

In reply to paragraph 4, it is denied that Plaintiffs have any cause of action for wrongful death under Article 4671, Revised Civil Statutes of the State

1133

Published by AsbestosClaims.Law
asbestosclaims.law/library/10063/1

of Texas. It is further denied that Article 5525, Revised Civil Statutes of the State of Texas, creates any cause of action. It is denied that this Defendant caused the deceased any personal injury during his lifetime.

4-A.

Answering Paragraph 4-A of said Complaint and only on behalf of Pittsburgh Corning Corporation, it is admitted that Pittsburgh Corning Corporation is now engaged in the manufacture of materials used for pipe insulation which contain a small amount of asbestos. It is denied that this Defendant, during all of the times mentioned in said Complaint, and for a long time prior thereto, was engaged in the manufacture of materials used for insulation containing asbestos. It is denied that now, or at any time, this Defendant manufactured said insulation products and placed the same on the market to be purchased and used by the general public, but to the contrary, this Defendant affirmatively alleges that it sells its products to distributors, independent contractors and agencies of the United States Government who employ experienced insulation workers in the application of the product.

This Defendant does not purport to answer said allegations contained in Paragraph 4-A for each and all of the other Defendants.

5.

In reply to Paragraph 5, this Defendant says that it has no knowledge with reference to the employment of Clarence Borel at any time mentioned in said paragraph, but denies the allegations contained in said paragraph with regard to Borel's contact with dangerous products and specifically denies that the insulation products manufactured by it were dangerous.

6.

This Defendant denies the allegations contained in Paragraph 6.

7.

This Defendant, answering only for itself, denies the allegations contained in Paragraph 7, including literary subparagraphs (a) through (e), inclusive.

Published by AsbestosClaims.Law
asbestosclaims.law/library/10063/2

8.

This Defendant denies the allegations contained in Paragraph 8, including literary subparagraphs (a) through (d), inclusive, and specifically denies that it breached any warranty which may have existed as to its products and to the deceased.

8-A.

This Defendant denies the allegations contained in Paragraph 8-A, and it is specifically denied that its products were unsafe for their intended use.

9.

This Defendant denies the allegations contained in Paragraph 9.

10.

In reply to the allegations in Paragraph 10, this Defendant denies that deceased sustained any injury as a result of any act or omission on the part of this Defendant, and denies that deceased was injured as a result of any alleged breach of warranty of this Defendant. This Defendant has no knowledge or information as to the cause or causes of deceased's alleged disability and death, but it denies that same was caused or brought about as a result of any act or omission on the part of this Defendant or from the use of any product manufactured by this Defendant.

This Defendant expressly denies any violation of the Uniform Commercial Code adopted under the laws of the State of Texas, for the reason that said Code was not effective in Texas until midnight, June 30, 1966, and was not retroactive.

11.

This Defendant denies the allegations contained in Paragraph 11.

12.

This Defendant denies the allegations contained in Paragraph 12.

13.

This Defendant denies the allegations contained in Paragraph 13 with the exception of the age of the deceased at the time of his death, and further

Published by AsbestosClaims.Law
asbestosclaims.law/library/10063/3

denies that Plaintiffs, or either of them, are entitled to recover any sum against this Defendant.

14.

This Defendant denies the allegations contained in Paragraph 14.

15.

This Defendant denies the allegations contained in Plaintiffs' prayer and denies that Plaintiffs, or either of them, are entitled to any relief against this Defendant, Pittsburgh Corning Corporation.

AFFIRMATIVE DEFENSES

First Affirmative Defense

This Defendant, Pittsburgh Corning Corporation, denies that the deceased sustained any injury as a result of contact or use of any product manufactured by it.

Second Affirmative Defense

Further answering herein, and by way of affirmative defense, this Defendant, Pittsburgh Corning Corporation, says that the products which this Defendant manufactured and sold were at all times reasonably fit and suitable for the purposes for which they were made, manufactured and sold. It is denied that the same were in anywise defective for the use for which they were manufactured, or that said products were unreasonably dangerous to the ultimate user and that, therefore, it is affirmatively alleged that this Defendant is not subject to liability to Plaintiffs, or either of them.

Third Affirmative Defense

This Defendant, Pittsburgh Corning Corporation, denies that any product which it manufactured and sold in anywise caused, or brought about any injury or illness to deceased, and this Defendant further says that the physical condition of which Plaintiffs complain is the result, in whole or in part, of prior or subsequent injuries, diseases, bodily conditions and infirmities, for which, or for the consequences of which, this Defendant is in nowise liable or responsible.

