IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
OCT 13 1971
JAMES R. COONEY, CLERK
BY DEPUTY Margaret Driver

CLARENCE BOREL

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

CIVIL ACTION NO. 6449

DEFENDANT'S MOTION FOR JUDGMENT ON THE VERDICT OF THE JURY; IN THE ALTERNATIVE, DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE JURY UNDER RULE 50-B; AND IN THE FURTHER ALTERNATIVE, DEFENDANT'S MOTION FOR A NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Fibreboard Corporation, erroneously named in this suit as Fibreboard Paper Products Corporation, and files this, its motion for judgment on the verdict of the jury; and in the alternative, motion for judgment notwithstanding the verdict of the jury under Rule 50-B; and in the alternative, motion for new trial, and as grounds for each of said motions would show the Court:

MOTION FOR JUDGMENT ON THE VERDICT OF THE JURY

1.

This was a suit for damages for personal injury during the lifetime of Clarence Borel and for death benefits under the Texas Death Statute, and exemplary damages filed by Thelma Borel, sole beneficiary of the Estate of Clarence Borel and surviving widow of Clarence Borel, against the defendant, Fibreboard Corporation, and other defendants, in which it was alleged and claimed that this defendant was responsible for the disease of asbestosis and a condition of mesothelioma, allegedly resulting

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from the asbestosis, which the plaintiff claimed was due to exposure to products containing asbestos manufactured by the defendant, Fibreboard Corporation, and by the remaining defendants, Pittsburgh-Corning Corporation, Owens-Corning Fiberglas Corporation, Johns-Manville Products Corporation, Philip Carey Corporation, Armstrong Cork Company, Eagle-Picher Industries, Inc., Standard Asbestos Manufacturing and Insulating Company, Combustion Engineering Company, Inc., Unarco Industries, Inc., and Ruberoid Company.

The plaintiff settled and compromised with the defendant, Owens-Corning Fiberglas Corporation for the sum of $4,225.55; the plaintiff settled and compromised said suit with Standard Asbestos Manufacturing and Insulating Company for the sum of $4,225.55; plaintiff settled with the defendant, Unarco Industries, Inc., for the sum of $6,225.55; and with Eagle-Picher Industries, Inc., for the sum of $6,225.55, and each of said defendants named paid said amounts to the plaintiff, Thelma Freida Borel, part of which was allocated to intervener, National Surety Company, the total sum of said allocation being $4,902.20. It having been stipulated that the Court without the intervention of the jury could find and determine the facts concerning whether plaintiff's decedent was subjected to the products of each of the defendants, Owens-Corning Fiberglas Corporation, Standard Asbestos Manufacturing and Insulating Company, Unarco Industries, Inc., and Eagle-Picher Industries, Inc., and whether such defendants were negligent or breached a warranty to the plaintiff's decedent, and also to determine the amount of the credit against the total verdict of the jury which would be made by reason of the settling defendants, the remaining defendants having requested the Court to find

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that plaintiff's decedent was subjected to the use of products manufactured by each of the settling defendants, that the use of the products of each of the settling defendants by the decedent caused or produced injury to his person which contributed or resulted in his death, and therefore the remaining defendants are entitled to a credit against the total amount of the damages found by the jury, being the sum of $68,000, and $9,783.30 medical expenses found by the Court, for a total of $77,783.30. The Court should find that under the case of Palestine Contractors, Inc. vs. Perkins, Tex. Sup. Ct., 386 S.W. 2d 764, reversing Ct. Civ. App., 375 S.W. 2d 751, the remaining defendants are entitled to a pro rata credit of four-tenths (4/10ths) of the total verdict, leaving the sum of $46,669.98 judgment, which would be the remaining amount of judgment which could be rendered jointly and severally against the remaining defendants, Fibreboard Corporation, Pittsburgh-Corning Corporation, Johns-Manville Products Corporation, Philip Carey Corporation, Armstrong Cork Company and Ruberoid Company.

The Court having rendered an instructed verdict as to the defendant, Combustion Engineering Company, Inc., found that the plaintiff did not prove that the decedent was subjected to the product of said defendant, and, accordingly, the plaintiff should take nothing against the defendant, Combustion Engineering Company, Inc., and the cross-plaintiffs should take nothing against the cross-defendant, Combustion Engineering Company, Inc.

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The Court having submitted this case on general instructions and special interrogatories only and not on a general verdict, the jury returned its verdict in answer to the following interrogatories:

"SPECIAL INTERROGATORY NO. 1

"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' opposite the named Defendant.

"ANSWER:

"Pittsburgh Corning Corporation No

"Armstrong Cork Company No

"Philip Carey Corporation Yes

"Ruberoid Company, Division of GAF Corporation Yes

"Johns-Manville Products Corporation Yes

"Fibreboard Paper Products Corporation Yes"

SPECIAL INTERROGATORY NO. 2: This interrogatory submitted the question of whether the six defendants were guilty of an act or acts of gross negligence, and the jury found that no defendant was guilty of gross negligence.

"If you have answered either Special Interrogatory 1 or 2 'Yes' and in that event only, you will answer the following interrogatory.

"SPECIAL INTERROGATORY NO. 3

"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?

"Answer 'Yes' or 'No.'

"ANSWER: Yes"

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"SPECIAL INTERROGATORY 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?

"Answer 'Yes' or 'No' opposite the named Defendant.

"ANSWER:

"Pittsburgh Corning Corporation Yes

"Armstrong Cork Company Yes

"Philip Carey Corporation Yes

"Ruberoid Company, Division of GAF Corporation Yes

"Johns-Manville Products Corporation Yes

"Fibreboard Paper Products Corporation Yes "

"SPECIAL INTERROGATORY 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:

"Actual Damages $68,000.00

"Damages for Gross Negligence None "

3.

The Court having charged the jury on specific acts of contributory negligence and the jury having answered Interrogatory No. 3 to the effect that the deceased was guilty of contributory negligence and that such negligence was a proximate cause of the injuries and death of the deceased, such acts of contributory negligence as found by the jury present a complete defense to any finding by the jury that the alleged warranties as contended for by the plaintiff and found to have been violated by this defendant, as well as the other defendants, is such a

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finding of negligence as constitutes a full and complete defense to the finding of the jury as to breach of warranties.

