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FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SEP 10 1971
JAMES R. COONEY, CLERK
BY DEPUTY Mildred C. Verret

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

CLARENCE BOREL

vs.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

CIVIL ACTION NO. 6449

CHARGE OF THE COURT AND OBJECTIONS

BE IT REMEMBERED that on the 28th, 29th days of September, 1971, before the Honorable Joe J. Fisher, United States District Judge, and a Jury, the following proceedings were had in the above-styled and numbered civil cause:

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- COURT'S CHARGE -

Members of the Jury:

The Court will now give you the Charge.

You, as jurors, are the sole judges of the facts. You are duty bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you.

You are not to single out any one instruction alone as stating the law, but you must consider the entire instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law regardless of any opinion you may have as to what the law ought to be. It would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the Plaintiff, and the answer thereto of the Defendants. You are to perform this duty without bias or prejudice to any party. The law does not permit jurors to be governed by sympathy, prejudice or public opinion. The parties and the

public expect that you will carefully and impartially consider all of the evidence, follow the law as stated by the Court, and reach a just verdict regardless of the consequences. The law is no respector of persons. All persons stand equal before the law and are to be dealt with as equals in a court of justice. A corporation is entitled to the same fair trial at your hands as a private individual.

Now, the burden is on the Plaintiff to prove every essential element of the case by a preponderance of the evidence. If the proof fails to establish any essential element of the Plaintiff's case by a preponderance of the evidence, then you would find for the Defendant or Defendants. To establish by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a PREPONDERANCE OF THE EVIDENCE means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your mind belief that what is sought to be proved is more likely true than not true.

There are, generally speaking, two kinds of evidence from which a jury may properly find the truth as to the facts of the case. One is DIRECT

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EVIDENCE, such as the testimony of an eyewitness. The other is INDIRECT OR CIRCUMSTANTIAL EVIDENCE, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence but simply requires that the jury find the facts in accordance with a preponderance of all the evidence received, both direct and circumstantial.

Statements and arguments of counsel are not evidence in the case unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, all facts and events which have been judicially noticed, and all applicable presumptions stated in these instructions. Any evidence to which an objection

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was sustained by the Court, and any evidence ordered stricken by the Court must be entirely disregarded; you are to consider only the evidence in this case. And in your consideration of the evidence you are not limited to the mere statement of the witnesses. On the contrary, you are permitted to draw from facts which you find have been proved; such reasonable inferences as seem justified in the light of your own experience.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called expert witness is an exception to this rule. A witness who, by education and experience, has become expert in any art, science, profession or calling, may be permitted to state his or her opinion as to a matter in which he or she is versed and which is material to a case, and may state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves. You may reject it entirely if you conclude the reasons given in support of the opinion are unsound. The opinion of a doctor as to the condition of

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a patient may be based entirely upon objective symptoms revealed through observation, examination, tests or treatment, or the opinion may be entirely upon subjective symptoms revealed only by statements made by the patient, or the opinion may be based, in part, upon objective symptoms and, in part, upon subjective symptoms. To the extent that any opinion testified to by a doctor is based upon subjective symptoms stated to him by a patient, the jury is entitled to consider the trustworthiness of such statements in determining the weight to be given the opinion.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce in your mind belief in the likelihood of truth as against the testimony of a lesser number of witnesses or other evidence which does produce such belief in your mind. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your mind as being most accurate and otherwise trustworthy. The testimony of a single witness

which produces in your mind belief in the likelihood of truth is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary if after fully considering all the evidence in the case, you hold greater belief in the accuracy and honesty of the one witness.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testified, by the character of the testimony given or by contradictory evidence. You should carefully scrutinize the testimony given and the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive and state of mind and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case, the manner in which each witness might be affected by the

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verdict and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

During the trial of the case certain testimony has been read to you by way of depositions. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand is usually presented in writing, under oath, in the form of a deposition. Such testimony is entitled to the same consideration and, insofar as possible, is to be judged as to credibility and weighed by the jury in the same way as if the witness had been present.

The plaintiff in this case claims damages for personal injuries as a result of the death of her husband, Clarence Borel, and alleges to have suffered death as a result of the proximate cause of the negligence on the part of the defendants. Therefore, the Court would give you the definition of negligence. NEGLIGENCE is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do actuated by those considerations which ordinarily

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regulate the conduct of human affairs. ORDINARY CARE is that care which persons of ordinary prudence will exercise in the management of their own affairs in order to avoid injury to themselves or others. Ordinary care is not an absolute term but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case the conduct in question must be considered in light of all the surrounding circumstances as shown by the evidence, because the amount of care used by an ordinary prudent person varies in proportion to the danger known to be involved in what is being done. It follows that in the exercise of ordinary care the amount of caution required will vary with the nature of what is being done and all the surrounding circumstances. To put it another way, as the danger that should reasonably be foreseen increases so the amount of care required by law also increases.

✓ PROXIMATE CAUSE means that cause which, in a natural and continuous sequence, produces an event and without which cause such event would not have occurred. In order to be a

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proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event or some similar event might reasonably result therefrom. There may be more than one proximate cause of an event.

Now, in this connection as we have told you, Mrs. Borel, as the plaintiff, alleges that the defendants, each and all of them, were guilty of negligence, which negligence was the proximate cause. Now, the plaintiff contends that the defendants knew or in the exercise of ordinary or reasonable care ought to have known that the insulation they so prepared and manufactured and distributed were deleterious, poisonous and highly harmful to the deceased's body, lungs, respiratory system, skin and health, and that therefore the defendants were negligent in failing to take any reasonable precaution or exercise reasonable care to warn the deceased of the danger and the harm to which he was exposed while handling the defendants' asbestos product as an insulator.

Further, they allege that the defendants

were negligent in failing and omitting to provide the deceased with the knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances or method of handling or using said products so as to protect the deceased from being disabled and resulting in his death.

Further, they contend 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, that the defendants should have removed such product from the market upon ascertaining that such products would cause asbestosis. Now those are the specific acts of negligence contended for by the plaintiff.

Now, in this connection it is necessary for the Court to give you certain instructions in regard to the warning. As you know, one of the acts of negligence contended for by the plaintiff and perhaps the principle act of negligence is that the manufacturer should have given a warning or a proper warning as to the use of its product. The Court would

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instruct you that a manufacturer of goods has a duty to give reasonable warning as to the dangers inherent or reasonably foreseeable in using his product. The defendants are under an obligation and duty to give reasonable warning as to the danger of their products, even if the product or products is ~~or~~ not being used in a specific manner, so long as the use to which the product was put was a use that the manufacturer could reasonably foresee.

Also, in connection with the manner of warning, the Court would instruct you that the defendants are under no duty to warn of any danger in the use of their products unless and until the state of the medical and technical knowledge was such that a reasonable prudent manufacturer would have been aware of the danger and the necessity of giving warning.

Further, the defendant cannot be held responsible for failure to give warnings unless it is first established by a preponderance of the evidence that the state of the medical and technical knowledge was such that the defendants, manufacturers of the products,

involved knew or in the exercise of care should have known that the manner in which their products was being handled, used and installed by insulator workers rendered them unreasonably dangerous to the user or consumer or those engaged in the installing of the product.