The Borel v. Fibreboard Case File (1969-1972), Answer to second amended complaint
ACL Doc 10063 · Page 4 of 13
Published by AsbestosClaims.Law
asbestosclaims.law/library/10063/4

Fourth Affirmative Defense

If deceased did sustain any injury as a result of the use 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, 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 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 an occupational disease from his long-continued occupation as an insulator, and not as a result of any isolated incident or contact with any product manufactured by Pittsburgh Corning Corporation. 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 employment over a number of years; and further, Defendant, Pittsburgh Corning Corporation denies that the deceased worked with products manufactured by it.

Fifth Affirmative Defense

Pittsburgh Corning Corporation denies that any product or products which it manufactured and sold for heat insulation purposes in anywise caused or brought about injury or illness, if any, to the deceased, and this Defendant says that the physical conditions of which Plaintiffs complain were in nowise caused or brought about by any product manufactured or sold by this Defendant, but such condition was due solely to disease and other causes, or to the acts and omissions of third persons, and the acts of the deceased.

Sixth Affirmative Defense

Further answering herein, and while denying that the deceased sustained an injury as a result of contact or use of any product manufactured by Pittsburgh Corning Corporation, if he did sustain an injury or did sustain an occupational disease as a result of the use of any insulation product

1137

The Borel v. Fibreboard Case File (1969-1972), Answer to second amended complaint
ACL Doc 10063 · Page 5 of 13
Published by AsbestosClaims.Law
asbestosclaims.law/library/10063/5

manufactured by this Defendant, which it specifically denies, either separately, or in conjunction with products manufactured by any of the other Defendants, then this Defendant would show that the injuries, conditions and damages of which Plaintiffs complain were due solely and alone, or in the alternative, were proximately caused by the negligent acts, wrongs and omissions of the deceased, and that at all times material hereto, deceased failed to exercise ordinary care for his own safety, all of which proximately caused the injuries and conditions of which Plaintiffs now complain, all of which is plead in bar hereof.

Seventh Affirmative Defense

For further answer herein, if such be necessary, and as an affirmative defense, this Defendant says that deceased failed and refused to use and utilize any safety devices, such as a mask or respirator for breathing; that he failed to request the use of such mask and respirator; 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; that he continued to work with insulation material containing some asbestos after he knew, or in the exercise of ordinary care, should have known that it was affecting his health.

Eighth Affirmative Defense

For further answer and affirmative defense, if such be necessary, this Defendant, Pittsburgh Corning Corporation, says that if the deceased did sustain any injury as the result of the use of any product manufactured by this Defendant, which this Defendant expressly denies, that the deceased used the product with full knowledge of the fact that he was creating dust from the insulation product, and that he continued to work in and around materials, or in areas where he was exposed to the inhalation of dust or other foreign substances, but that he continued to work under such conditions, knowing that he would breathe the dust, and that it was, or would be harmful to him, which bars him from any recovery under the theory that any risk was open and obvious to him, and he is likewise barred under the doctrine of volenti non fit injuria.

The Borel v. Fibreboard Case File (1969-1972), Answer to second amended complaint
ACL Doc 10063 · Page 6 of 13
Published by AsbestosClaims.Law
asbestosclaims.law/library/10063/6

Ninth Affirmative Defense

If deceased did sustain any injury, as a result of the use of any product manufactured by this Defendant, Pittsburgh Corning Corporation, which is expressly denied, then such occurred more than two years prior to the filing of this suit and such cause of action for personal injury is barred by the two (2) year statute of limitations for the State of Texas.

Tenth Affirmative Defense

If deceased did sustain any injury as the result of the use of any product manufactured by this Defendant, which is affirmatively denied, then such occurred more than four (4)years prior to the filing of this suit and such cause of action for personal injury is barred by the four (4) year statute of limitations for the State of Texas.

Eleventh Affirmative Defense

Further answering herein, Defendant, Pittsburgh Corning Corporation says that the deceased was an experienced insulation worker, according to his allegations, and knew at all times that he was working with asbestos and products containing asbestos, as well as other products, which were harmful to him or, in the alternative, if he did not know this, his employers knew, at all times, that they were working with insulation materials which contain some asbestos, and said employers had knowledge of the fact that particles of said products could enter the air when said products were cut or applied, and the employer likewise had knowledge that if blowers orfans were not used in the area, that their employees would be subject to the dust hazard and inhalation of dust; which said knowledge of the deceased's employers was imputed to the deceased; and further, the failure orrefusal of his employer or employers to provide some means whereby the dust was removed from the air as a safety measure, was due to the negligence of his said employer or employers for which, or for the consequences of which, this Defendant is not liable.