In this connection, the Court charged the jury with the following acts of contributory negligence and with none other: Whether the deceased failed to exercise ordinary and reasonable care with regard to his own safety with respect to: (a) Failure to use masks and respirators for protection from dust containing some asbestos; (b) In failing to request his employer to furnish blowers to remove dust-laden air; (c) In working in asbestos dust-laden air with full knowledge that he was inhaling such dust-laden air; (d) In continuing to work with insulation materials containing some asbestos after he knew, or in the exercise of ordinary care should have known, that it was affecting his health. The jury having made affirmative findings and there being evidence to support each and all of said acts of contributory negligence, such findings are a complete bar and defense to the jury finding of negligence in answer to Interrogatory No. 1 and to the breach of warranty in Interrogatory No. 4.

4.

The finding of the jury in answer to Interrogatory No. 3 convicting the decedent of contributory negligence is a complete defense to the jury finding of negligence on the part of this defendant and the several defendants in answer to Interrogatory No. 1.

5.

The jury having found that the decedent's contributory negligence was a proximate cause of his injury and death, such destroys the finding that the breach of warranty in answer to Interrogatory No. 4 was a proximate cause of his injury and death, and presents a complete defense to the breach of warranty theory of recovery.

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6.

The defendants having pleaded that the deceased, Clarence Borel, during the time that he was working with insulation products which contained some asbestos, knew and realized that he was working with a product containing asbestos; that he knew and realized he was inhaling dust-laden air which contained some asbestos; that he knew and realized that the inhalation of such dust-laden air was harmful to his health; that he knew and realized that the dust-laden air was causing injury or harm to his body as a result of the inhalation; that he continued to work with insulation materials containing some asbestos after he knew and realized that the dust-laden air was causing some harm to his body or health; and the burden of proof being upon the plaintiff to obtain a finding that the deceased, Clarence Borel, did not know and realize such facts, and the plaintiff having failed to request an interrogatory or finding of the jury that Borel did not know and realize such facts, there is no basis upon which to render a ~~verdict~~ judgment for the plaintiff; but to the contrary, a ~~verdict~~ judgment must be rendered for this defendant and each of the defendants on the verdict of the jury.

7.

This defendant and each of the defendants having pleaded that the plaintiff's claim or claims was bareed by the two (2) year statute of limitation of the State of Texas, the one (1) year statute of the State of California, and the one (1) year statute of the State of Louisiana, and the undisputed evidence shows that the plaintiff's decedent knew that he had sustained injury

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or harm to his body more than two (2) years prior to the time that he made a claim or filed a suit, the plaintiff failed to introduce any evidence which tolled the statute of limitation.

The undisputed evidence shows that the decedent had an X-ray in June, 1964, and at that time the physician told him that he had a spot on his lungs and this was caused by the nature of his employment as an asbestos worker.

8.

The Court having elected to submit this case on a special verdict and interrogatories under Rule 49-A, and not upon a general verdict or a general verdict accompanied by answers to interrogatories, and the defendants each having pleaded that the plaintiff's decedent voluntarily assumed the risk with knowledge and appreciation of the danger that he was inhaling asbestos dust which was harmful, and having objected to the failure of the Court to submit such issue by an interrogatory to the jury, and the burden of proof being on the plaintiff to obtain a finding that the deceased, Borel, did not know and realize such facts, and the plaintiff having failed to request such an interrogatory or finding of the jury that Borel did not know and realize such facts, such fact must be construed as having been found against the plaintiff or the verdict of the jury, and therefore there is lacking a necessary finding upon which to render a judgment for the plaintiff in this case.

The Court is limited to the findings of the jury in answer to the special interrogatories and the Court cannot find any omitted facts since the defendants each requested the submission of an interrogatory covering this factual defense and

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objected to the Court's Charge because of the failure of the Court to give such instruction.

9.

The defendants, and each of them, having pleaded that the plaintiff's claim or claims was barred by the two (2) year statute of limitation of the State of Texas, and the statutes of limitations of other states, and having requested the Court to submit a special interrogatory which would permit the jury to find the facts as to limitation and having objected to the failure of the Court to submit a special interrogatory on limitation, the Court cannot find the facts with respect to the issue of limitation, but to the contrary, since the burden was on the plaintiff to introduce evidence to establish that the claim was not barred by the two (2) year statute of limitation and there is no finding, judgment should be rendered for this defendant.

WHEREFORE, this defendant prays that the Court enter judgment that the plaintiff, Thelma Freida Borel, do have and recover nothing of and from the defendant, Fibreboard Corporation, and have and recover nothing of and from the remaining defendants and that the remaining defendants do have and recover nothing of and from Fibreboard Corporation on their respective cross-actions.

Respectfully submitted;

WELLER, WHEELUS, GREEN & BROCATO
P. O. BOX 350
BEAUMONT, TEXAS 77704

BY_____
GEO. A. WELLER,
ATTORNEYS FOR DEFENDANT,
FIBREBOARD CORPORATION.

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ALTERNATIVE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE JURY UNDER RULE 50-B

Pleading in the alternative, comes now the defendant, Fibreboard Corporation, and files this, its motion for judgment notwithstanding the verdict of the jury under Rule 50-B, and in the further alternative, for a new trial, and respectfully moves this Honorable Court:

1.

That the Court enter judgment in favor of this defendant that plaintiff and intervener take nothing against it and that the remaining cross-defendants take nothing on their cross-action, for the following reasons:

(a) There are no issues of fact on the basis of which plaintiff and intervener and cross-defendants are entitled to any judgment against this defendant.

(b) There is no evidence in this case that the plaintiff's decedent worked with or received any injury or damage from any product manufactured by the defendant, Fibreboard Corporation, which contained some asbestos.

(c) Because the undisputed evidence in this case shows that the claim of plaintiff's decedent, and therefore the claim of plaintiff, was barred by the two (2) year statute of limitation of the State of Texas because it is undisputed that plaintiff's decedent had notice that he had received some injury and damage from the use of products containing asbestos more than two (2) years prior to the filing of this suit or the origination or filing of any claim with the Industrial Accident Board of the State of Texas for workmen's compensation, and therefore the claim is barred by the two (2) year statute of limitation of the State of Texas and the one (1) year statute of limitation of the State of California.

(d) Because the undisputed evidence in this case shows that the plaintiff's decedent knew he was working with a product

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or products which contained some asbestos; that he was inhaling the dust-laden air which contained some asbestos; that he knew and realized that the inhalation of asbestos dust was harmful to his health; that he knew and realized that the dust-laden air containing some asbestos was causing harm or injury to his body and that he continued to work with insulation materials containing some asbestos after he knew and realized that the dust-laden air was causing some harm to his body and health, and such knowledge and realization constitutes an absolute defense to any claim of the plaintiff.

