IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

OCT 22 1971

JAMES R. COONEY, CLERK
BY DEPUTY Margaret Driver

CLARENCE BOREL

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

CIVIL ACTION NO. 6449.

DEFENDANT RUBEROID COMPANY'S MOTION FOR JUDGMENT ON THE VERDICT OF THE JURY; IN THE ALTERNATIVE, DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE JURY

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Ruberoid Company, 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, 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 life-time 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, Ruberoid Company, 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 from the asbestosis, which the plaintiff claimed was due to exposure to products containing asbestos manufactured by the defendant, Johns-Manville Products Corporation, and by the remaining defendants, Pittsburgh-Corning Corporation, Owens-Corning Fiberglas Corporation, Fibreboard Corporation, Philip Carey Corporation, Armstrong Cork Company,

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Eagle-Picher Industries, Inc., Standard Asbestos Manufacturing and Insulating Company, Combustion Engineering, 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 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 to 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 expense found by the Court, a total sum of $77,783.30. The Court should find that under the case of

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Palestine Contractors, Inc. v. 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, 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, Inc., and the cross-plaintiffs should take nothing against the cross-defendant, Combustion Engineering, Inc.

2.

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

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"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 "

"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 "

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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 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, without objection from plaintiff, with the following acts of contributory negligence: 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. 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.

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5.

The jury having found that the decedent's contributory negligence was a proximate cause of his injury and death, such finding constitutes a complete defense to the breach of warranty theory of recovery.

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 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.

7.

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

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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 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.

8.

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 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

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and from the remaining defendants and that the remaining defendants do have and recover nothing of and from Ruberoid Company on their respective cross-actions.

Respectfully submitted,

BARNES & BARNES

BY Robert C. Barnes

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Ruberoid Company.

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

In the alternative, comes now the defendant, Ruberoid Company, 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, Ruberoid Company, 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

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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 compendation, 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 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 employees 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 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.

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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) The plaintiffs have wholly failed to discharge the burden of proof resting upon them 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.

(2) 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.

(3) 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 plaintiffs' 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 plaintiffs' decedent which was violated by this defendant.

(4) An instructed verdict should be given in this case because the plaintiffs have wholly failed to discharge the burden of proof resting upon them to show that plaintiffs' decedent worked at any specific time with products containing asbestos which were manufactured by this defendant; and even if he did work with any product containing

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asbestos which was manufactured by this defendant, plaintiffs have wholly failed to show the time of such exposure, the degree of such exposure to dust containing asbestos and have wholly failed to show that he sustained any injury or damage to his person as a result of the use of products manufactured by this defendant, therefore there is no basis for plaintiffs' claim that plaintiffs' decedent suffered an injury to his person during a period of time that he was working with a product or products manufactured by this defendant. The deceased, C larence Borel, admitted during his lifetime in his claim for workmen's compensation that he became ill with chest pain which was originally diagnosed as pneumonia and was later found to be asbestosis. He admitted: "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 contacted asbestosis. Signed, Clarence Borel." Therefore, the plaintiffs' claim that he suffered an injury and contracted asbestosis or another disease as the result of working with a product or products containing some asbestos 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 dust particles, some of which contained asbestos, as it is not every exposure to asbestos dust that causes injury.

(5) An instructed verdict should be given in this case because the evidence is insufficient to show that the plaintiffs' decedent actually worked with products which contained some asbestos which were manufactured by this defendant, and the evidence is likewise insufficient to show that even if the plaintiffs' decedent did work on some jobs where a product manufactured by this defendant was used there is no evidence as

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to the type of exposure which he sustained and there is no evidence that he did, in fact, sustain an injury as a result of using the product manufactured by this defendant, but to the contrary, such conclusion would have to be based upon speculation and conjecture.

(6) An instructed verdict should be given in this case because the undisputed evidence is that it takes occupational exposures over a period beginning at least twenty (20) years prior to the time that the disease of asbestosis evidences itself, and further, that it takes approximately thirty (30) years in any event if the alleged asbestosis develops into mesothelioma; therefore, there is no basis for the plaintiffs' claim that decedent suffered asbestosis and mesothelioma as the 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.

