FILED
FEB 17 1970
James R. Cooney, Clerk U. S. Court
By Virginia R. Sims DEPUTY

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

SAMUEL R. POTTER :

VS. : CIVIL ACTION NO. 6329

FIBREBOARD PAPER PRODUCTS :
CORPORATION, ET AL :

PLAINTIFFS' SECOND AMENDED ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now SAMUEL R. POTTER, hereinafter called plaintiff, leave of the Court having been first had and obtained, and files this his second amended original complaint, complaining of:

(1) FIBREBOARD PAPER PRODUCTS CORPORATION, a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(2) COMBUSTION ENGINEERING, INC., a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(3) JOHNS-MANVILLE PRODUCTS CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, Prentice-Hall Corporation System, Littlefield Building, Austin, Travis County, Texas;

(4) OWENS-CORNING FIBER GLASS CORPORATION, a corporation organized, created and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(5) EAGLE-PICHER INDUSTRIES, INC., a corporation duly organized, created and existing under and by virtue of the laws of the State of Ohio, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(6) PITTSBURGH CORNING CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the State of Pennsylvania, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

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(7) UNARCO INDUSTRIES, INC., a corporation duly organized, created and existing under and by virtue of the laws of the State of Illinois, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(8) PHILIP CAREY CORPORATION, a corporation duly organized, created and existing under and by virtue of the laws of the State of Ohio, with an agent for service, to-wit, Prentice-Hall Corporation System, Littlefield Building, Austin, Travis County, Texas;

(9) ARMSTRONG CONTRACTING AND SUPPLY CORPORATION, a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(10) STANDARD ASBESTOS MANUFACTURING AND INSULATING COMPANY, a corporation duly organized, created and existing under and by virtue of the laws of the State of Missouri, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(11) RUBEROID COMPANY, a Division of GAF CORPORATION, a corporation organized, created and existing under the laws of the State of Delaware, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

(12) ARMSTRONG CORK COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, with an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas;

hereinafter called defendants; and for cause of action, plaintiff alleges:

1.

That the ground upon which jurisdiction of this Court depends is diversity of citizenship of the parties hereto.

2.

That the amount in controversy herein exceeds the sum of Ten Thousand Dollars, exclusive of interest and costs.

3.

That plaintiff is a resident of the State of Texas, and resides in Orange County, Texas.

4.

That defendants during all the times herein mentioned and for a long time prior thereto, have been and now are engaged in the manufacture of materials used for insulation containing asbestos; that the products manufactured, compounded and prepared by defendants, acting through their servants, employees, agents and

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representatives were and are placed on the market to be purchased and used by the public.

5.

The plaintiff says that during the years 1940 to 1967, inclusive, he was employed as an insulator, and that in the performance of his duties as an insulator, he was required to handle large quantitites of the products manufactured and distributed by the above named defendants. That in addition to the fact that plaintiff actually used the products manufactured by the above named defendant, and many more, as an insulator, and specifically many and various products containing asbestos, the plaintiff says that on many of the jobs, while not using himself the specific products manufactured by the defendants, he was nevertheless exposed to the dangerous materials and especially asbestos dust and fibers which were used by other workers in the same area at which plaintiff was working.

6.

That during the period of time in which plaintiff was employed as an insulator from the year 1940 to 1967, inclusive, in the course of his employment, due to the negligence and carelessness of the defendants, he was caused to come in contact with the insulation produced and manufactured and distributed by the defendants, and its chemical compounds, deleterious substances and matter, and directly in consequence of said negligence and carelessness of the defendants, did sustain severe, permanent and disabling injuries as hereinafter set forth.

7.

That the injuries and damages complained of herein were directly and proximately caused by the negligence and carelessness of the defendants in the following additional particulars:

(a) That the defendants knew or in the exercise of ordinary

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or reasonable care ought to have known that the insulation they so prepared, manufactured and distributed were deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health, and that plaintiff would not know of such danger to his health, notwithstanding which, defendants negligently failed to take any reasonable precautions or exercise reasonable care to warn plaintiff of the danger and harm to which he was exposed while handling the defendants' said insulation.

(b) That the defendants knew or in the exercise of ordinary care ought to have known that their said insulation was deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health, and that plaintiff would not know of such dangerous character, notwithstanding which defendants failed and omitted to provide plaintiff with the knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances, if in truth there was any, to protect him from being poisoned and disabled as he was by exposure to such deleterious and harmful compound substances and other material contained in said defendants' insulation.

(c) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that their insulation was deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health, notwithstanding which defendants negligently and carelessly packaged said insulation so that in the ordinary handling for installation thereof, this plaintif f would come in contact with such deleterious, poisonous and highly harmful compound substances and other material contained in said defendants' insulation;

(d) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that the insulation they produced contained deleterious, poisonous and

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highly harmful substances to the human body, lungs, respiratory system, skin and health, notwithstanding which defendants negligently failed to take any reasonable precautions or exercise reasonable care by placing any warnings on their containers of said insulation to warn the handlers thereof of the dangers to health in coming in contact with said insulation.

(e) That the defendants knew or in the exercise of reasonable care ought to have known that their insulation contained deleterious and highly harmful substances to plaintiff's health, body, lungs, respiratory system and skin, and defendants knew or in the exercise of ordinary or reasonable care should have known that plaintiff would not know the dangerous characteristics of their said insulation, notwithstanding which defendants negligently failed to take reasonable precautions or exercise reasonable care to warn plaintiff of said danger and to instruct the plaintiff in the proper handling of their said insulation, or to take any reasonable precautions or exercise any reasonable care to protect plaintiff from harm and negligently failed to adopt and enforce a reasonable safe plan and method of handling and installing said insulation.

8.