2.

The undisputed evidence in this case shows that the employer or employers of Borel knew and had knowledge that their employees, including Borel, would be subject to the dust hazard and inhalation of asbestos dust-laden air; that they knew that the individual asbestos worker would breathe the dust into his nose and body system unless he used a mask or respirator; that the employer knew that the asbestos dust was harmful to the body and would cause or contribute to cause the disease of asbestosis which was recognized as an occupational disease, and such knowledge of the employer or employers of Borel was imputed to the employee, Borel, under the law of Texas.

3.

Because the plaintiff wholly failed to obtain a jury finding in answer to a special interrogatory that Clarence Borel did not know and realize that the inhalation of asbestos dust was harmful to his health and was causing injury or harm to his body and that he did not continue to work with asbestos insulating materials after he knew and realized that the dust-laden air was causing some harm to his body and health, and having failed to

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obtain an affirmative finding of the jury to such effect and having failed to discharge the burden of proof resting upon the plaintiff, judgment should be rendered for this defendant.

4.

Because the undisputed evidence in this case shows that if plaintiff's decedent sustained the disease of asbestosis it occurred as a result of an exposure or exposures more than twenty (20) years prior to the date of his death, and if he sustained the disease or condition of mesothelioma such occurred as a result of an exposure or exposures some thirty (30) or more years prior to the date of his death, and the undisputed evidence shows that the state of medical and scientific knowledge as to asbestos insulation workers contracting the disease of asbestosis or the disease of mesothelioma was such that the manufacturer was not charged with knowledge of such fact until the year 1963 or 1964. Under the undisputed evidence, the deceased, if he had both of such diseases and conditions, such was contracted long prior to the time that the defendants, and each of them, were charged with the medical and scientific knowledge sufficient to find them negligent or guilty of a breach of warranty.

5.

Because the Court erred in overruling and failing to sustain this defendant and cross-plaintiff's motion for an instructed verdict duly and timely made, for each and all of the following reasons:

(1) There are no issues of fact on the basis of which plaintiff, intervener and cross-defendants are entitled to any judgment against this defendant and cross-plaintiff.

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(2) The plaintiff wholly failed to discharge the burden of proof resting upon her to show that the insulation product manufactured by this defendant was defective and not suitable for the purpose for which such products were intended and were therefore dangerous and harmful to human beings and to the health of man.

(3) The evidence is insufficient to establish that the insulation product manufactured by this defendant was defective and not suitable for the purpose for which such products were intended and were therefore dangerous and harmful to human beings and to the health of man.

(4) Because the undisputed evidence in this case establishes that the insulation product containing asbestos manufactured by this defendant was reasonably safe and suitable for the purpose for which such product was intended, and if there was any danger in the use of the product such danger occurred in the manner and means and under conditions prescribed by the contractor or owner for whom the plaintiff's decedent worked, and such conditions were transitory and were conditions over which this defendant had no control, and this defendant therefore owed no duty to the plaintiff's decedent which was violated by this defendant.

(5) Because the plaintiff wholly failed to discharge the burden of proof resting upon her to show that decedent worked at any specific time with products containing asbestos which were manufactured by this defendant; and even if he did work with such a product, plaintiff wholly failed to show the time of such exposure, the degree of such exposure, and wholly failed to show that plaintiff's decedent sustained any injury or damage to his

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person as a result of the use of such products, therefore there is no basis for plaintiff's claim that plaintiff's decedent suffered an injury to his person during a period of time he was working with a product manufactured by this defendant.

In this connection, the deceased admitted during his lifetime in his claim for workmen's compensation: "Although I became ill on the last job I worked, the fact is that I have worked as an insulator for the past 33 years, subject to the hazards of the job and I cannot truthfully say when I contracted asbestosis. Signed, Clarence Borel." Therefore, plaintiff's claim that Borel suffered an injury and contracted asbestosis or another disease as a result of working with a product manufactured by this defendant is based upon speculation and conjecture and the jury should not be allowed to speculate as to when and where the deceased sustained an excess exposure to asbestos dust, as it is not every exposure to such dust that causes injury.

(6) Because the evidence is insufficient to show that plaintiff's decedent actually worked with products which contained some asbestos which were manufactured by this defendant, and likewise, even if plaintiff's decedent did work on a job where a product manufactured by this defendant was used, there is no evidence of the type of exposure and no evidence that he did in fact sustain an injury at such time and place.

(7) Because the undisputed evidence is that it takes occupational exposures to dust containing asbestos over a period beginning at least twenty (20) years prior to the time that the disease of asbestosis manifests itself, and further, it takes approximately thirty (30) years in any event if the alleged

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asbestosis develops into mesothelioma or the exposure to asbestos causes mesothelioma; therefore there is no basis for the plaintiff's claim that decedent suffered asbestosis and mesothelioma as a result of any contact with this defendant's product during the last five (5) to seven (7) years of his working existence in the asbestos industry.

(8) Because as a matter of law, the plaintiff cannot recover for an alleged injury or damage to the deceased's person which may have occurred as a result of exposure to dust from products containing asbestos which plaintiff claims was manufactured by this defendant, when such exposure occurred on or after April 8, 1964, the date upon which Clarence Borel admitted that an X-ray was taken and he was told that the X-rays showed a spot on his right lung which was the result of his occupation, but, nevertheless, he continued to work with asbestos products.

In this connection, plaintiff wholly failed to show that Borel was exposed to dust containing some asbestos particles from products manufactured by this defendant prior to April 8, 1964, and the plaintiff wholly failed to show there was any excessive exposure to defendant's product or injury to decedent.

(9) Because the undisputed evidence established as a matter of law that the plaintiff's claim for alleged injury and damage, if any, is barred by the statute of limitation of two (2) years of the State of Texas. In this connection, plaintiff's decedent admitted that he had X-rays taken in 1964 and was advised that he had a spot on one lung which was the result of his occupation as an asbestos worker.

(10) Because the undisputed evidence establishes as a matter of law that if plaintiff's decedent sustained any alleged

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injury and damage in the State of California as the result of any exposure, such is barred by the one (1) year statute of limitation of the State of California.

