GED:MB 3/10/70 0-2

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

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MAR 12 1970
JAMES R. COONEY, CLERK
BY DEPUTY

S. R. POTTER

vs.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

CIVIL ACTION
NO. 6329

AMENDED ANSWER OF PITTSBURGH CORNING CORPORATION TO PLAINTIFF'S SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now PITTSBURGH CORNING CORPORATION, named as the sixth Defendant in the above-styled and numbered cause, and files this its Amended Answer to Plaintiff's Second Amended Complaint, and for such Answer this Defendant would show the Court as follows:

1.

Answering Paragraphs 1, 2 and 3 of Plaintiff's Second Amended Complaint, this Defendant admits the same.

2.

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

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for the ultimate application of said product.

3.

This Defendant denies each and every, all and singular, the allegations contained in Paragraphs 5, 6, 7, including literary sub-paragraphs (a) through (e), inclusive, 8, including literary sub-paragraphs (a) through (d), inclusive, 8-A, 9, 10, 13, 14 and 15, and demands strict proof thereof, if relevant to any alleged cause of action against this Defendant, Pittsburgh Corning Corporation.

4.

Answering Paragraph 11 of said Complaint, Pittsburgh Corning Corporation denies that it, its agents, servants or employees, were in any way negligent or careless, as alleged therein, and further denies that there was any breach of warranty as between this Defendant and the said Plaintiff, or that it is liable, in any way, under the doctrine of strict liability alleged by Plaintiff, or that the Plaintiff suffered any harm and injury to his health and resulting disability therefrom, as a result either of any negligence or breach of warranty on the part of this Defendant, its agents, servants or employees, or that the doctrine of strict liability is in any way applicable to this Defendant. For lack of sufficient knowledge or information to constitute a belief, this Defendant can neither admit nor deny the allegations contained in Paragraph 11 regarding Plaintiff's alleged loss of wages and earnings, or that he will continue to suffer such loss, or that he is unable to continue in his employment as an insulator, or that he is able to engage in any gainful activity at the present time, or that his earning capacity has been greatly and forever permenently diminished and impaired, and therefore, demands strict proof thereof, by the Plaintiff, if relevant.

5.

Answering Paragraph 12 of said Complaint, for lack of sufficient knowledge or information to constitute a belief, this Defendant, Pittsburgh Corning Corporation, denies the allegations of Paragraph 12 of said

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Complaint.

6.

Answering the prayer to Plaintiff's said Complaint, this Defendant denies that Plaintiff is entitled to any of the relief sought against it.

7.

This Defendant denies each and every allegation contained in said Second Amended Complaint, not heretofore admitted, controverted or denied.

AFFIRMATIVE DEFENSES

First Affirmative Defense

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

Second Affirmative Defense

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

Third Affirmative Defense

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

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Fourth Affirmative Defense

If Plaintiff did sutain any injury as a result of the use of any product manufactured by this Defendant, which is expressly denied, then such injury was sustained as a result of the occupation of the Plaintiff, in that he had been engaged as an insulator or worker in the insulation field for a number of years, and at all times knew that he was working in dust-laden air, which contained asbestos dust, as well as other dust particles, part of which were created by his own work, and the work of other insulators, and by the failure of his employer or owner of the premises on which he was working to provide facilities for the elimination of dust-laden air, and therefore, any such injury as he may have sustained, was an occupational disease from his long-continued occupation as an insulator, and not as a result of any isolated incident or contact with any product manufactured by Pittsburgh Corning Corporation. This Defendant says that it is not legally liable or responsible for any occupational disease which was suffered or sustained by Plaintiff in the course of his employment over a number of years; and further, Defendant, Pittsburgh Corning Corporation denies that the Plaintiff worked with products manufactured by it.

Fifth Affirmative Defense

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

Sixth Affirmative Defense

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

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occupational disease as a result of the use of any insulation product manufactured by this Defendant, which is specifically denied, either separately, or in conjunction with products manufactured by any of the other Defendants, then this Defendant would show that the injuries, conditions and damages of which Plaintiff complains, were due solely and alone, or, in the alternative, were proximately caused by the negligent acts, wrongs and omissions of the Plaintiff, and that at all times material hereto, Plaintiff failed to exercise ordinary care for his own safety, all of which proximately caused the injuries and conditions of which he now complains, all of which is plead in bar hereof.