Now, keeping these specific acts of negligence contended for by the plaintiff in mind, the Court would instruct you that if you find from a preponderance of the evidence that the defendants or any one of them was guilty of any one act or omission of negligence contended for by the plaintiff and that such act of negligence was a proximate cause of the injuries and death of Mr. Borel, then you would find for the plaintiff, unless you should find for the defendant or defendants under some further instruction of the Court. The Court would further instruct you that you need not find that all of the acts or omissions of negligence as contended for by the plaintiff exist. You only have to find that some one act or omission of negligence existed from a preponderance of the evidence and which single act or omission of

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negligence was the proximate cause.

Now, further, the plaintiff contends that the defendants were guilty of gross negligence. The plaintiff further alleges that the injuries and death of the deceased resulted and plaintiff's resulting damages were directly and proximately caused by the gross negligence, wantonness, omission and conscious indifference on the part of the defendants, their agents, servants and employees, managers, superintendent, supervisors and officers and their utter disregard for the lives and welfare of persons coming in contact with their products. And plaintiff seeks to recover an award for this count 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. You are instructed that the term GROSS NEGLIGENCE means that entire want of care which would raise the belief that the act or omission complained of was a result of a conscious indifference to the right or welfare of a person or persons to be affected by it. In order to prove the essential elements of plaintiff's case, the burden is upon the plaintiff to establish by

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a preponderance of the evidence that the acts of negligence as complained about by the plaintiff were gross in their actions. In other words, that they were not only ordinary negligent acts, but that they were gross negligent acts and that such acts on the part of the defendants, their agents, servants and employees, managers, supervisors, superintendents and officers was a proximate cause of the injury of the deceased and his death.

Now, the plaintiff also contends that the defendants are liable under a breach of warranty or what is known as strict liability. They contend that the defendants and each of them knew that their insulation 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 and that defendants, each of them, knew that the insulating products containing asbestos manufactured and distributed by the company 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' product; that 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 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 defect in the products of the defendants were a proximate cause of the injury and resulting death of Clarence Borel; that as the result of the use of the defendants' product by the deceased he suffered serious, sever, disabling and permanent injuries resulting in his death and as a result thereof, defendants and each of them are strictly liable to plaintiff for their failure to deliver a product to the deceased that would not cause the deceased harm.

Now, in this connection, the Court would instruct you that one who undertakes to manufacture an article for sale or use by others is held to the skill of an expert in that business and to an expert's knowledge of the arts,

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material and processes involved. The manufacturer's status as an expert would thus seem doubly relevant. First, as bearing on its duties to communicate its superior knowledge to those who, because of their own limited information, would otherwise be unable to protect themselves. And, two, as tending to show that the manufacturer knew or should have known of the possible harm that might befall some users of the product. Furthermore, the manufacturer is bound to keep reasonably abreast of scientific knowledge and discoveries concerning his field and, of course, is deemed to possess whatever knowledge is thereby imparted.

Therefore, the Court would instruct you as to BREACH OF IMPLIED WARRANTY or the doctrine of STRICT LIABILITY which the plaintiff asserts against the defendants. You are instructed that the products manufactured, assembled and distributed by the defendants in this case carried with it under the relevant commercial law an implied warranty that it was of merchantable quality. This means that the manufacturer, assembler and distributor warranted to the user that the product was safe and fit for the ordinary purpose for

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which goods are used. You are also instructed under the relevant commercial statute that manufacturers, assemblers and distributors impliedly warrant that the goods they sell are fit for a specific purpose which such goods are required. Therefore, the Court would instruct you that if you find from a preponderance of the evidence that the product was, in fact, unsafe for ordinary or for the specific use for which it was sold, then the implied warranty of merchantability and fitness for a particular purpose has been breached and you will find for the plaintiff on the theory of the breach of implied warranty or strict liability. If you further find from a preponderance of the evidence that the breach of the implied warranty was a proximate cause of the injuries and death of the deceased.

The Court would further instruct you that in connection with the theory of the plaintiff's recovery on implied warranty or the doctrine of strict liability, you do not have to be concerned with the issue of contributory negligence which is a defensive issue alleged by the defendants, and which is a defense insofar as the negligence of

the defendants are concerned. In other words, if you found the deceased contributorily negligent, the defendants would have a defense as to any act of negligence that you might find on their part. However, the defense of contributory negligence does not apply to the implied warranty or strict liability doctrine and theory of recovery on the part of the plaintiff. So you would still be able to ~~recover~~ find for the plaintiff if you found that the defendants, any or all of them, breached their implied warranty in regard to the sale of a product and distribution of their products containing asbestos.

Now, the Court will turn to the defenses of the Defendants. The defendants contend, of course, that they are not guilty of any act of negligence contended for by the plaintiff. Further, that they are not guilty of any act of negligence which would be gross negligence and that they deny that the deceased sustained any injury as a result of contact or use of any products manufactured by them.

Further, the defendants also say that if the deceased did sustain any injury as a result

of the use of any products manufactured by them, then the deceased was guilty of various acts and omissions of contributory negligence, one or more which was a proximate cause of his alleged injury and resulting death. And, therefore, he is barred from recovery by the various acts of contributory negligence.

In this connection, the defendants contend that the deceased was negligent in failing to use a mask and respirator for protection from dust containing some asbestos; in failing to request his employer to furnish blowers to remove dust laden air; in working in asbestos dust laden air with full knowledge that he was inhaling such dust laden air; in continuing 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. Therefore, the Court would instruct you that if you find any one act or omission of negligence as contended for by the defendants on the part of the deceased and you find that any single act or omission of negligence, contributory negligence, on the part

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of the deceased was a proximate cause of his injuries and death, then you would find for the defendants insofar as the negligence issue is concerned as contended for by the plaintiffs. In other words, any negligence on the part of the defendants that you might find would be offset and set aside by the negligence of the deceased. Also, in this connection, the Court would instruct you that Mr. Borel was under a duty to exercise ordinary care for his own safety and that a failure to do so on his part proximately caused his injury or death or contributed to cause injury or death constituted such contributory negligence as would prevent a recovery in this case by the plaintiff.

Accordingly, you are instructed if you find and believe from the evidence in this case that Mr. Borel failed to exercise ordinary care for his own safety by reason of a failure to use a mask or respirator or prctection when available or by working in an area containing dust arising from the use of insulating material containing asbestos when he knew or in the exercise of ordinary care should have known that it was affecting his health, and that his negligence in any respect

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was a proximate cause of his injury and death. Then you must return a verdict in this case against the plaintiff and in favor of the defendants unless, of course, that you should find for the plaintiff on the issue of a breach of implied warranty and strict liability. Also the defendants contend that the deceased, Mr. Borel, knew of the dangerous nature of the asbestos product manufactured by the defendants in connection with his insulation work and appreciated the danger and with such knowledge voluntarily assumed the risk by continuing his employment. Further, that this knowledge of the danger of the insulation was known to Mr. Borel's contractor or employer. Therefore, the Court would instruct you that if you find from a preponderance of the evidence that the deceased knew of the dangerous nature of the asbestos products with which he was working and appreciated the danger of working with such products or that he had knowledge through his contractor of the dangerous nature of the product and that he assumed the risk by continuing his work, then you would find against the plaintiff and in favor of the defendants.