(11) Because the undisputed evidence established as a matter of law that if plaintiff's decedent sustained any alleged injury and damage in the State of Louisiana as the result of any exposure, such is barred by the one (1) year statute of limitation of the State of Louisiana.

(12) Because the plaintiff failed to discharge the burden of proof to show that the defendant, Fibreboard Corporation, or any other manufacturer, prior to the latter part of 1963 or the early part of 1964 could by the reasonable application of human skill and foresight have known that construction workers applying its insulation product in construction work under usual and ordinary conditions such as the plaintiff's decedent, Borel, would sustain asbestosis as a result of working with asbestos products, because the state of the medical and scientific knowledge was such that it was recognized that it was reasonably safe for asbestos construction workers to work in such trade where threshold limit values of airborne dust were five million particles of all kinds of dust per cubic foot of air, and prior tests and experiments in naval shipyards and later in the construction industry had shown that the dust counts were under the five million particles per cubic foot of air.

(13) Because the plaintiff wholly failed to discharge the burden of proof resting upon her to show that any act or omission of this defendant was a failure to exercise ordinary care in relation to the plaintiff and that any act or omission

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of this defendant in the manufacture of its product caused or contributed to cause the decedent's alleged injury, death or damage, if any.

(14) Because a statutory beneficiary suing under the Texas Wrongful Death Statute, Article 4671, can recover only if the decedent, had he lived, could have recovered, and since the decedent had notice that he sustained some injury more than two (2) years prior to the time that he filed or asserted claim in the State of Texas, such claim and suit is barred by the Texas two (2) year statute of limitation. In this connection, plaintiff's decedent admitted that he had an X-ray at the time he purchased his house on April 8, 1964, and the physician told him he had a spot on his lung which was caused as a result of his employment as an asbestos worker, and therefore plaintiff's decedent knew that he had sustained some damage to his body as the result of his employment and if he had a claim or claims for damages then such claim in any event accrued not later than such date and more than two (2) years expired before decedent filed a claim for workmen's compensation and before the filing of this suit. Further, any alleged cause of action for exposures in the State of California or Louisiana are each barred by the one (1) year statute of limitation and the tolling of such statute is not suspended by any alleged claim for workmen's compensation.

(15) Because the undisputed evidence in this case established that the products containing some asbestos which this defendant manufactured and sold to owners of plants or commercial insulating contractors were at all times reasonably fit and suitable for the purpose for which they were manufactured

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and sold and such products were not in anywise defective for the use for which they were manufactured and sold.

(16) Because the undisputed evidence in this case showed and established that if the decedent had asbestosis he acquired such asbestosis as a result of an occupational hazard or working in dust-laden air which contained asbestos dust over a period beginning thirty-three (33) years prior to January 17, 1969, and that it takes at least twenty (20) years from the time of an injurious exposure to develop the disease of asbestosis and the evidence showed that if he had the disease of asbestosis it was from such prior exposures, and the evidence does not establish that he sustained asbestosis as a result of exposures during the five (5) years or even ten (10) years prior to January, 1969.

(17) Because the undisputed evidence in this case showed that plaintiff's decedent was guilty of a failure to exercise ordinary care for his own safety and that such failure was a proximate cause of his condition, in that he failed to use and utilize any masks or respirators on his construction jobs and that he worked in dust-laden air containing some asbestos dust with full knowledge that he was inhaling such dust-laden air and that he was sustaining some injury and he failed to remove himself from such dust-laden air.

(18) Because the undisputed evidence showed that at all times plaintiff's decedent knew that he was working with insulation products containing some asbestos and it was common knowledge that the inhalation of dust particles containing asbestos, as well as other dust, was harmful to the respiratory

system, and he knew that work with products which contained some asbestos created dust which was harmful to him, but, nevertheless, he continued to work in dust-laden air where insulation materials containing asbestos were used and he continued to work with full knowledge that he was inhaling some asbestos dust, therefore plaintiff is barred from any recovery under the theory of volenti non fit injuria.

(19) Because the plaintiff's decedent failed to exercise ordinary care for his own welfare and such failure was a proximate cause of at least part of his disability if any part of his disability was caused or produced by an exposure or exposures after plaintiff's decedent had knowledge that the dust was harmful to him and after he had chest X-rays in April, 1964, and was told that the spot on his lung was the result of his employment, but he nevertheless, continued to work and subjected himself to asbestos dust which he knew and realized was harmful.

(20) Because the undisputed evidence in this case showed that plaintiff's decedent's employer or employers knew at all times that they were working with insulation products containing some asbestos and that such product when cut and applied created some dust and that such dust was harmful if proper ventilation was not provided to the employee, and the employer likewise knew that respirators or masks should be used under dusty conditions, and under the law of Texas, plaintiff's decedent was charged with the same knowledge which his employer had or which his foreman or supervisor had.

(21) Because the undisputed evidence in this case showed that the plaintiff's decedent claimed he was exposed, and the evidence shows he was exposed, to insulation products

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containing some asbestos and worked with products manufactured by Johns-Manville Sales Corporation, Eagle-Picher Industries, Inc., Pittsburgh-Corning Corporation, Owens-Corning Fiberglas Corporation, Combustion Engineering, Inc., R & I Refractory & Insulation Corporation, Unarco Industries, Inc., Ruberoid Company, Philip Carey Corporation, Armstrong Cork Company, Standard Asbestos Manufacturing and Insulation Company, and plaintiff alleged that the decedent worked with each and all of said products and that each and all of said products caused or contributed to cause his injury and disability, therefore the alleged acts and omissions of this defendant could not proximately cause the plaintiff's alleged injury and damage.

(22) Because the undisputed evidence in this case shows that the plaintiff claims that deceased was exposed to the product or products manufactured by at least eleven (11) different manufacturers at various different dates, times and places and at no time was the alleged exposure to the product a joint and several exposure, but the alleged exposures were separate, and the plaintiff is unable to determine whether each exposure caused or contributed to cause the decedent's injury and death, therefore it would be gross speculation to submit this case to the jury and permit the jury to speculate as to which exposure was injurious and an alleged proximate cause of plaintiff's injury and damage.

(23) Because the undisputed evidence shows that the utility and need of the asbestos insulation products in industry far outweigh the possibility of harm to construction workers, and the imposition of strict liability against this defendant because

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the plaintiff's decedent may have sustained the disease of asbestosis over a period of twenty-five (25) years would be an undue impediment to business and an intolerable injustice because under the evidence the scope of liability would not be confined to the zone of danger which could reasonably have been foreseen before these products were sold.