Twelfth Affirmative Defense

For further answer herein, and by way of affirmative defense, this Defendant says that if the deceased sustained any injury, as the result

Published by AsbestosClaims.Law
asbestosclaims.law/library/10063/7

of the use of any product manufactured by Pittsburgh Corning Corporation, which is affirmatively denied, then there existed no duty on the part of this Defendant to warn the deceased of any potential danger in the handling of the insulating materials and products, and this Defendant denies that it owed any duty to the deceased to give him any warnings with respect to such products.

Thirteenth Affirmative Defense

This Defendant, Pittsburgh Corning Corporation, denies the existence of any warranty on its part, and denies any fault or breach of warranty on the part of this Defendant, but on the contrary, says that the insulation product or products manufactured by it were at all times reasonably fit and suitable for the purpose of insulation which was the purpose for which they were manufactured and sold, and the deceased's injury, if any, did not result from any defect of such products. Further, any and all dust conditions which resulted from use of the products were created during the application thereof, at which time the products were cut or changed from the original form in which they were manufactured by this Defendant, and the conditions under which the deceased worked were at all times prescribed by his employer, or the owners of the premises where the deceased was employed. This Defendant had no responsibility for the condition or conditions at the place of employment where the deceased was performing his work, nor is it responsible for the conditions which existed as a result of the changed such product or products from their original form in which they were manufactured by this Defendant.

Fourteenth Affirmative Defense

Further answering herein, and in the alternative, this Defendant says that it is not and cannot be subject to liability to Plaintiffs herein under the doctrine of strict liability for the reason that the product or products which were manufactured and sold by this Defendant were not defective and unreasonably dangerous to the user thereof or, specifically to the deceased, at the time its said product or products were manufactured and sold; that any injury to deceased, if any, which occurred to him as a result of use of its

Published by AsbestosClaims.Law
asbestosclaims.law/library/10063/8

product or products, occurred when said product or products were not being used in the normal and customary fashion and the deceased, or in the alternative, his employer or employers, changed said product or products from the form in which it was initially manufactured, so that the injury, if any to the deceased, did not occur during an intended use of said product or products, and the method or methods of use and application thereof by the deceased and, in the alternative, his employer or employers, was negligent and dangerous under the circumstances.

Fifteenth Affirmative Defense

Further answering herein and, in the alternative, this Defendant says that the deceased's alleged injuries 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, for whose acts this Defendant is in nowise liable or responsible or, in the alternative, if the deceased sustained any injuries from the use of any of its products or from any breach of warranty, none of which are admitted, but denied, then such was the result of the fault or breach of warranty of third parties, other than this Defendant.

Sixteenth Affirmative Defense

For further answer herein, and by way of affirmative defense, this Defendant says that the deceased's injuries and damages, if any, were the result of an unavoidable accident.

Seventeenth Affirmative Defense

Further answering herein and, in the alternative, Defendant, Pittsburgh Corning Corporation, would show that there is and was no legal liability on the part of this Defendant, in that the alleged happenings in question were brought about or caused by transitory conditions arising in the course of the work which the deceased was doing, and ordinarily incident thereto; and the deceased and his employers used their own manner, method and means for performing such work, and this Defendant, Pittsburgh Corning Corporation, owed no duty with respect to such work, nor was there any relationship as

The Borel v. Fibreboard Case File (1969-1972), Answer to second amended complaint
ACL Doc 10063 · Page 9 of 13
Published by AsbestosClaims.Law
asbestosclaims.law/library/10063/9

between the deceased and Pittsburgh Corning Corporation, which created any duty on the part of it as to the manner or method in which the work was done, or the conditions under which the deceased performed such work.

Eighteenth Affirmative Defense

For further answer herein, Defendant says that if the Plaintiffs should recover any judgment herein (and this Defendant, Pittsburgh Corning Corporation specifically denies that Plaintiffs are entitled to recover judgment as against it), then, and in such event, and under the provisions of Article 2212 of Vernon's Annotated Civil Statutes of the State of Texas, as well as at common law, and the laws of any state where any alleged course of action occurred, Defendant is entitled to judgment for contribution over and against the other defendants herein, and each of them, jointly and severally.

WHEREFORE, Defendant, PITTSBURGH CORNING CORPORATION, moves and prays the Court that upon trial hereof Plaintiffs recover nothing, as against this Defendant and, in the alternative, for judgment against the other defendants for contribution over, and for such other and further relief in the premises as this Defendant may show itself justly entitled to receive.