Now, turning our attentions to the matter of the defenses of the defendants in connection with the implied warranty or strict liability, you are charged that if there is any unreasonable risk or danger from using defendants' products containing asbestos, which risk or danger must be the risk or danger beyond that which would be contemplated by insulation contractor or insulator with the knowledge available to them as to characteristics of the product, such unreasonable risk or danger from using defendants' product must have been reasonably foreseen by the manufacturer. Therefore, if you find from a preponderance of the evidence that Mr. Borel came in contact with the defendants' product and developed asbestosis thereafter and at such time of contract, the product containing asbestos manufactured by the defendants and that the danger of the use of the said asbestos products by Mr. Borel could not have been reasonably foreseen by the manufacturer, then there could be no proximate cause and your verdict would be for the defendants. In other words, there would be no proximate cause of the breach of the warranty or strict liability

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that would justify your finding in favor of the plaintiff, but you would have to find for the defendants. Also, in connection with the implied warranty theory, you are instructed that the burden of proof is on the plaintiff in this case. Before they are entitled to recover any damages against any of the defendants to establish by a preponderance of the evidence that the product sold by the particular defendant or defendants was defective at the time it was sold. Before a product can be found to be defective it must establish that it was unreasonably dangerous to the user or consumer at the time it was sold. You are further instructed that the burden of proof is on the plaintiff to establish also by a preponderance of the evidence not only that the product was defective but also that the defect in the product was a proximate cause of the death of Clarence Borel. By the term DEFECTIVE as used in this charge is meant a condition not contemplated by the insulator, contractor or ultimate user. Accordingly, you are instructed that in the event plaintiff has failed to prove by a preponderance of the evidence the existence

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of a defect in the product at which time the product was sold and that such defect was the proximate cause of death of Clarence Borel, then you cannot find for the plaintiff on the theory of breach of implied warranty or strict liability and you must return a verdict against the plaintiff and in favor of the defendants.

Now, to summarize the issues for the jury to decide. You are a fact finding body. First, you must decide whether or not from a preponderance of the evidence the greater weight of credible testimony, whether each of the defendants were guilty of the acts of negligence contended for by the plaintiff and that such acts of negligence, was a proximate cause or any one of the acts or omissions of negligence was a proximate cause resulting in injuries and death of the deceased. Further, you are to determine whether or not such acts of negligence was gross negligence or amounted to gross negligence as the Court has instructed you, which gross negligence was a proximate cause of the injuries sustained by the deceased resulting in his death. In that connection, the plaintiff has the burden of

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proof, must prove the contentions. If you made these findings but you also found that Mr. Borel, the deceased, was guilty of some act or omission of contributory negligence which resulted in his death then you would not be able to find for the plaintiff on the theory of negligence, and the burden of proof as to whether or not the deceased was negligent is on the defendants. If you found contributory negligence you would not be able to find for the plaintiff on the theory of negligence, but you could consider the theory of the breach of the implied warranty or strict liability. And if you found for plaintiff on those issues or on that theory, then you would give your attention to the question of damages. On the other hand, if you found on the issue of assumed risk you would find for the defendants or if you found for the defendants on the other instructions which the Court has given you, you would find for the defendants.

The Court would also call your attention to the fact that there can be more than one proximate cause of the injury. The law does not recognize

just one proximate cause of the injury. On the contrary, many factors or things or conduct of two or more persons may operate at the same time, either independently or together to cause an injury and in such case each may be a proximate cause.

Now, should the facts which you find be favorable for the plaintiff and against the defendants on the question of liability, then it would be your duty to determine the damages which you find from a preponderance of the evidence that the plaintiff is entitled to recover. You are instructed that the surviving children of the deceased are all adults and are not dependent upon Mr. Borel and are not entitled to recover any damages by reason of his death and they, in fact, have waived all of their claims in favor of Mrs. Borel. You cannot find any damages in regard to the surviving children and you will not give it any consideration.

Now, with reference to the action for damages for Mrs. Borel for wrongful death of her husband, you are instructed that under the law of this state the wife is permitted to

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recover for pecuniary loss sustained by the wife because of her husband's death and include contributions from the earnings of the deceased as he might have made toward the support of Mrs. Borel. The aid, assistance, advice, encouragement which the wife would reasonably expect from her husband, considering the circumstances of the parties as well as the value of attention, care and counsel. This also includes the value of the services that the husband performed and would reasonably have been expected to perform for the wife in and about the home before his death. In considering the sum of money which you may find from a preponderance of the evidence if paid now in cash would reasonably compensate Mrs. Borel for actual pecuniary loss proximately resulting from the death of Mr. Borel, you are instructed that you can only consider the acts of pecuniary loss sustained, if any, and you may consider the present pecuniary value of such services, if any, which you may find from a preponderance of the evidence Mr. Borel would in reasonable probability would have rendered his wife had he not died.

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You may not consider, and you cannot allow Mrs. Borel anything for consolation, comfort or for any sorrow, anguish or grief resulting from the death of her husband. In this connection, you can allow Mrs. Borel such damages, if any, as in reasonable probability resulted in a pecuniary loss to her by reason of the death of her husband. It may be taken into consideration in the measurement of damages, the husband's age at the time of his death, his earning capacity, his life expectancy and the life expectancy of the wife, and also the character and habits of the deceased and his physical condition and health, and in addition to that the evidence to the effect of medical science is constantly improving the life span.

The Plaintiff, Mrs. Borel, is also entitled to receive monetary or pecuniary value of conscious pain and suffering, if any, suffered by her husband prior to his death and if during the period of time between the injuries and his death you in your judgment reasonably conclude that he suffered pain then an amount for pain and suffering should be included in your verdict. You have a right, therefore, to award such sum as you find and believe from a preponderance of the evidence would be fair and reasonable as compensation for

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this pecuniary loss. Exact ascertainment of such damages is obviously not possible.

The jury is therefore, from your own knowledge and experience, sense of justice and finding from a preponderance of the evidence, called upon to fix compensation with reference as far as possible to the conditions existing at the time of the death. Also, the Court would instruct you that the law provides where there is gross negligence that in addition to actual damages, punitive damages, may be awarded at your discretion. You will consider, of course, the circumstances of whether or not punitive damages are appropriate. The matter lies largely within your discretion as jurors, but you must first find that there is that wrongful intent or an utter disregard and conscious indifference on the part of the defendants to the lives and welfare of others. You would have, in order to find punitive damages, to find that there were at least some actual damages before you could find any punitive damages under the law, and there is no mathematical rule of thumb in connection with it. The only rule that applies is the rule of reason and they must be reasonable.

Also the Court would instruct you that you need not give any consideration to the question of fixed damages in the way of medical expenses and hospital expenses and funeral, death expenses, as these matters are not disputed and have been offered by the plaintiff without any contest on the part of the defendants and if the jury awards actual damages in the case the Court would then -- this is a matter that the Court would be concerned with and the Court would add to such damages, if any, that the jury might find, the fixed damages which would be the medical, hospital, funeral expenses.

Now, the Court would further instruct you that your verdict must be unanimous. It does not mean that you must be of the same opinion when you begin discussing your verdict, but it does mean that you must deliberate and when you reach your verdict that it will be the verdict of each and every one of you.

So the Court will now pass to you the forms of interrogatories which have been prepared by the Court for you to answer and you will have sent to you all of the exhibits if you request them to be sent to you in the jury room. As soon

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as you have retired you will elect a foreman and your foreman will be in charge of your deliberations. If it is necessary for you to have further communication with the Court, you will do so in writing through your foreman.