(24) Because the alleged claim is that plaintiff's decedent sustained injury and damage beginning with exposures to some products containing asbestos as long as thirty-three (33) years prior to the time it was discovered that he sustained or had the occupational disease of asbestosis and during this period of time he knew he was working in dust-laden air which contained some asbestos dust, and the dust conditions were created on the job by plaintiff's decedent and his fellow workers as a result of changing or altering the product and it was the duty of the employer or the owner of the premises to provide facilities such as blowers and suction saws and fans to eliminate the dust-laden air and it was the duty of the employer to furnish respirators in areas where there was excessive exposures to the dust. There was no duty on the part of the defendant manufacturer to provide the working conditions in plants owned by third parties or the working conditions under independent contractors over which the manufacturer had no control, and they had no duty to warn the plaintiff's decedent and his employer of the danger to dust inhalation, which they already knew.

(25) Because it is undisputed as a matter of law that the plaintiff's decedent and decedent's employers had notice of the existence of an occupational disease known as asbestosis since the enactment in 1947 of the occupational disease part of

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the Texas Workmen's Compensation Law or the inclusion in 1947 of asbestosis as an occupational disease.

(26) Because it is undisputed that the state of the medical knowledge and scientific knowledge was such that it had not been determined that asbestos insulation workers were subject to contracting the disease of asbestosis as the result of exposures in the asbestos insulation industry because the threshold limit values of airborne dust which contained some asbestos of five million particles of dust per cubic foot of air was reasonably safe for such workers, and further, because it had been determined that the work of asbestos insulators working in naval shipyards was reasonably safe since the tests showed that average threshold limit values of such work to be within the recognized threshold limit value of five million particles of all dust per cubic foot of air.

(27) Because it is undisputed that a notice was placed upon the product of Johns-Manville in January, 1965, and other notices, including notice of this defendant, was placed on its product on or prior to January 1, 1966, therefore the plaintiff's decedent had notice of the potential danger from the inhalation of excessive amounts of asbestos dust, and having had such warning, plaintiff cannot now complain that plaintiff's decedent did not know of the potential danger. No recovery could or should be had for any event after January 1, 1966, or after the date of the notice.

(28) Because there is no evidence of probative force to raise an issue as to whether the illness and death of Clarence Borel was proximately caused by the use of any product manufactured and sold by this defendant.

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(29) Under the evidence in this case it is entirely a matter of speculation as to whether any product manufactured and sold by this defendant in anywise caused or contributed to the illness and death of Clarence Borel.

(30) Plaintiff has failed to raise an issue against this defendant, because under all of the evidence it is just as reasonable to assume or presume that Clarence Borel's illness and death was caused by exposure to and inhalation of dust from products manufactured by one or more of the other manufacturers and sellers of insulation material as it is to presume or assume that his illness and death was caused by exposure to or inhalation of dust from this defendant's product, and accordingly, plaintiff wholly failed to meet the burden of proof with respect to any claim asserted against this defendant.

(31) Because there is no evidence that the acts of the defendants jointly and on the same date caused any injury or damage to the deceased or that they acted in concert, and there are no cases which have ever held that one tort feasor who may have committed an act or omission on one date can be held jointly and severally liable for the acts and omissions of other defendants who may have committed a separate and distinct tort on a separate and distinct date, and to permit a recovery in this case would be to permit the joinder of separate and independent alleged causes of action or acts and omissions which allegedly caused the damages which were separate and independent acts and occurrences.

(32) Because the plaintiff is not entitled to apply the doctrine of strict liability in tort against this defendant

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in an ex post facto fashion as if it were the law of Texas for many years prior to the time that such doctrine was established in Texas by the Texas Supreme Court. Since the doctrine of strict liability in tort cannot and should not apply retroactively as to the acts and omissions of this defendant in the manufacture and sale of its products, the plaintiff has wholly failed to discharge her burden of proof and has adduced no competent evidence to establish liability on the part of this defendant.

(33) Because if any particular exposure to asbestos dust from products manufactured by this defendant could, under the evidence, be a proximate cause or a producing cause of any injury to the plaintiff's decedent, then of necessity the decedent's many exposures to asbestos dust from many products subsequent to the time that warnings of danger were placed upon such products, including the products of this defendant, likewise proximately caused or constituted a producing cause of some indivisible portion of plaintiff's decedent's injuries. Since the portion of the decedent's injury attributable to exposure subsequent to the time warnings were placed on this defendant's products has not been developed by the plaintiff, and since the plaintiff has made no attempt to attribute any portion or percentage of the decedent's condition to exposure to this defendant's products prior to the time that this defendant admittedly posted such notices and warnings on its products, the plaintiff has wholly failed to make an actionable case against this defendant.

(34) The plaintiff has failed to show by competent evidence that the decedent's employers did not have adequate

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knowledge of the harm or danger associated with the use of this defendant's products, and the plaintiff, therefore, has failed to negative "no duty" on the part of this defendant as required of her under the law of the State of Texas. Since there is no duty on the part of the manufacturer of a product to warn of a danger known to the purchaser of such product, nor to the employees of such purchaser, which in this case would be the decedent and his employers, and since the plaintiff has failed to show that the decedent's employers did not have such knowledge of danger, the plaintiff has failed to carry her burden of negativing "no duty," and, therefore, has failed to make a case for the jury against this defendant.

(35) Because it is undisputed that this defendant's products comply with the industry standards of quality and safety in every respect; and there is no competent evidence that (1) there is a method of manufacturing such products so that they will be safer, (2) nor that any manufacturer makes a safer such product, (3) nor that this defendant violated any legislative safety standard.

6.

The Court having charged the jury on specific acts of contributory negligence and the jury having answered Interrogatory No. 3 to the effect that the deceased was guilty of contributory negligence and that such negligence was a proximate cause of the injuries and death of the deceased, such acts of contributory negligence as found by the jury present a complete defense to any finding by the jury that the alleged warranties as contended for by the plaintiff and found to have been violated by this defendant, as well as the other defendants, is such a finding of

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negligence as constitutes a full and complete defense to the finding of the jury as to breach of warranties.

7.

The jury having found that the decedent's contributory negligence was a proximate cause of his injury and death, such destroys the finding that the breach of warranty in answer to Interrogatory No. 4 was a proximate cause of his injury and death, and presents a complete defense to the breach of warranty theory of recovery.