Seventh Affirmative Defense

For further answer herein, if such be necessary, and as an affirmative defense, this Defendant says that Plaintiff was duly advised of the condition of which he now complains in 1961 or 1962; that said Plaintiff at that time was suffering from respiratory problems, weakness and shortness of breath; that he received medical treatment therefor, and that nevertheless, the Plaintiff failed and refused to use and utilize any safety devices, such as a mask or respirator for breathing; that he failed to request the use of such mask and respirator; that he failed to request his employer to furnish blowers and other equipment to remove the dust-laden air, and he worked in dust-laden air subsequent to his medical treatments and, despite the admonitions of the doctor of his own choice, with full knowledge that he was inhaling such dust-laden air; that he continued to work with insulation material containing some asbestos after he knew, or in the exercise of ordinary care, should have known that it was affecting his health.

Eighth Affirmative Defense

For further answer and affirmative defense, if such be necessary, this Defendant, Pittsburgh Corning Corporation, says that if the Plaintiff did sustain any injury as the result of the use of any product manufactured by this Defendant, which this Defendant expressly denies, that Plaintiff used the product with full knowledge of the fact that he was creating dust from the

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insulation product, and that he continued to work in dust, despite the warnings of a physician of his own choice; but nevertheless, continued to work in and around materials, or in areas where he was exposed to the inhalation of dust or other foreign substances, but that he continued to work under such conditions, knowing that he would breathe the dust, and that it was, or would be harmful to him, which bars him from any recovery under the theory that any risk was open and obvious to him, and he is likewise barred under the doctrine of volenti non fit injuria.

Ninth Affirmative Defense

If Plaintiff did sustain any injury, as a result of the use of any product manufactured by this Defendant, Pittsburgh Corning Corporation, which is expressly denied, then such occurred more than two years prior to the filing of this suit on May 27, 1969, and such cause of action for personal injury is barred by the two (2) year statute of limitations for the State of Texas.

Tenth Affirmative Defense

If Plaintiff did sustain any injury as the result of the use of any product manufactured by this Defendant, which is affirmatively denied, then such occurred more than four (4) years prior to the filing of this suit on May 27, 1969, and such cause of action for personal injury is barred by the four (4) year statute of limitations of the State of Texas.

Eleventh Affirmative Defense

Further answering herein, Defendant, Pittsburgh Corning Corporation says that Plaintiff was an experienced insulation worker, according to his allegations, and knew at all times that he was working with asbestos and products containing asbestos, as well as other products, which were harmful to him or, in the alternative, if he did not know this, his employers knew, at all times, that they were working with insulation materials which contain some asbestos, and said employers had knowledge of the fact that

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particles of said products could enter the air when said products were cut or applied, and the employer likewise had knowledge that if blowers or fans were not used in the area, that their employees would be subject to the dust hazard and inhalation of dust; which said knowledge of Plaintiff's employers was imputed to Plaintiff; and further, the failure or refusal of his employer or employers to provide some means whereby the dust was removed from the air as a safety measure, was due to the negligence of his said employer or employers for which, or for the consequences of which, this Defendant is not liable.

Twelfth Affirmative Defense

For further answer herein, and by way of affirmative defense, this Defendant says that if Plaintiff sustained any injury, as the result of the use of any product manufactured by Pittsburgh Corning Corporation, there existed no duty on the part of this Defendant to warn Plaintiff of any potential danger in the handling of the insulating materials and products, and this Defendant denies that it owed any duty to Plaintiff to give him any warnings with respect to such products.

Thirteenth Affirmative Defense

This Defendant, Pittsburgh Corning Corporation, denies the existence of any warranty on its part, and denies any fault or breach of warranty on the part of this Defendant, but on the contrary, says that the insulation product or products manufactured by it were at all times reasonably fit and suitable for the purpose of insulation which was the purpose for which they were manufactured and sold, and the Plaintiff's injury, if any, did not result from any defect of such products. Further, any and all dust conditions which resulted from use of the products were created during the application thereof, at which time the products were cut or changed from the original form in which they were manufactured by this Defendant, and the conditions under which Plaintiff worked were at all times prescribed by his employer, or the owners of the premises where the Plaintiff was employed. This Defendant

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had no responsibility for the condition or conditions at the place of employment where Plaintiff was performing his work, nor is it responsible for the conditions which existed as a result of the change of such product or products from their original form in which they were manufactured by this Defendant.

Fourteenth Affirmative Defense

Further answering herein, and in the alternative, this Defendant says that it is not and cannot be subject to liability to Plaintiff herein under the doctrine of strict liability for the reason that the product or products which were manufactured and sold by this Defendant were not defective and unreasonably dangerous to the user thereof or, specifically to the Plaintiff, at the time its said product or products were manufactured and sold; that any injury to Plaintiff, if any, which occurred to him as a result of use of its product or products, occurred when said product or products were not being used in the normal and customary fashion and the Plaintiff, or in the alternative, his employer or employers, changed said product or products from the form in which it was initially manufactured, so that the injury, if any, to Plaintiff did not occur during an intended use of said product or products, and the method or methods of use and application thereof by Plaintiff and, in the alternative, his employer or employers, was negligent and dangerous under the circumstances.