Now the special interrogatories prepared reads: "Do you find from a preponderance of the evidence that any of the defendants listed below was negligent in any of the respects contended by plaintiff, which negligence was a proximate cause of the injuries and death of the deceased?"

Answer "Yes" or "No"

And the Court has listed the six defendants involved in this suit: Pittsburgh Corning Corporation; Armstrong Cork Company; Philip Carey Corporation; Ruberoid Company, Johns-Manville Products Corporation; Fibreboard Paper Products Corporation.

Special Interrogatory No. 2: "Do you find from a preponderance of the evidence that any of the defendants listed below committed some act of gross negligence as contended for by the plaintiff and that such act of gross negligence was a proximate cause of the death of the deceased."

Answer "Yes" or "No" opposite the named

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Defendant."

The Court has also listed all of the six defendants in which you will write the word either "yes" or "no" accordingly to the findings of the jury.

The Court has also given you the definition of gross negligence at the bottom of the issue which is defined as heedless and wreckless disregard for the rights of others. HEEDLESS and WRECKLESS DISREGARD meaning that such an entire want of care as to indicate that the act or failure to act in question was a result of the conscious indifference to the right, welfare and safety of the persons affected by it and in order to establish gross negligence, the burden is on the plaintiff to show that the defendants could or should have foreseen and prevented the injury and that the defendants acted with a degree of negligence which brought about the accident and injury.

Special Issue No. 3 inquires: "Do you find from a preponderance of the evidence that the deceased was guilty of contributory negligence and that such negligence was a proximate cause of the injuries and death of the deceased?"

And you answer "Yes" or "No." And a place for you to answer.

Special Issue No. 4: "Do you find from a preponderance of the evidence that the warranties as contended for by the plaintiff were violated by any of the defendants listed below, which breach of warranty was a proximate cause of the injuries and death of the deceased?" And your answer "Yes" or "No" opposite the named Defendant. And it is listing the six defendants.

Special Issue No. 5: "What amount of money, if paid now in cash, would fairly and reasonably compensate the plaintiff, Freida Borel, for the damages she sustained by virtue of the death of her husband?" Answer in dollars and cents, if any. And the place to answer the actual damages and also the damages for gross negligence. A place for the foreman to sign on the bottom of the page with the date of the verdict.

The attorneys have a right to object to the Court's Charge and make observations. They have a right to do this out of the presence of the jury. It may be necessary for us to give

you further instructions. We do not anticipate that it will be necessary at this time.

We will now ask the Marshal to show you to the jury room and you will retire to begin your deliberations. As soon as you have retired you will elect a foreman. It may be since you have been involved now for about two hours that you would like to take a little recess. If you do, you may do so and you will indicate to the Court if you wish to do so and we will give you ten or fifteen minutes, whatever you require.

All right, you may follow Mr. Berry to the jury room.

REPORTER'S NOTE: Whereupon, at this time the jury retired for deliberations at 3:56 p.m.

THE COURT: We are going to take a recess for fifteen minutes after which time the Court will hear the objections of the attorneys.

REPORTER'S NOTE: Whereupon, at this time a recess was taken and Court resumed.

THE COURT: Please be seated. Mr. Stephenson, you may make such objections as you have.

MR. STEPHENSON: Your Honor, I only have

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one. And as I understood the Court's Charge, the jury was not instructed that contributory negligence is no defense to the question of gross negligence and I would request the Court to instruct the jury that contributory negligence is not a defense to the finding of gross negligence.

THE COURT: I am not sure about that.

MR. STEPHENSON: That is the only one I have.

THE COURT: The objection is overruled.

Mr. Tucker?

MR. TUCKER: May it please the Court. I assume that the objections that I now make would be objections of each defendant and likewise objections made by Mr. Weller can be -- or the other defendants would be applicable to each defendant.

THE COURT: Correct.

MR. TUCKER: The defendants object --

THE COURT: Also the Court would make this statement also, not only will the objections made by any defendant be applicable to all defendants but also any requested issue that might have been submitted by any of the defendants will be considered applicable to all defendants and it will not be necessary for you to make specific objections to the Court's failure to give the requested issues,

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but merely call the Court's attention to the fact that you object to the Court's failure to do so. And if you will, assist the Court in arranging the issues that we failed to give, that you wish to object to, the Court's failure to give, we will be glad to sign them and give them to the Clerk for filing.

MR. TUCKER: Thank you.

The defendants object to the general submission of negligence and proximate cause and to the special interrogatory which allows the jury to return a general verdict on negligence and proximate cause because the Court has submitted a number of different grounds of negligence which may be considered by the jury in answering the issues. Some of which we feel are not raised by the evidence. Since a general verdict will be returned, there will be no way to ascertain whether that verdict is based upon the submission of different grounds of negligence which are not raised by any testimony or any evidence at all, and likewise, as to proximate cause.

We particularly call the Court's attention to the fact that one of the grounds of negligence submitted and proximate cause which the jury may

consider in answering special interrogatory No. 1 was on the ground that the defendant should have removed their products from the market after ascertaining the danger from asbestosis. We object to the inclusion of that ground because, first, there was no duty on the part of the defendant to do so. Second, there was no evidence to raise an issue that they were negligent in failing to remove their products from the market. Having given appropriate warning once that was ascertained the Defendants met any legal duty and having put out the warning they certainly had no duty under the law as I see it to remove their products from the market. Likewise, there was no evidence to raise any issue that negligence in that respect, that is, at the time the danger from asbestosis was ascertained could under any theory have been a proximate cause of Mr. Borel's injury and death. We also specifically call the Court's attention to the inclusion as a separate ground of negligence which the jury may consider in answering Interrogatory No. 1. The ground of negligence in failing to inform the user about protective clothing or other protective devices. We object to that

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because there was no evidence to raise the issue of negligence in that respect and likewise because there was no evidence to raise the issue that any negligence in failing to advise or inform as to protective devices was a proximate cause.

We object to the inclusion of negligence on the ground that defendants failed to test, to ascertain the danger of their products because there was no evidence to justify that submission of that ground of negligence. There being no proof as to what tests could have been made or that any such tests were generally made or accepted in the industry. There is no evidence to raise the issue that there were any such tests actually then available or known to any of the defendants or that the failure to make a test was a proximate cause.

We object to the submission, although the Court, I believe, covered it to some extent in the general charge, that is, the defense of voluntary assumption of risks or violenti non fit injuria because there was no interrogatory submitted to the jury whereby they might answer and find in favor of the defendants based upon that

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defense, and even though the jury may find an believe that all of the elements were established, there is still no way under the form of verdict as submitted to the jury whereby they could return a finding in favor of the defendants on that theory. We have specifically called the Court's attention to, I believe it was, our requested charge number 11, which set out the elements of that defense and would request the Court to give the jury a special interrogatory so that they could answer and make a finding specifically on that defense.

We object to the Court's submission, either of voluntary assumption of risks or contributory negligence or both insofar as the Court instructed the jury that that would not be a defense to an action on the theory of warranty. We feel that the defense, whether you call it contributory negligence or voluntary assumption of risk based upon plaintiff's knowledge or Mr. Borel's knowledge of the condition of the danger and the appreciation of the danger and voluntarily continuing to work with such knowledge that that would constitute a defense to an action, either on the theory of negligence as well as on the warranty theory.