8.

The defendants having pleaded that the deceased, Clarence Borel, during the time that he was working with insulation products which contained some asbestos, knew and realized that he was working with a product containing asbestos; that he knew and realized he was inhaling dust-laden air which contained some asbestos; that he knew and realized that the inhalation of such dust-laden air was harmful to his health; that he knew and realized that the dust-laden air was causing injury or harm to his body as a result of the inhalation; that he continued to work with insulation materials containing some asbestos after he knew and realized that the dust-laden air was causing some harm to his body or health; and the burden of proof being upon the plaintiff to obtain a finding that the deceased, Clarence Borel, did not know and realize such facts, and the plaintiff having failed to request an interrogatory or finding of the jury that Borel did not know and realize such facts, there is no basis upon which to render a verdict for the plaintiff; but to the contrary, a verdict must be rendered for this defendant and each of the defendants on the verdict of the jury.

9.

The Court having elected to submit this case on a special verdict and interrogatories under Rule 49-A, and not upon a general verdict or a general verdict accompanied by answers to interrogatories, and the defendants each having pleaded that the plaintiff's decedent voluntarily assumed the risk with knowledge and appreciation of the danger that he was inhaling asbestos dust which was harmful, and having objected to the failure of the Court to submit such issue by an interrogatory to the jury, and the burden of proof being on the plaintiff to obtain a finding that the deceased, Borel, did not know and realize such facts, and the plaintiff having failed to request such an interrogatory or finding of the jury that Borel did not know and realize such facts, such fact must be construed as having been found against the plaintiff or the verdict of the jury, and therefore there is lacking a necessary finding upon which to render a judgment for the plaintiff in this case.

The Court is limited to the findings of the jury in answer to the special interrogatories and the Court cannot find any omitted facts since the defendants each requested the submission of an interrogatory covering this factual defense and objected to the Court's Charge because of the failure of the Court to give such instruction.

ERRORS DURING TRIAL

1.

The error of the Court in admitting into evidence plaintiff's Exhibit No. 10, and particularly that part of the cards pertaining to use of the products of Fibreboard Corporation, over the objection that such card or cards was based upon hearsay according to information correlated by some unknown person and because the exhibits are self-serving and at the time plaintiff's counsel attempted to introduce the cards plaintiff's decedent had

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not upon deposition identified the use of any product or products manufactured by this defendant.

2.

The Court erred in admitting plaintiff's exhibit No. 10, and particularly that part thereof pertaining to Fibreboard Corporation, because the plaintiff's decedent on deposition failed to identify the time or place that he worked with the product of this defendant, and the exhibits taken together with the testimony of decedent stating that he used products manufactured by this defendant over his working lifetime constitutes no more than a self-serving declaration, opinion and conclusion based on hearsay testimony, and because this defendant did not have the opportunity to examine the person or persons who supplied the hearsay information.

3.

The error of the Court in admitting the opinion of Dr. Daniel E. Jenkins that there was adequate literature and scientific knowledge to put a manufacturer of asbestos products on notice of the dangerous nature of the product in the year 1940 and subsequent years, all over the objection of defendants that such opinion did not involve an opinion on scientific or medical knowledge but was an opinion based upon hearsay and the expression of an opinion on an ultimate issue in the case which invaded the province of the jury.

4.

The error of the Court in admitting the testimony of Dr. Daniel E. Jenkins as to the studies of Dr. Selikoff and others reprinted from the Annals of New York Academy of Science

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in 1965, over the objection that such articles were hearsay testimony and not original evidence and such testimony was improper as an effort to support and form the basis for the opinion of Dr. Jenkins.

5.

The Court erred in admitting over the objection of defendants Exhibits Nos. _____ to _____, which were slides or photographic evidence taken of various experiments or conditions, all over the objection that such was hearsay and that none of such material related to asbestos insulation workers.

6.

The error of the Court in admitting the testimony of the witnesses, Samuel R. Potter, Claude J. Tomplait, J. J. Crawford and Percy LaGrappe, to the effect that each had the occupational disease of asbestosis, over the objection of the defendants that such testimony was irrelevant and immaterial and not the opinion of a physician and was highly prejudicial to permit such persons to testify to their physical condition; and further, that such testimony was based upon hearsay.

7.

The error of the Court in failing and refusing to submit the defendants' defense that the cause of action asserted by Borel in his lifetime and by plaintiff after his death was barred by the two (2) year statute of limitation of the State of Texas.

8.

The error of the Court in failing to instruct the jury as requested in defendants' requested charge No. 20, covering the defense that plaintiff's cause of action was barred by the two (2) year statute of limitation under the law of the State of Texas.

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9.

The error of the Court in failing and refusing to submit defendants' requested special interrogatory No. 1, which would have submitted to the jury the factual question as to whether Borel sustained some injury to his body on or prior to April 8, 1964, June 1, 1967, October 19, 1967, and October 19, 1968, in which event his claim would have been barred by the two (2) year statute of limitation of the State of Texas.

10.

The error of the Court in refusing to submit defendants' requested special interrogatory No. 2, or some form thereof, inquiring of the jury as to whether Clarence Borel knew on or prior to the dates set forth in said interrogatory that he had sustained some injury to his body as a result of working with a product or products containing some asbestos.

11.

The error of the Court in failing and refusing to submit to the jury an interrogatory incorporating the defense of assumption of risk (defendants' requested special interrogatory No. 9), and in overruling defendants' objection to the charge because no interrogatory was submitted to the jury whereby they might answer and find such fact or facts in favor of defendants.

12.

The error of the Court in overruling the objection of defendants to the charge of the court that contributory negligence was in nowise a defense to a breach of implied or express warranty.

13.

The error of the Court in failing and refusing to submit an interrogatory to the jury and to request a finding which would

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have negatived knowledge and realization on the part of Borel that his exposure to asbestos dust was harmful and causing him injury, and in overruling defendants' objection to the charge because of such failure.

14.

The error of the Court in overruling defendants' objection to the Court's Charge because of failing and refusing to give defendants' requested charge No. 1, which reads:

> "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."

15.

The error of the Court in overruling defendants' objection to the Court's Charge because of failing and refusing to give defendants' requested charge No. 6, defining the term "defect" or "defective condition," which reads:

> "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 a 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."

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16.

The error of the Court in overruling defendants' objection to the Court's Charge because of failing and refusing to give defendants' requested charge No. 18, defining the term "unreasonably dangerous," which reads:

> "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."