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

The plaintiffs have wholly failed to show that Clarence Borel was exposed to dust containing some asbestos particles from products manufactured by this defendant prior to 1964, and the plaintiffs have wholly failed to show that there was any excessive exposure or injury. To the contrary, the undisputed evidence is that it is impossible to determine which exposure at which time caused injury and caused or produced the occupational disease of asbestosis as it is not every exposure to dust containing some asbestos particles which causes injury or causes asbestosis.

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(8) Because the undisputed evidence establishes as a matter of law that the plaintiffs' 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, plaintiffs' 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.

(9) Because the undisputed evidence establishes as a matter of law that if plaintiffs' decedent sustained any alleged 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.

(10) Because the undisputed evidence establishes as a matter of law that if plaintiffs' 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.

(11) Because the plaintiffs have failed to discharge the burden of proof to show that the defendant, Johns-Manville Products 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 plaintiffs' 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.

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(12) Because the plaintiffs have wholly failed to discharge the burden of proof resting upon them to show that any act or omission of this defendant was a failure to exercise ordinary care in relation to the plaintiffs and that any act or omission of this defendant in the manufacture of its product caused or contributed to cause the decedent's alleged injury, death or damage, if any.

(13) Because the evidence is insufficient to show that any act or omission of this defendant was a failure to exercise ordinary care in relation to the plaintiffs and that any act or omission 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) An instructed verdict should be given in this case 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, plaintiffs' 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 plaintiffs' 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 the 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

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State of California or Louisiana are each barred by the one (1) year statute of limitation and the tolling of such s tatute is not suspended by any alleged claim for workmen's compensation.

(15) Because the undisputed evidence in this case establishes 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 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 shows and establishes 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 shows that if he had the disease of asbestosis it was from such 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 shows that plaintiffs' 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) An instructed verdict should be given in this case because the undisputed evidence shows that at all times plaintiffs' decedent knew

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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 plaintiffs are barred from any recovery under the theory of volenti non fit injuria.

(19) The plaintiffs' 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 plaintiffs' 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 in the asbestos insulation products without using a respirator and mask and without requiring his employer to furnish proper dust collecting equipment.

(20) Because the undisputed evidence in this case shows that plaintiffs' 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 plaintiffs' decedent was charged with the same knowledge which his employer had or which his foreman or supervisor had.

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(21) Because the undisputed evidence in this case shows that the plaintiffs' decedent claimed he was exposed, and the evidence shows he was exposed, to insulation products containing some asbestos and worked with products manufactured by Fibreboard Paper Products Corporation (Fibreboard 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 plaintiffs allege 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 plaintiffs' alleged injury and damage.

(22) Because the undisputed evidence in this case shows that the plaintiffs claim 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 ano time was the alleged exposure to the product a joint and several exposure, but the alleged exposures were separate, and the plaintiffs are 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 plaintiffs' injury and damage.

(23) An instructed verdict should be given in this case 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

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defendant because the plaintiffs' decedent may have sustained the disease of asbestosis over a period of twenty-five years would be an undue impediment to business and an interolerable 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) Ther e is no evidence of gross negligence which would entitle the plaintiffs to any exemplary damage because there is no evidence of an entire want of care which would raise the belief that any act or omission complained of as to this defendant was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.

(25) Because as a matter of law the plaintiff cannot recover punitive damages for liability based upon an alleged breach of warranty.

(26) The evidence is insufficient to show any gross negligence which would entitle the plaintiffs to any exemplary damage because the evidence is insufficient to show an entire want of care which would raise the belief that any act or omission complained of as to this defendant was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.

(27) Any finding of gross negligence or exemplary damages in this case would be so against the great weight and preponderance of the evidence as to be clearly wrong.

(28) There is no evidence of any willful negligence or acts so gross as to indicate indifference to the safety of others, wantonness, recklessness or malice, or that the defendant had a fixed purpose to bring about the alleged injury of which the plaintiffs complain.