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The defendants object to the submission of gross negligence because, first, we feel that it is not raised by any testimony in the case. We object also because although gross negligence and exemplary damages are submitted for the jury's consideration that the form of verdict submitted to the jury requires or authorizes a general finding as to damages for gross negligence, when gross negligence is penal in its nature and if submitted at all should be submitted separately so the jury could determine what sum would be awarded as to each defendant individually. This form of submission allows one defendant to be penalized for the alleged gross negligence or a different degree of gross negligence on the part of other defendants.

We object to the submission of negligence and the damages based thereon because there is no way or no submission whereby the Court has required the jury to make a finding that the negligence of any defendant was a substantial or material factor in bringing about the disease or death of Clarence Borel. Likewise, the same applies as to the submission of warranty. There is no

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requirement in this charge that the jury must find that the alleged breach of warranty on the part of any defendant was a material factor whatsoever. Consequently, one or more of the defendants may be held responsible although actually their contribution, if there was any, to the plaintiff's condition, Mr. Borel's condition, was entirely insignificant.

We object to the general submission of damages because it allows the jury to assess damages against one defendant because of the acts, the negligence or the breach of warranty on the part of some other defendant.

We also object to the Court's instructions that in answering the actual damages, Your Honor, the jury might consider and allow damages to Mrs. Borel for the conscious pain and suffering of Clarence Borel. This is not a recoverable item of damage which may be recovered by Mrs. Borel under the death statute, it is an item of damage if it is recoverable at all not by Mrs. Borel but by the estate of the deceased. And once again, I particularly want to call the Court's attention to our requested instruction number 16, I beg the Court's pardon, it is the submission on requested

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instruction number -- requested charge number 11 setting out specific instruction and the elements of voluntary assumption of risk which we request the Court to submit as a defense to the action, either on the negligence or warranty theory.

Thank you.

THE COURT: Do any of the defendants have anything to add to the objections made by Mr. Tucker?

MR. WELLER: Yes, Your Honor.

First, on behalf of each defendant, object to the failure of the Court to give a requested charge and interrogatory on the two year statute of limitation of the State of Texas. I will have to see which one that is.

THE COURT: All right. You can find it later.

MR. WELLER: And I would ask the Court Reporter where I make a reference to a requested charge that the charge, requested charge, be included as a part of the objection.

I further object to the Court's Charge because the charge as framed and particularly the award of damages permits an award, a joint

recovery for separate and distinct alleged torts which occurred on separate and distinct days. I further object to the charge because there is no evidence of any exposure or harmful exposure to products manufactured by Fibreboard Corporation. I would ask that the same objection be included for each and all of the defendants by name. I further object to the instruction on breach of warranty for the reason that this is an attempt at applying an Ex Post Facto decision or making it retroactive for a period of thirty three years whereas the law of this state on breach of warranty was not such as to apply strict liability at that early date.

I further object to the form of the interrogatory and the instruction on gross negligence in that the instruction allows recovery of gross negligence on the occurrence or theory of simple negligence in the instruction. And, further, to the definition of gross negligence in the interrogatories because such would allow a double recovery of damages for simple negligence.

I further object to the instruction of the Court on gross negligence because there is

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no evidence and in the alternative insufficient evidence of any acts of gross negligence on the part of any one of the individual defendants.

I further object to the submission of the damage issue on gross negligence because this will result in an award against the seven remaining defendants in this case on a joint and basis and there is no basis in the law to require several, one defendant to respond for the gross negligence of another.

I further object because the failure to submit the issue of gross negligence separately and the damage issue separately as to each defendant. The same thing -- I make the same objection to the issue of simple negligence, the negligence issue each and all of the negligent issues in the case because each defendant, because of the failure to submit it separately.

I object because the interrogatory as framed on negligence and proximate cause makes it joint whereas proximate cause should be separate one from the other, wherein that the jury could find that a defendant was guilty of negligence but that it was not a proximate cause.

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I further object to the charge because the failure to instruct the jury that there can be no recovery to any exposure from and after the date of the placing of notices on the respective products of each of the defendants.

I object to the damage issue because of the failure to separate the issue of ordinary damages from the award or requested award for pain and suffering.

I object to the charge generally, in the beginning of the charge, the Court instructed the jury that they could find a fact based upon what was more likely true than not true and this changes the burden of proof and I further object on the failure of the Court to instruct the jury on the definition of negligence on new and independent cause. There could have been a new and independent cause under the evidence in this case which was the producing cause of the mesothelioma and other injuries. I object to the instruction or the issue on failure, negligence in failing to provide knowledge as to proper wearing apparel because there is no duty on the part of the defendants. I object to the negligence issue on the fact that the defendants

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should have tested the product because the term test is too globale and there is no -- first, there is no duty and secondly, there is no evidence that we should have tested the products. I believe Mr. Tucker has gotten the one about removal.

I object to the Court's Charge where the jury was told that it was a duty of each of the defendants to give reasonable warnings of the danger of their product because the undisputed evidence here is medical and scientific knowledge was not such that the defendants either knew or should have known of any danger to asbestos workers in connection with their product.

I object to the submission of gross negligence because there is no evidence of malice or an entire want of care or willfulness on the part of any or each of the defendants.

I object to the charge in this case on warranty because there is no cause of action for implied warranty in the case of an action for death.

I further object to the Court's Charge because there was no evidence that either of the products manufactured by the several defendants

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was in a defective condition or that the product was unreasonably dangerous or that there was a defect in the product at the time of sale. And further, there is no evidence that a defect in the product was the proximate cause of any damage.

I object to the Court's Charge on commercial law and the fact that a statute was adopted which imposed an implied warranty of fitness for the product for the use for which it was manufactured for the reason that the commercial code was not adopted in Texas until 1966 and the charge leaves the jury under the impression that each of the defendants are under some statutory duty. And, further, I object to the Court's Charge that they should base damages on their own knowledge and experience and sense of justice because this places and undue burden on the defendant, allows the jury to speculate and is not based -- and the jury is not limited to the evidence which was introduced upon the trial of this case.

The defendants object to the Court's failure to instruct his requested, requested charge number 1, which we ask that the Court Reporter quote.

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REQUESTED CHARGE NO. 1

"You are instructed that a manufacturer of any product such as insulation products manufactured by the defendants in this case is under no duty to make the product accident proof or fool proof. Their only duty is to design and manufacture a product which is reasonably safe and suitable for the purpose for which it is manufactured and sold when used in a reasonable manner."

MR. WELLER: The defendants object to the failure of the Court to instruct the jury as follows -- as part of requested charge number 2 under the circumstances of this case, such knowledge can only be had by the defendants if medical science also had it and had made it publically known at the time that Clarence Borel's disease of asbestosis started.

Defendant objects to the failure of the Court to define defect or defective condition as requested in charge number 6 which we will quote.

REQUESTED CHARGE NO. 6

"By the term "defect" or "defective condition" as used in this charge is meant a

condition not contemplated by the ultimate consumer or user, or professional insulator, which will render it unreasonably dangerous to him. The seller is not liable when he delivers a product in a reasonably safe condition and subsequent mishandling or other causes makes it harmful. The burden of proof to establish that the product was in defective condition at the time it left the hands of the seller is upon the plaintiff.

You are further instructed that a product is not in a defective condition when it is safe for normal handling and use.