17.

The error of the Court in overruling defendants' objection to the Court's Charge because of failing and refusing to give defendants' requested charge No. 19, which reads:

> "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."

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18.

The error of the Court in overruling defendants' objection to the Court's Charge because of failing and refusing to give defendants' requested charge No. 16, which reads:

> "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.
>
> "You are further instructed that the burden is on the plaintiffs 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."

19.

The error of the Court in overruling defendants' objection to the Court's Charge because of failing and refusing to give defendants' requested charge No. 5, which reads:

> "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.

20.

The error of the Court in overruling defendants' objection to the Court's Charge because of failing and refusing to give defendants' requested charge No. 11, which reads:

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"You are instructed that the plaintiffs cannot recover any damages in this case if Clarence Borel voluntarily encountered the risk of injury while using or installing insulation products containing asbestos or while working with such products or working in the area where insulation products containing asbestos were being used or installed. The elements involved in the defense of voluntary assumption of risk are (1) that the party has knowledge of the facts constituting a dangerous condition or activity; (2) that he knows the condition or activity is dangerous; (3) he appreciates the nature or extent of the danger; and (4) he voluntarily exposes himself to this danger.

"You are further instructed that a party may not close his eyes to obvious or known dangers and he cannot be heard to say that he did not know or appreciate a danger if he were possessed of or had knowledge of the conditions which brought about the danger.

"You are therefore instructed that in the event you find and believe that each and all of the elements above referred to have been established by a preponderance of the evidence, that then you must return a verdict in this case against the plaintiffs and in favor of each defendant, and this is so even though you may find and believe from the evidence that defendants were negligent or that there was a breach of warranty pertaining to their products."

21.

The error of the Court in failing to submit an interrogatory to the jury on the issue of the assumption of risk and in overruling defendants' objection to the charge because of the failure to submit an interrogatory to the jury which would have permitted the jury to make a finding in regard to the assumption of risk.

22.

The error of the Court in instructing the jury that contributory negligence or assumption of risk is not a defense to liability based upon strict liability or liability based upon warranty, all over the objection of the defendants that such was an erroneous instruction in that affirmative acts of contributory negligence or knowledge and information under the theory

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of volenti non fit injuria or assumption of risk does constitute a defense to strict liability and liability based upon express or implied warranty.

23.

The error in overruling objections to the instructions to the jury in failing to place the burden of proof upon the plaintiff requiring a finding negativing knowledge and realization under the theory of volenti or voluntary assumption of risk, which was pleaded by the defendants and raised by the evidence.

24.

The error of the Court in overruling defendants' objections to the charge because of failing and refusing to give the defendants' requested charge No. 4 instructing the jury as to the defense of contributory negligence.

25.

The error of the Court in overruling defendants' objection to the Charge of the Court in the submission of negligence generally on a number of specific grounds without submitting special interrogatories as to each ground, over the objection of defendants that such submission amounted to a general charge and as to one or more of the specific acts there was no evidence to support such submission or finding of the jury, and the form of the submission made it impossible for the Court or the defendants to determine the specific finding of negligence found by the jury against each of the defendants.

26.

The error of the Court in failing and refusing to reduce the verdict of the jury and the total amount of the judgment

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by a pro rata part of such judgment based upon the exposure of Borel to the products of the settling defendants, Owens-Corning Fiberglas Corporation, Standard Asbestos Manufacturing and Insulating Company, Unarco Industries, Inc., and Eagle-Picher Industries, Inc., and each of them. Under the Palestine Contractors case, as to those settling defendants with whose product the plaintiff's decedent worked during his lifetime and was exposed to and which he claimed and asserted caused him damage, the remaining defendants are entitled to have a pro rata reduction in the total amount of the judgment of one-tenth (1/10th) for each of the settling defendants.

27.

In the alternative, and in the event the Court refuses to reduce the judgment on the basis of a pro rata share of the total verdict as to each of the settling defendants, Owens-Corning Fiberglas Corporation, Standard Asbestos Manufacturing and Insulating Company, Unarco Industries, Inc., and Eagle-Picher Industries, Inc., then this defendant says that each of the defendants in this case are entitled to a total credit against the judgment of the jury for the amount paid and contributed to the plaintiff and plaintiff's decedent, which was $4,225.55 by Owens-Corning Fiberglas Corporation; $4,225.55 by Standard Asbestos Manufacturing and Insulating Company; $6,225.55 by Unarco Industries, Inc.; and $6,225.55 by Eagle-Picher Industries, Inc., or the total sum of $20,902.20, and if the judgment is not reduced by such sum, then such is error.

28.

The error of the Court in giving the instruction on strict liability and implied warranty over the objection of the

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defendants that such instruction had the effect of instructing the jury that they should return a verdict against each of the defendants to whose product the plaintiff's decedent had been exposed during his lifetime.

29.

The Court erred in overruling defendants' motion in limine to suppress as evidence a series of cards marked P-10 (referred to as marked P-1 through P-12 attached to plaintiff's decedent's deposition) on the grounds set forth in said motion.

30.

The Court erred in granting the plaintiff more than three peremptory challenges, to-wit, six, and in overruling defendants' objections to the allowance to plaintiff of more than three peremptory challenges and defendants' objections to limiting the number of peremptory challenges to be exercised by the defendants to nine strikes.

31.

The Court erred in overruling the defendants' objection to the Court's Charge which instructed the jury that it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if after consideration of all of the evidence in the case the jurors believe that what is sought to be proved on that issue is more likely true than not and to establish by a preponderance of the evidence means to prove something is more likely so than not so.

32.

The error of the Court in overruling the objections of the defendants that there is no cause of action for breach of warranty which causes or produces death.

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33.

The Court erred in instructing the jury over the objections of the defendants that: "If, in examining the evidence attending the surroundings of the accident and deceased's injuries, and the explanation, after you have weighed it, if you are satisfied that you find what did occur was due to negligence on the part of anybody, then, of course, the plaintiffs have established the burden that the law imposes upon them."

34.

The Court erred in overruling the objection of the defendants that there was no evidence as to the amount of the pecuniary loss, which included contributions from the earnings of the deceased to his wife, and that such instruction allowed the jury to base its answer upon speculation and conjecture.

35.