Fifteenth Affirmative Defense

Further answering herein, and, in the alternative, this Defendant says that the Plaintiff's alleged injuries and damages, if any, were caused solely, or, in the alternative, were proximately caused by acts, wrongs, omissions and negligence of third parties, or a third party, for whose acts this Defendant is in nowise liable or responsible; or, in the alternative, if Plaintiff sustained any injuries from the use of any of its products or from any breach of warranty, none of which are admitted, but denied, then such was the result of the fault or breach of warranty of third parties, other than this Defendant.

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Sixteenth Affirmative Defense

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

Seventeenth Affirmative Defense

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

Eighteenth Affirmative Defense

For further answer herein, Defendant says that if the Plaintiff should recover any judgment herein (and this Defendant, Pittsburgh Corning Corporation specifically denies that Plaintiff is entitled to recover judgment as against it), then, and in such event, and under the provisions of Article 2212 of Vernon's Annotated Civil Statutes of the State of Texas, as well as at common law, Defendant is entitled to judgment for indemnity and/or contribution over and against the co-defendants herein, and each of them, jointly and severally.

WHEREFORE, Defendant, PITTSBURGH CORNING CORPORATION, moves and prays the Court that upon trial hereof Plaintiff recover nothing, as against this Defendant and, in the alternative, for judgment against the co-defendants for indemnity and/or contribution over, and for such other and further relief in the premises as this Defendant may show itself

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justly entitled to receive.

Respectfully submitted,

WELLS, DUNCAN, BEARD,
GREENBERG AND HUNT

By George E. Duncan
515 Beaumont Savings Building
Beaumont, Texas 77701

Attorneys for Defendant, PITTSBURGH
CORNING CORPORATION

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CROSS-ACTION OF DEFENDANT, PITTSBURGH CORNING CORPORATION

TO SAID HONORABLE COURT:

Comes now PITTSBURGH CORNING CORPORATION, one of the Defendants in the above-styled and numbered cause, and files this its Cross-Action against FIBREBOARD PAPER PRODUCTS CORPORATION, COMBUSTION ENGINEERING, INC., JOHNS-MANVILLE PRODUCTS CORPORATION, OWENS-CORNING FIBER GLASS CORPORATION, EAGLE-PICHER INDUSTRIES, INC., UNARCO INDUSTRIES, INC., PHILIP CAREY CORPORATION, STANDARD ASBESTOS MANUFACTURING AND INSULATING COMPANY, ARMSTRONG CONTRACTING AND SUPPLY CORPORATION, and RUBEROID COMPANY and ARMSTRONG CORK COMPANY, all hereinafter called Cross-Defendants, and for said Cross-Action would show this Honorable Court the following:

1.

Defendant, Pittsburgh Corning Corporation, alleges and avers that if Plaintiff sustained any injury as a result of any act or omission on the part of this Defendant, Pittsburgh Corning Corporation, which this Defendant specifically denies then, such injury was caused and proximately caused and contributed to be caused by the acts and omissions of the remaining Defendants above-named and each of them, and Defendant, Unacro Industries, Inc. being a successor in interest to the Union Asbestos and Rubber Company, and if any Judgment is entered herein against this Defendant, Pittsburgh Corning Corporation then, and in such event, this Defendant is entitled to indemnity from each and all of the other co-defendants or, in the alternative, is entitled to contribution against each and all of the other co-defendants in accordance with the provisions of Article 2312 of Vernon's Annotated Civil Statutes of Texas.

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

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

Respectfully submitted,

WELLS, DUNCAN, BEARD,
GREENBERG AND HUNT

By George E. Duncan
515 Beaumont Savings Building
Beaumont, Texas 77701

Attorneys for Defendant, PITTSBURGH CORNING CORPORATION

Certificate of Service

I hereby certify that a copy of the above and foregoing Amended Answer of Defendant, Pittsburgh Corning Corporation, to Plaintiff's Second Amended Complaint, as well as the Cross-Action of Pittsburgh Corning Corporation against all other Defendants, was mailed to Ward Stephenson, Esquire, Attorney for Plaintiff, and to the other attorneys of record in this case, postage prepaid, United States Mail, on this the 11th day of March, 1970.

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

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S. R. POTTER

vs.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

AMENDED ANSWER OF PITTSBURGH CORNING CORPORATION TO PLAINTIFF'S SECOND AMENDED COMPLAINT

AND

CROSS-CLAIM

LAW OFFICES OF
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