In addition, plaintiff says that the defendants breached their warranties to plaintiff in the following respects:

(a) That the defendants knew or in the exercise of reasonable care ought to have known that their insulation was defective and that such insulation was not suitable for the purposes for which it was intended.

(b) That the defendants should have tested their products, especially those containing asbestos, to ascertain the safe or dangerous nature of such products before offering them for sale, or in the alternative, should have removed such products from the

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market upon ascertaining that such products would cause asbestosis.

(c) That the defendants should have devised a method of application of their products, especially those containing asbestos, that would have kept those using such products from contracting asbestosis if the defendants would not remove such products from sale to the public.

(d) That the products of the defendants, especially those containing asbestos, were warranted, either expressly or implied, to be merchantable, when in truth they were not, and therefore, the defendants breached to the plaintiff, as well as to others, the warranty of merchantability.

8-A.

In addition, plaintiff says that the defendants, and each of them, knew that their insulating products containing asbestos would be sold to the public and would be used by persons such as the plaintiff and would be relied on by such persons to safely do the job for which they were manufactured; that the defendants, and each of them, knew that the insulating products containing asbestos manufactured and distributed by them would cause harm to the plaintiff, and the defendants, because of their positions as manufacturers, owed a strict duty to the plaintiff not to harm the plaintiff through the use of defendants' products; that the defendants placed on the market products in a defective condition that were unsafe for their intended use or which were unreasonably dangerous; that the defendants placed the products on the market knowing that they would be used without inspection for defects; that the plaintiff used the defendants' insulating products containing asbestos in a manner that was reasonably foreseeable; that the defects in the products of the defendants were a proximate cause of the plaintiff's injuries; that as a result of the use of the defendants' products by plaintiff, he suffered serious, severe, disabling and permanent injuries, and as a result thereof, defendants, and each of them, are strictly

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liable to the plaintiff for their failure to deliver a product to the plaintiff that would not cause the plaintiff harm.

9.

The plaintiff would further show unto the Court that at all the times material hereto, over a period of years in which plaintiff has been employed as an insulator, the manufacture, sale and distribution of insulation materials with which plaintiff came in contact, was under the exclusive control of the defendants, their agents, servants and employees, and that had the defendants herein not been guilty of negligence as hereinabove set forth, plaintiff would not have sustained his injuries and damages as herein set forth, and therefore, plaintiff says that he is entitled to recover from the defendants under the doctrine of res ipsa loquitur.

10.

That as a direct and proximate cause of the aforesaid occurrence and circumstances and the negligence and carelessness of the defendants, and the defendants' breach of warranties and breach of strict liability, the plaintiff was permanently and severely injured; that he has sustained very serious and permanent injuries to his lungs and respiratory system, which has affected other parts of his body; that he is suffering from the disease asbestosis; that he suffers from shortness of breath, inability to breathe, clubbing of the fingers and toes; that it is necessary that plaintiff have available to him at all times a container of oxygen in order that he may be able to breathe; that plaintiff has extreme difficulty sleeping; that he tires easily; that he constantly coughs; that his future outlook is very dim; that he has sought the services of physicians in an effort to cure or arrest the condition from which he is suffering, but to no avail; that the plaintiff has lost his good health, all of which is permanently disabling to him.

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11.

That by reason of the negligence and carelessness of the defendants, and each of them, and their breach of warranties as above alleged, and their breach of strict liability, and because of the harm and injury to plaintiff's health and the resulting disability therefrom, the plaintiff has suffered a total loss of wages and earnings, and will continue to suffer such loss; that he was unable to continue in his employment as an insulator, an employment that he had been engaged in for many years, or to engage in any gainful activity at the present time, and his earning capacity has been greatly and forever permanently diminished and impaired.

12.

That in an effort to treat, relieve and heal himself of said injuries and to regain his health, the plaintiff was obliged to incur and will incur in the future an expense amounting to a considerable sum of money for medical and hospitalization care, expenses for medicines, supplies, and so forth, the amount of which plaintiff is unable to accurately estimate at this time.

13.

That by reason of the facts hereinabove alleged, plaintiff has suffered and sustained at the hands of the defendants, and each of them, general and special damages in the sum of Five Hundred Thousand ($500,000.00) Dollars.

14.

Plaintiff further says that his injuries and damages were directly and proximately caused by the gross negligence, omission, conscious indifference and utter disregard for the welfare of plaintiff on the parts of the defendants herein, their agents, servants, employees, managers, superintendents, supervisors and officers; that the award for this count should be in such an amount that it would act as a deterrent to the defendants and others from the future commission of like offenses and wrongs; and plaintiff further says that if each of the acts of negligence alleged above

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did not independently and of themselves constitute gross negligence, then certainly all of said acts of negligence combined and in the aggregate constituted gross negligence, and the proximate cause of the plaintiff's injuries; that as a result of plaintiff's injuries, he has suffered actual damages as herein shown, which were the direct and proximate cause of his injuries, for which plaintiff is entitled to recover exemplary damages in the sum of Five Hundred Thousand ($500,000.00) Dollars.

15.

That by reason of the facts hereinabove alleged, plaintiff has suffered and sustained at the hands of the defendants, and each of them, general and special damages in the sum of Five Hundred Thousand ($500,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendants and each of them in the sum of Five Hundred Thousand ($500,000.00) Dollars general and special damages, together with the sum of Five Hundred Thousand ($500,000.00) Dollars exemplary damages, together with his costs and disbursements herein, and interest on said judgment from the date thereof until paid at the rate of six (6%) per cent per annum, and such other and further relief to which he may be entitled to receive.

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CERTIFICATE OF SERVICE BY MAIL

I, Ward Stephenson, hereby certify that a true and correct copy of the foregoing instrument was, on this the 12 day of February, 1970, mailed [redacted] to the following named attorneys:

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