The Court erred in overruling defendants' objections to the global submission of negligence and proximate cause against each of the defendants because several of the different grounds of negligence submitted were not raised by the evidence and there is no way to determine the basis for the verdict of the jury, that is, whether the jury found negligence in failing to remove the product from the market or failing to inform users of protective devices, or failing to "test."

36.

The Court erred in overruling objections to negligence and proximate cause, particularly the charge that it was negligent if the defendant failed to remove the product from the market, because there was no evidence to support such submission and there

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was no duty on the part of each defendant to remove its product from the market.

37.

The Court erred in overruling the objections to the Charge of the Court as to negligence in failing to give warnings of the possible dangers involved in the use of its product because there was no evidence of negligence in this respect and such alleged negligence could not have been a proximate cause of the alleged injury and death.

38.

The Court erred in overruling this defendant's objection to the Charge to the Jury that the jury could find negligence on the part of each of the defendants in failing to inform users of protective devices because there was no evidence that such failure was a proximate cause of the occurrence.

39.

The Court erred in failing to sustain the objection of this defendant to the charge of negligence on the part of each defendant in failing to test its product because there was no evidence to support the submission of such issue; there was no proof of what test or tests should have been made; and the word "test" is submitted in a global fashion.

40.

The error of the Court in overruling defendants' objection to the Charge generally, and particularly to that part of the Charge as to breach of warranty and proximate cause based thereon, because such allows one defendant to be penalized for the acts of other defendants and assumes that the plaintiff's decedent

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sustained injury as the result of the use of each defendant's product, and such allows the jury to assess damages against each of the defendants for damages caused by another defendant.

41.

The Court erred in instructing the jury on the law of the Commercial Code or Commercial Law, stating that such law requires that a product be safe for the purpose for which sold, which objection was that the Commercial Code in the State of Texas was not adopted until 1966, and such statute cannot be applied retroactively.

42.

The Court erred in overruling the defendants' objections to the Court's Charge because the Charge allowed the jury to find separate and distinct acts of negligence against the various defendants and to award joint damages against each and all of the defendants because of such exposure.

43.

The Court erred in overruling the objection of these defendants because the Charge as framed allowed the jury to find each of the defendants liable as joint and several tort feasors, whereas any alleged tort by an individual defendant was a separate and distinct incident for which the remaining defendants were not liable or responsible.

44.

The Court erred in overruling the objection of this defendant to the Charge of the Court because such Charge as framed made the alleged breach of warranty retroactive under the law of the State of Texas and was in effect an ex post facto application of the law.

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45.

The Court erred in overruling these defendants' objections to the instruction on damages, and particularly the instruction that the jury should use their own knowledge and experience and sense of justice in arriving at a damage verdict, because such places an undue burden on the defendants and the jury was not limited to damages based on the evidence.

46.

The Court should not enter a judgment on the verdict of the jury because the Charge was based solely upon special interrogatories and not upon a general verdict, and since the Court wholly failed to submit an interrogatory on the knowledge and appreciation and assumption of risk on the part of the plaintiff's decedent, when the burden was on the plaintiff, there is no basis upon which a verdict can be rendered in favor of the plaintiff. In other words, since we have a special verdict and not a general verdict, the Court is limited to the findings of the jury in answer to the special interrogatories and there is no finding that the plaintiff's decedent did not know, appreciate and realize the danger of working with a product containing asbestos or exposing himself to asbestos dust or in continuing to work with asbestos products after he knew that he was sustaining some injury.

47.

The Court should enter judgment for this defendant because the burden was on the plaintiff to obtain a finding that deceased did not know that he had sustained an injury more than two (2) years prior to the date of his suit or the date of filing

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a claim or claims under the Workmen's Compensation Act, and no such issue was submitted to the jury.

48.

The error of the Court in overruling defendants' objection to the Charge and in failing and refusing to give defendants' requested charge No. 4, which reads:

> "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 warranty 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 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 own safety by reason of a failure to use masks 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."

49.

The error of the Court in overruling defendants' objection to the Court's Charge 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 answered that the day or dates were unknown as to the injury then there could have been no recovery.

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50.

The error of the Court in overruling defendants' objection to the Charge because of its failure to charge the jury as requested in charge marked "Ruberoid's Specially Requested Instruction No. 1," which reads:

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

51.

The error of the Court in overruling defendants' objection to the charge because of its failure to charge the jury as requested in charge marked "Ruberoid's Specially Requested Instruction No. 5," which reads:

> "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."

52.

The Court erred in failing and refusing to submit the factual issue contained in defendants' requested special interrogatory

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No. 10, presenting the defense that if the employer or employers of Borel during his employment knew or had knowledge as to the fact that asbestos dust was harmful to the body and could cause or contribute to cause the disease of asbestosis, and such interrogatory would have presented a defense to plaintiff's cause of action since the knowledge of the employer is imputed to the employee, and proper objection having been made to the Court's Charge for failure to submit this interrogatory, the failure to submit this defense was error.

WHEREFORE, this defendant prays, first, that the Court enter judgment on the special interrogatories submitted to the jury and the verdict of the jury that the plaintiff take nothing and that this defendant be discharged with its costs; second, that this Court grant this defendant's motion for judgment notwithstanding the verdict of the jury; and third, that because of numerous errors upon the trial of the case that the Court grant this defendant a new trial and set aside the verdict of the jury. This defendant prays for such other and further relief to which it may be entitled, either at law or in equity.

Respectfully submitted;

WELLER, WHEELUS, GREEN & BROCATO
P. O. BOX 350
BEAUMONT, TEXAS 77704

BY _____
GEO. A. WELLER,
ATTORNEY FOR DEFENDANT,
FIBREBOARD CORPORATION.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing motion was served on Mr. Ward Stephenson, Stephenson & Thompson, Stephenson Building, Orange, Texas, 77630, attorney for plaintiff, and to all attorneys of record for settling defendants and remaining defendants, by mailing a copy to their respective addresses on the 13th day of October, 1971.

GEO. A. WELLER

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CIVIL ACTION NO. 6449

CLARENCE BOREL

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

DEFENDANT'S MOTION FOR JUDGMENT ON THE VERDICT OF THE JURY; IN THE ALTERNATIVE, DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE JURY UNDER RULE 50-B; AND IN THE FURTHER ALTERNATIVE, DEFENDANT'S MOTION FOR A NEW TRIAL.

WELLER, WHEELUS, GREEN & BROCATO
ATTORNEYS AT LAW
BEAUMONT SAVINGS BUILDING
BEAUMONT, TEXAS 77704

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