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(29) An instructed verdict should be granted in this case because the alleged claim is that plaintiffs' 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 a dust-laden air which contained some asbestos dust, and the dust conditions were created on the job by plaintiffs' 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 plaintiffs' decedent and his employer of the danger to dust inhalation, which they already knew.

(30) An instructed verdict should be granted in this case because it is undisputed as a matter of law that the plaintiffs' decedent and decendent'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 the Texas Workmen's Compensation Law or the inclusion in 1947 of asbestosis as an occupational disease.

(31) An instructed verdict should be granted in this case 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

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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.

(32) An instructed verdict should be granted in this case because it is undisputed that a notice was placed upon the product of this defendant, Johns-Manville Products Corporation, in January, 1965, and other notices were placed on the product of other manufacturers on or prior to January 1, 1966, therefore the plaintiffs' decedent had notice of the potential danger from the inhalation of excessive amounts of asbestos dust, and having had such warning, plaintiffs cannot now complain that plaintiffs' 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.

(33) An instructed verdict should be given in this case as to any claim for exemplary damages because the present claim for exemplary damages is asserted against seven (7) separate and distinct defendants and as a matter of law there cannot be a recovery of exemplary damages for an injury or injuries allegedly caused at separate and distinct times by seven (7) separate and distinct defendants, and since they cannot differentiate as between the seven (7) defendants there can be no recovery for exemplary damages.

(34) Because four (4) of the defendants in this case have settled and compromised the claim or claims of plaintiffs and the plaintiffs have executed a release of said defendants and such release operates as a release of the cause of action for the alleged joint and several acts of the several defendants.

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

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

(37) Plaintiffs have 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, plaintiffs wholly failed to meet the burden of proof with respect to the claim asserted against this defendant.

(38) Because the plaintiffs are not entitled to apply the doctrine of strict liability in tort against this defendant 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 plaintiffs have wholly failed to discharge their burden of proof and have adduced no competent evidence to establish liability on the part of this defendant.

(40) 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 plaintiffs'

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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 plaintiffs' 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 plaintiffs, and since the plaintiffs have 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 plaintiffs have wholly failed to make an actionable case against this defendant.

(41) The plaintiffs have failed to show by competent evidence that the decedent's employers did not have adequate knowledge of the harm or danger associated with the use of this defendant's products, and the plaintiffs, therefore, have failed to negative "no duty" on the part of this defendant as required of them 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 plaintiffs have failed to show that the decedent's employers did not have such knowledge of the danger, the plaintiffs have failed to carry their burden of negativing "no duty" and, therefore, have failed to make a case for the jury against this defendant.

(42) The plaintiffs have failed to adduce any evidence as to the purpose for which any particular product of this defendant was used by the plaintiffs' decedent. That is, as to this defendant's products,

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the plaintiffs' decedent. That is, as to this defendant's products, plaintiffs have adduced no evidence showing the particular function of any of this defendant's products actually used by the plaintiffs' decedent. Therefore, there could be no evidence that any particular product of this defendant to which plaintiffs' decedent was exposed was not reasonably suitable for the purpose for which it was intended, nor that any particular product of this defendant was unreasonably dangerous to the decedent when used for such purpose, since there is no evidence as to what such purpose was.

(43) Because the danger of harm from using this defendant's products, if any such danger there may have been, was one which arose out of the manner in which such product was being used by the plaintiffs' decedent and his co-workers in the course of applying such product in the field. That such a danger is known in law as a "transitory danger," for which there is no liability on the part of this defendant.

(44) Because there is no evidence that the risk or hazard resulting from a proper use of asbestos products outweighs the utility of the product when used for its intended purpose.

(45) 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.

(46) Because it is undisputed that this defendant's products contain no defect and that they are intended for industrial use by specialized contractors and that such use does not create any risk not already inherent in the constituents of this defendant's products, since

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such risk is an environmental hazard characteristic of the use by specialized contractors and their employees, including Clarence Borel, of this particular type of product.