Respectfully submitted,

WELLS, DUNCAN, BEARD,
GREENBERG AND HUNT

By George E. Duncan
515 Beaumont Savings Building
P. O. Box 3708

Beaumont, Texas 77704

Attorneys for Defendant,
PITTSBURGH CORNING CORPORATION

The Borel v. Fibreboard Case File (1969-1972), Answer to second amended complaint
ACL Doc 10063 · Page 10 of 13
Published by AsbestosClaims.Law
asbestosclaims.law/library/10063/10

CROSS-ACTION OF DEFENDANT,
PITTSBURGH CORNING CORPORATION

TO SAID HONORABLE COURT:

Comes now PITTSBURGH CORNING CORPORATION, one of the Defendants in the above-styled and numbered cause, and files this its Cross-Action against Fibreboard Paper Products Corporation, Combustion Engineering, Inc., Johns-Manville Products Corporation, Owens-Corning Fiber Glass Corporation, Eagle-Picher Industries, Inc., Unarco Industries, Inc., Philip Carey Corporation, Standard Asbestos Manufacturing and In sulating Company, Ruberoid Company and Armstrong Cork Company, all hereinafter called CROSS-DEFENDANTS, and for said Cross-Action would show this Honorable Court the following:

1.

Defendant, Pittsburgh Corning Corporation, alleges and avers that if Plaintiffs' deceased sustained any injury as a result of any act or omission on the part of this Defendant, Pittsburgh Corning Corporation, which this Defendant specifically denies, then, such injury was caused and proximately caused and contributed to be caused by the acts and omissions of the remaining Defendants above-named and each of them, the Defendant, Unarco Industries, Inc. being a successor in interest to the Union Asbestos and Rubber Company, and if any judgment is entered herein against this Defendant, Pittsburgh Corning Corporation then, and in such event, this Defendant is entitled to indemnity from each and all of the other Defendants or, in the alternative, is entitled to contribution against each and all of the other defendants in accordance with the provisions of Article 2212 of Vernon's Annotated Civil Statutes of Texas.

2.

This Defendant adopts and alleges each and every act against the Cross-Defendants herein, as is alleged in the Plaintiffs' Second Amended Original Complaint against each and all of sidd Defendants.

The Borel v. Fibreboard Case File (1969-1972), Answer to second amended complaint Published by AsbestosClaims.Law
ACL Doc 10063 · Page 11 of 13 asbestosclaims.law/library/10063/11

WHEREFORE, this Defendant prays Judgment of the Court that Plaintiffs take nothing against it, and that it go hence with its costs; in the alternative, that it have Judgment for indemnity; in the further alternative, that it have Judgment for contribution as set out above, and for such other and further relief in the premises as this Defendant may show itself justly entitled to receive.

Respectfully submitted,

WELLS, DUNCAN, BEARD,
GREENBERG AND HUNT

By George E. Duncan
515 Beaumont Savings Building
P. O. Box 3708
Beaumont, Texas 77704

Attorneys for Defendant,
PITTSBURGH CORNING CORPORATION

Certificate of Service

I hereby certify that a copy of the above and foregoing First Amended Original Answer of Pittsburgh Corning Corporation to Plaintiffs' Second Amended Original Complaint, as well as the Cross-Action of Pittsburgh Corning Corporation against all other Defendants, was mailed to Ward Stephenson, Esquire, Attorney for Plaintiffs, and to the other attorneys of record in this case, postage prepaid, United States Mail, on this the 28th day of January, 1971.

George E. Duncan
George E. Duncan,
Attorney for Defendant,
PITTSBURGH CORNING CORPORATION

The Borel v. Fibreboard Case File (1969-1972), Answer to second amended complaint
ACL Doc 10063 · Page 12 of 13
Published by AsbestosClaims.Law
asbestosclaims.law/library/10063/12

CIVIL ACTION NO. 6449

CLARENCE BOREL

vs.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

FIRST AMENDED ORIGINAL ANSWER OF PITTSBURGH CORNING CORPORATION TO PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT

LAW OFFICES OF
WELLS, DUNCAN AND BEARD
BEAUMONT SAVINGS BUILDING
BEAUMONT, TEXAS
77701

The Borel v. Fibreboard Case File (1969-1972), Answer to second amended complaint
ACL Doc 10063 · Page 13 of 13
Published by AsbestosClaims.Law
asbestosclaims.law/library/10063/13