You are further instructed that in order for a product to be "defective" or in a "defective condition" it must be in such a condition at the time it leaves the hands of the seller as to make it unreasonably dangerous to the user or consumer."

MR. WELLER: Defendants object to the failure of the Court to instruct the jury as to what was "unreasonably dangerous to the contractor or professional insulator" as requested in charge number 18.

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REQUESTED CHARGE NO. 18

"You are instructed that for a product to be "unreasonably dangerous" to the contractor or professional insulator, the product when sold must be in a "defective condition," which means there must be a miscarriage or defect in the production of the product or a foreign substance which was not intended to be placed in the product and the product must be not reasonably fit for the intended use for which it was sold, and dangerous to an extent beyond that which would be contemplated by an insulation contractor or professional insulator, and in determining whether such product is unreasonably dangerous and unfit for its intended use, you will take into consideration the knowledge available to the contractor or professional insulator as to the characteristic of the product, and you will also take into consideration and weigh the utility and need of the product to the industrial community, against the probability of harm arising from its use."

MR. WELLER: And defendant objects to the failure of the Court to instruct the jury

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that as requested in charge number 19, that is, that the plaintiffs have the burden to show that Borel was exposed to asbestos fibers arising out of or due to the products manufactured by the particular defendant, and such defendant's products or asbestos dust caused by its use was of a substantial nature. And I ask that the request be quoted in the objections.

REQUESTED CHARGE NO. 19

"You are instructed that before the plaintiffs are entitled to recover against any of the defendants that they have the burden of establishing by a preponderance of the evidence (1) that Clarence Borel during his lifetime was exposed to asbestos dust or fibers arising out of or due to the products manufactured by the particular defendant, and (2) that such exposure to the defendant's product or asbestos dust caused by its use was of such a substantial nature as to contribute to the disease and the ailments which brought about his death.

You are further instructed that the liability of the defendants, or any of them, cannot be based upon speculation or guess and

as to each defendant, unless the evidence is sufficient to establish to your satisfaction by a preponderance of the evidence the fact of exposure to the product manufactured by defendant and that such exposure was a proximate cause of Borel's subsequent illness and death, you must return a verdict against the plaintiffs and in favor of such defendant or defendants."

MR. WELLER: I object to the failure of the Court to instruct the jury as requested in charge number 16 which I am asking the reporter to quote.

REQUESTED CHARGE NO. 16

"You are instructed that the failure to warn of possible results or dangers arising out of the use of a product is not actionable negligence nor will a failure to warn render the product defective, unless and until it has been established that the defendants could have reasonably foreseen or anticipated the dangers arising out of the normal and expected use of their products and the need to give warning thereof.

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You are further instructed that the burden is on the plaintiff to establish that the medical and scientific knowledge and data which was reasonably available to the defendants was sufficient to give the defendants notice of the dangers which might arise from exposure to their products occurring during the normal and expected use thereof.

You are further instructed that defendants cannot be held responsible on any theory of failing to give warning unless it is established that prior to the time Clarence Borel underwent injurious exposure to dust containing asbestos while defendants' products were being used that the state of the medical and scientific knowledge was such that defendants knew or reasonably should have known of such dangers."

MR. WELLER: I further object to the Court's Charge and failure to give requested charge number 7. No, we will omit that one.

I object to the Court's failure to give requested charge number 5, which we will ask be quoted.

REQUESTED CHARGE NO. 5

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"You are instructed in this case that you will not consider any exposure of Clarence Borel to any insulation product which contained some asbestos after the date on which the individual manufacturer began placing the notice of possible danger or injury to exposure to the dust laden air which emanated from the product which contained some asbestos."

MR. WELLER: And I object to the failure of the Court to give the defendants' requested charge number 10, which we will ask be quoted.

REQUESTED CHARGE NO. 10

"You are instructed that in considering the defense of voluntary assumption of risk that Clarence Borel's need for employment or his financial condition does not constitute an excuse to a person who voluntarily exposes himself to a known danger, and accordingly, in determining the question of whether or not Clarence Borel voluntarily assumed the ris, you will not take such factors into consideration."

MR. WELLER: I object to the Court's Charge because of the failure to give defendants' requested charge number 4 and I will point out

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here that the acts of contributory negligence set forth in the requested charge are absolute defenses to the cause of action for damages on the theory of either negligence or breach of implied warranty, and the Court restricted the instruction stating that it was not a defense to the cause of action on implied warranty.

REQUESTED CHARGE NO. 4

"The defendants in this case have asserted the defense of contributory negligence. You are instructed that contributory negligence on the part of Clarence Borel constitutes a complete defense to all claims asserted in this action and bars a recovery by the plaintiffs, even though you may find and believe that the defendants were negligent or breached a warrnty pertaining to their products.

In connection with the defense of contributory negligence, you are instructed that Clarence Borel was under a duty to exercise ordinary care for his own safety, and that a failure to do so on his part proximately causing his injury or death or contributing to cause his injury or death constitutes such contributory negligence as

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would prevent a recovery in this case by the plaintiffs.

Accordingly, you are instructed that if you find and believe from the evidence in this case that Clarence Borel failed to exercise ordinary care for his won safety by reason of a failure to use maks or respirators for protection when available, or by working in areas containing dust arising from the use of insulating material containing asbestos when he knew or in the exercise of ordinary care should have known that it was affecting his health, and that his negligence in any respect was a proximate cause of his injury or death, then you must return a verdict in this case against the plaintiffs and in favor of the defendants."

MR. WELLER: I further object to the failure of the Court to give requested charge number 20 on which governs the two year statute of limitations under the laws of the State of Texas, and I will also object to the failure to charge on limitation because the undisputed evidence in this case shows that Clarence Borel had notice of injury prior to two years, prior to the time

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that he filed any claim or claims for Workmens Compensation and his claim for damages was barred at the time the claim for compensation was filed.

REQUESTED CHARGE NO. 20

"Defendants have asserted the defense of the two year statute of limitations. Under the Texas law, which governs this case, a party is required to institute suit within two years after his cause of action accrues, otherwise the action is barred. You are further instructed that in the event Clarence Borel failed to institute suit during his lifetime within the two year limitation period, that such failure constitutes a complete defense in this case and you must return a verdict in favor of the defendants and against the plaintiffs.

As applied to this case, Clarence Borel during his lifetime instituted this suit on October 20, 1969. If you find and believe from the evidence in this case that Clarence Borel knew or in the exercise of ordinary and reasonable care should have known at any time prior to October 19, 1967, that he had sustained a disease or some injury to his body brought about

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by exposure to asbestos dust and fibers in the course of his work as an insulator, that then the action is barred by the two year statute of limitations and your verdict must be against the plaintiffs and in favor of the defendants."

MR. WELLER: I further object to the failure of the Court to charge as requested in charge number 15 on gross negligence that they should not allow any speculative damages that is not proved by reasonable certainty, this is to ordinary damages, I am sorry.

REQUESTED CHARGE NO. 15

"You are instructed that in assessing the damages, if any, of plaintiffs that you cannot take into consideration or award any damages by way of punishment, but may only assess such pecuniary damages as are established by a preponderance of the evidence. You are further instructed that you cannot consider or allow speculative damages, by which is meant damage not proved with reasonable certainty."

MR. WELLER: I further object to the failure of the Court to instruct the jury as shown, as requested in charge 21 on the grounds

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that net income in a death case is the proper measure of damages which would instruct the jury that they would make a deduction for any Federal income tax.