(47) Because it is undisputed in this record that the duty to provide reasonable protection for Clarence Borel or to warn of the danger resulting from his occupation is solely that of the asbestos contractors employing the decedent, since there is no evidence that this defendant or any other manufacturer could be expected to be more fully informed of the working conditions surrounding the use of asbestos products by insulation workers in the field than would be the asbestos contractors employing insulation workers such as the decedent. That is, there is no evidence that the manufacturer could be expected to have superior knowledge of the dangers to which Clarence Borel may have been exposed as the result of the work he was doing for thirty-three years of his life in the particular conditions under which he was doing such work.

(48) The plaintiffs have wholly failed to discharge the burden of proof resting upon them to show that the insulation products manufactured by this defendant were defective and not reasonably suitable for the purpose for which such products were intended.

(49) The evidence is insufficient to establish that the insulation products manufactured by this defendant were defective and not reasonably suitable for the purpose for which such products were intended.

(50) Plaintiff has failed to meet the burden of proof, in that there is no evidence to raise an issue that any specific conduct on the part of this defendant or on the part of any of the defendants caused the illness and death of Clarence Borel.

(51) An instructed verdict should be given in this case because there is no evidence that the defendants acted jointly causing any injury

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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 damage which were separate and independent.

(52) Because the evidence construed in the light most favorable to the plaintiff could establish no more than that Borel's condition may have resulted from separate and distinct exposures on separate and distinct occasions and that there is no evidence that any particular exposure to any product resulted in any substantial harm to him or caused his death.

WHEREFORE, defendant, Ruberoid Company, moves and prays the Court that the Court set aside the verdict of the jury and render and enter judgment notwithstanding the verdict that plaintiff recover nothing against this defendant.

BARNES & BARNES

BY Robert C. Barnes

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ALTERNATIVE MOTION FOR NEW TRIAL

In the alternative, defendant, Ruberoid Company, moves the Court to grant this defendant a new trial because of the errors committed during the course of trial as hereinafter set forth:

1.

The error of the Court in overruling defendants' objections and in admitting into evidence plaintiff's Exhibit No. 10, and particularly that part of the cards pertaining to use of the products of Ruberoid Company in that the information contained on such card or cards was hearsay and was based upon hearsay 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 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 Ruberoid Company, 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

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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 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. Rotter, 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 higjly 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

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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.

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.

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 have negatived

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knowledge and realization on the part of Borel that his exposure to asbestos dust was harmful and causing him injury.

14.

The error of the Court in 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 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 dangerousto 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."

16.

The error of the Court in 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

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to be placed in the product and the product must 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 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."

18.

The error of the Court in 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

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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 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 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 failing and refusing to give defendants' requested charge No. 11, which reads:

"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 or 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.

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"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 of volenti non fit injuria does not constitute a defense to strict liability and liability based upon express or implied warranty.

23.

The error in 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.

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24.

The error of the Court in 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 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.

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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 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.

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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.

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 answers 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

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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 the general submission of negligence and proximate cause in Special Interrogatory No. 1, particularly the charge submitting negligence on the theory that the defendant failed to remove the product from the market, because there was no evidence to support such submission and there was no duty on the part of any 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 objections 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

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such issue; there was no proof of what test or tests should have been made; and the word "test" is submitted in global fashion.

40.

The error of the Court in overruling defendants' objections 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 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.

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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.

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. Likewise, the burden was on the plaintiff to obtain a finding that he 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 a claim or claims under the Workmen's Compensation Act.

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The Court erred in overruling defendants' objections and submitting Special Interrogatory No. 1, inquiring generally as to negligence on the part of the defendants and whether such negligence was a proximate cause, because the Court submitted for the jury's consideration various grounds of negligence which were not raised by the evidence, and by requiring the jury to return a general verdict of negligence, it is impossible to determine on what ground this defendant was held guilty of negligence, and such verdict may well be based upon grounds of negligence submitted by the Court but not raised by the evidence, particularly in one or more of the following respects:

(a) That defendants should have removed their product from the market upon ascertaining that such products would cause asbestosis, there being no duty on the part of any defendant to remove its product from the market, and there being no evidence to raise an issue that any such failure to remove the product from the market upon ascertaining that the product would cause asbestosis was a proximate cause of Borel's injury and death.