REQUESTED CHARGE NO. 21

"You are instructed as a matter of law that any award for damages made to the plaintiffs, if any is made, is not income to the plaintiffs within the meaning of the Federal income tax law. Should you find that the plaintiffs, or any of them, are entitled to an award of damages, then you are to follow the instructions given you by this Court in measuring those damages, and in no event should you either add to or subtract from that award on account of Federal income taxes.

MR. WELLER: And I would further object to the charge of the Court because of the failure to submit the special interrogatories which would have specified the date of injury as to the product of each defendant. And also, because if the jury had answered the interrogatory that the day or dates were unknown as to the injury then there could have been no recovery. I also object to

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the failure of the Court to give the special interrogatories on the issues of limitation and I will have to specify which one that is, if the Court please.

It is requested interrogatory number -- Could I give the reporter the number as soon as I find it, Your Honor?

THE COURT: You can find it later and hand them to the Court to be signed.

The objection of the defendants are overruled. Are there other matters to be presented to the Court for purpose of the record?

MR. BARNES: Your Honor, I had some objections that I want to add.

THE COURT: You want to add some?

MR. BARNES: Yes.

THE COURT: All right. I don't intend to limit any of the defendants to any objections. I hope that you will not make the same ones since they apply --

MR. BARNES: I will try to avoid it, Your Honor.

MR. WELLER: Your Honor, for the record, the special interrogatories which covers the matter

of limitation are special interrogatories 1, 2, and 3 of the requested interrogatories.

INTERROGATORY NO. 1

"Do you find from a preponderance of the evidence that Clarence Borel sustained some injury to his body on or prior to the dates hereinafter set forth as a result of working with a product or products containing some asbestos?

(a) On or prior to April 8, 1964?

Answer: _____

(b) On or prior to June 1, 1967?

Answer: _____

(c) On or prior to October 19, 1967?

Answer: _____

(d) On or prior to October 19, 1968?

Answer: _____

Answer "Yes" or "No" opposite the letter inquiry."

INTERROGATORY NO. 2

"Do you find from a preponderance of the evidence that Clarence Borel knew on or prior to the dates hereinafter set forth that he had sustained some injury to his body as a result

of working with a product or products containing some asbestos?

(a) On or prior to April 8, 1964?

Answer: _____

(b) On or prior to June 1, 1967?

Answer: _____

(C) On or prior to October 19, 1967?

Answer: _____

(d) On or prior to October 19, 1968?

Answer: _____

You will answer each subdivision "Yes or "No."

INTERROGATORY NO. 3

"Do you find from a preponderance of the evidence that the date or dates upon which the plaintiff, Borel, sustained excessive exposures to dust laden air containing asbestos dust are unknown?

Answer: "Known" or "Unknown."

ANSWER: _____

If you answer "Known" state the date or dates on which he sustained excessive exposure to dust laden air containing asbestos dust.

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_____

_____

_____

_____ "

THE COURT: All right.

MR. BARNES: May it please the Court. The defendants further object to the Court's Charge wherein he described "unreasonably dangerous" in connection with the products of the defendants because such descriptions, definition fail to allow the jury to weigh any risk inherent or associated with such products against the utilities of such products.

Defendants further objects to the Court's instructions of the jury that if they find any single ground of negligence as claimed by the plaintiffs that that would be sufficient basis upon which to return a verdict against the defendants in favor of the plaintiffs in that under the law the jury would be required to find at least two of such grounds of alleged negligence since the negligence concerning warning is alternative to the other grounds and since any finding satisfying

the defendants' obligation in regard to warning would completely exonerate the defendants in this case.

The defendants further object to the Court's instructions to the jury concerning the alleged failure of the defendants to warn in that such instructions fail to contemplate the plaintiff's burden of proof to negative knowledge concerning such conditions on the part of the plaintiff's employer.

The defendants further objects to the Court's definition of gross negligence because it would allow the jury to return a finding of exemplary damages based upon what the defendants "should have foreseen" as opposed to what they did in fact know.

The defendants further object to the Court's refusal to give Ruberoid's special requested instructions number 1, 2, 3, 5, 6, 8 and 9, quoting each one of them, please, Mr. Reporter.

RUBEROID'S SPECIALLY REQUESTED INSTRUCTION NO.

1

"You are further instructed that a manufacturer of a product that contains no defect

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and is intended for industrial use by specialized contractors, and which product does not create any new risk not already inherent in the constituent parts comprising such product, has no duty to warn regarding the risk and dangers involved in the use of such product. Therefore, if you find from a preponderance of the evidence that the product or products of any one or more of the Defendants contained no defect, and that such product or products created no new risks not already inherent in the constituent parts of such products, then you will find for such Defendant and against the Plaintiffs."

2

"You are further instructed that it is the sole duty of the asbestos contractors to protect their workers or warn them of risks and dangers of which such contractors could be expected to be as fully informed as the makers of the asbestos containing products used by such contractors. Therefore, if you believe from a preponderance of the evidence that the asbestos contractors employing Clarence Borel could be

expected to be as fully aware of the risks involved in using products containing some asbestos as could the manufacturers thereof, then you will find in favor of the Defendants and against the Plaintiffs."

3

"You are further instructed that employers specializing in the use of asbestos containing products applied under different and varying conditions are considered to be in a better position to appreciate and find out the potential risks involved in their process and the ways and means to minimize such risks, especially when the magnitude of the danger varies because of a variety of processes and conditions under which asbestos containing products are used. Therefore, if you find from a preponderance of the evidence that the asbestos products of the Defendants in this case are applied under varying conditions and in a variety of processes peculiarly known to the insulation contractors, and if you further find from a preponderance of the evidence that such contractors were in a better position to

know and appreciate the potential risks involved in their process, then you will find in favor of the Defendants and against the Plaintiffs."

5

"You are further instructed that a manufacturer cannot be regarded as selling an unreasonably dangerous product if such product is designed in a universally accepted or customary manner, unless there is expert testimony that safer products could have been made feasibly, or that in the manufacture of such products some regulatory measure has been violated, or unless some manufacturers of such products made them safer. Therefore, if you find from a preponderance of the evidence that any particular Defendant's products were manufactured in a universally accepted or customary manner and that there is no expert testimony that a safer such product could be made feasibly, and that such product does not violate some regulatory measure, and that no manufacturer made a safer such product, then you will find in favor of such Defendant and against the Plaintiffs."

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6

"You are further instructed that a manufacturer of a product to be used by specialized contractors is not liable to the employees of such contractors for risks or dangers involved in the use of such products if such product reaches the hands of such specialized contractor in the condition that the ordinary such contractor would expect such product to be in. Therefore, if you find from a preponderance of the evidence that any Defendant's products reached the hands of the purchaser thereof in the condition that such purchaser contemplated that such product would be in, and that such product was not dangerous beyond the extent that was contemplated by the purchaser of such product, then you will find in favor of such Defendant and against the Plaintiffs."

8

"You are further instructed that the Plaintiffs have the burden of proving by a preponderance of the evidence that Clarence Borel's employers did not know of the danger involved in the use of insulation products

containing some asbestos. Therefore, unless you find from a preponderance of the evidence that Clarence Borel's employer did not know of the risks or dangers involved in the use of any particular Defendant's products, then you will find in favor of such Defendant and against the Plaintiffs."