(b) That defendants were negligent in failing to inform the user about protective clothing or other protective measures, there being no evidence of probative force to raise the issue of negligence or proximate cause with respect to the protective clothing.

(c) In failing to test, there being no evidence to raise the issue that defendants were negligent in such respect, particularly in the absence of proof as to what tests could or should have been made, or that any such tests were generally made or accepted in the industry, or that there were any tests actually available or known to defendants.

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48.

The Court erred in submitting Interrogatory No. 1, which is a general submission of negligence and proximate cause, and overruling defendants' objection, in that the Court included in such submission the theory of negligence for the failure to remove the product from the market after ascertaining the danger from asbestosis as a proximate cause of Borel's injury and death, in that there was no evidence to raise the issue that at the time defendants discovered the danger from asbestosis, that the removal of their product from the market could have in any manner affected Borel's condition. The danger of asbestosis, under all of the evidence, was not known to defendants prior to the latter part of 1964, and under the undisputed evidence any exposure after that date had no causal connection with Borel's injury and death.

49.

The Court erred in overruling the Defendants' Objection to the Court's Charge to the jury to the effect that if they found any single ground of negligence as claimed by the plaintiffs that they 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 should be required to find at least two of such grounds of alleged negligence, including a violation of the duty to warn as one of such grounds, 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.

50.

The Court erred in failing to give what was denominated "Ruberoid's Specially Requested Instruction No. 1,", which reads as follows:

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"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 Court erred in failing to give what was denominated "Ruberoid's Specially Requested Instruction No. 2," which reads as follows:

"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."

52.

The Court erred in failing to give what was denominated "Ruberoid's Specially Requested Instruction No. 3," which reads as follows:

"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."

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53.

The Court erred in failing to give what was denominated "Ruberoid's Specially Requested Instruction No. 5," which reads as follows:

> "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."

54.

The Court erred in failing to give what was denominated "Ruberoid's Specially Requested Instruction No. 6," which reads as follows:

> "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."

55.

The Court erred in failing to give what was denominated "Ruberoid's Specially Requested Instruction No. 8," which reads as follows:

> "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

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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."

56.

The Court erred in failing to give what was denominated "Ruberoid's Specially Requested Instruction No. 9," which reads as follows:

> "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."

57.

The Court erred in overruling the following objection of the Defendants to Plaintiff's Exhibit No. 10 (series of cards):

> "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's 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

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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."

58.

The Court erred in refusing to allow Ruberoid Company to show a moving picture film, identified in the record as Ruberoid Company's Bill of Exception No. 1, which film is entitled, "Why Asbestos."

WHEREFORE, defendant Ruberoid Company, moves and prays the Court that upon hearing hereof that the Court set aside the verdict of the jury and that this defendant be granted a new trial, and for such other and further relief in the premises as it may be justly entitled to receive.

Respectfully submitted,

BARNES & BARNES

BY Robert E. Barnes

2315 Calder - P. O. Box 5098,
Beaumont, Texas 77702,
Attorneys for Defendant,
Ruberoid Company.

The foregoing motions for judgment on the verdict, motion for judgment notwithstanding the verdict and alternative motion for new trial were served by mailing copies thereof in the United States mail on October 22nd, 1971, to plaintiff's attorney, Ward Stephenson, Stephenson Building, Orange, Texas, and to attorneys of record for other defendants herein.

Robert E. Barnes

Robert E. Barnes,
Attorney for Ruberoid Company.

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Civil Action No. 6449

In the United States District Court

in and for the Eastern District of Texas, Beaumont Division

Clarence Borel

vs.

Fibreboard Paper Products Corporation, et al.

DEFENDANT RUBEROID CO.'S MOTION FOR JUDGMENT ON THE VERDICT OF THE JURY; IN THE ALTERNATIVE, DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE JURY.

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