9

"You are further instructed that it is undisputed that insulation products containing some asbestos serve a useful purpose in industry and have a peculiar utility making such products suitable for use as insulation materials. And you are further instructed that if you find from a preponderance of the evidence that such utility outweighs the hazard or risk of danger involved in the industrial use of such product, that you will find in favor of the Defendants and against the Plaintiffs."

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THE COURT: All right. Any further objections?

REPORTER'S NOTE: Whereupon, at this time there was no response from the attorneys.

THE COURT: All of the objections for all of the defendants are overruled.

Anything further?

MR. BARNES: Just this one additional one, Your Honor. The defendants further objects to the Court instructing the jury that any medical expenses would be added to the recovery in the event that a favorable verdict to the plaintiff was returned in that the stipulation of counsel involved in this case was limited to stipulating that the bills themselves would not need to be authenticated. And in this connection, of course, the defendants would object to the adding of any medical expenses to the amounts found by the jury in its verdict.

THE COURT: The objections will be overruled.

We will stand adjourned awaiting the verdict of the jury.

THE MARSHAL: Everyone rise, please.

REPORTER'S NOTE: Whereupon, at this time the Court recessed awaiting the verdict of the jury.

REPORTER'S NOTE: Whereupon, Mr. Barnes

made objections into the record as to a certain exhibit being admitted into evidence by the Court.

MR. BARNES: The defendant, Ruberoid Company makes the following objections to Plaintiff's Exhibit No. 10, being the cards introduced in evidence and identified by Mrs. Jackie Bean. Those objections are as follows:

No. 1, that such cards are not the best evidence of the information contained on said cards, especially in view of Mrs. Bean's testimony that Clarence Borel filled out certain sheets of paper which are not in evidence, purportedly containing some of the information which Mrs. Bean testified that she typed on said cards.

No. 2, because said cards are in violation of Article 3716 in the Revised Civil Statutes of Texas, commonly referred to as the "Dead Man Statute," in that they involve certain transactions with the deceased.

No. 3, in that said cards are too vague and indefinite to be considered as competent evidence in this case because there is no identification as to any particular product of

this defendant as being used at any particular time or on any particular job. And in that there is nothing on said cards indicating the extent or duration of any exposure on any particular job as listed on said cards and in that there is nothing on said cards which refers to or identifies any particular working conditions which existed at any time pertinent to the dates mentioned on said cards.

No. 4, because the information contained on said cards was elicited by leading and suggestive questions to which leading and suggestive questions, proper and timely objections were made at the time of the taking of the plaintiff's deposition, of the deceased's deposition.

MR. BARNES: That is all. Signed by Robert Barnes.

REPORTER'S NOTE: Whereupon, at this time the Bill of Exception by Mr. Barnes was offered for the record.

* * *

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REPORTER'S NOTE: Whereupon, at this time, 5:00 o'clock p.m. the jury returned to the courtroom in order to adjourn for the day and return on September 29, 1971.

THE COURT: Mr. Foreman and ladies and gentlemen, members of the jury, you can be seated. Mr. Jenkins, the Court understands that the jury does not feel that they can reach a verdict this afternoon and has requested to adjourn until tomorrow morning, is that correct?

THE FOREMAN: Yes, sir, that is correct.

THE COURT: The Court will permit the jury to decide the hour they return, either nine or nine-thirty. Have you discussed that among yourselves?

THE FOREMAN: We haven't, no, sir.

THE COURT: Well, we will take a vote then. How many of you would like to return at nine in the morning?

REPORTER'S NOTE: Whereupon, at this time there was a unanimous vote by the jury to return at 9:00 o'clock a.m.

THE COURT: I think that will take care of it then. You may be excused then until nine

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o'clock tomorrow morning.

The Court will give you this information. The other three cases in which the juries were selected have settled so you will be excused from having to serve on those cases, and I think some six of you had been selected on the case which was to begin tomorrow morning. How many of you were selected on that jury?

REPORTER'S NOTE: There was a short pause at this time.

THE COURT: Six, that is correct. So you will not have to be concerned about that case.

Do you have the form of verdict as has been given you?

THE FOREMAN: Yes.

THE COURT: The Clerk's office will keep the form of verdict and also if there are other exhibits that you would like to have, you may make that request tomorrow morning and you will meet the Deputy Marshal in the courtroom here at nine o'clock tomorrow morning.

Now, please do not discuss this case when you separate. Sometimes juries become so interested in the case that they can't refrain

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from talking about it whenever they are not in the jury room. But you would be violating the Court's orders if you do this. So no two or three or more of you should get together and discuss this case while you are separated and do not discuss it with each other and do not permit anyone who is not a member of your jury to talk to you about the case. If that should happen, you must report it to the Court.

We will meet back tomorrow morning at nine o'clock. The Marshal will accompany you to the jury room and you will begin your deliberations.

We will stand adjourned until that time.

THE MARSHAL: Everyone rise.

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REPORTER'S NOTE: Whereupon, the jury reached a verdict at 4:00 o'clock p.m.

THE COURT: Mr. Foreman, have you reached a verdict?

THE FOREMAN: We have, Your Honor.

THE COURT: Hand it to the Marshal and the Marshal will hand it to the Clerk, and the Clerk will read the answers.

THE CLERK: Verdict of the Jury. "Special Interrogatory No. 1, no, no, yes, yes, yes, yes.

Special Interrogatory No. 2, all six blanks are answered no.

Special Interrogatory No. 3, is yes.

Special Interrogatory No. 4, all six answers are yes.

Special Interrogatory No. 5, actual damages, sixty eight thousand dollars, damages for gross negligence, none.

The verdict of the jury signed by Foreman, Roy L. Jenkins.

THE COURT: Mr. Foreman and members of the Jury, this is the verdict of each and every one of

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you?

REPORTER'S NOTE: Whereupon, all jurors answered in the affirmative.

THE COURT: The Court will accept the verdict and order it filed.

We wish to express our appreciation to each of you for services rendered. I can appreciate the dedication with which you accepted your responsibility as jurors in this case. I think that you have conducted yourselves in a very admirable manner, you listened carefully to the testimony, you have given the case careful study in your deliberations and you have rendered what the Court would consider a fair verdict under the evidence in the case. So we will excuse you from further consideration of this case, and we hope that now you are experienced jurors, that you will want to come back Monday. However, in view of the fact that you spent eight days on this case, the Court will be rather lenient if you request to be excused from further jury service. However, we will let you decide whether you wish to avail yourself of this privilege, and if you do, you may talk to the ladies in the Clerk's Office and indicate to them whether you

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wish to return Monday or whether you wish to be excused.

We will stand adjourned.

THE MARSHAL: Everyone rise, please.

REPORTER'S NOTE: Whereupon, at this time the trial was concluded.

UNITED STATES DISTRICT COURT)
) —OFFICIAL REPORTER'S
EASTERN DISTRICT OF TEXAS) CERTIFICATE

I, Jerry T. Bloxom, Official Court Reporter for the District Court of the United States for the Eastern District of Texas, do hereby certify that the above and foregoing constitute a true, correct and complete transcript of the Court's Charge and Objections to Court's Charge in the above-styled and numbered civil cause.

WITNESS my official signature in the City of Beaumont, Texas, on this the 9th day of October, 1971.

Jerry T. Bloxom
Official Court Reporter
United States District Court
Eastern District of Texas.

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