IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
DEC 7 1970
James R. Cooney, Clerk, U. S. Court
By Margaret Turner
DEPUTY

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| SAMUEL R. POTTER | : | |
| VS. | : | CIVIL ACTION NO. 6329 |
| FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL | : | |
| CLARENCE BOREL | : | |
| VS. | : | CIVIL ACTION NO. 6449 |
| FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL | : | |
| J. J. CRAWFORD | : | |
| VS. | : | CIVIL ACTION NO. 6492 |
| FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL | : | |

PLAINTIFFS' ANSWER TO DEFENDANTS' REPLIES TO MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COME the plaintiffs in the above actions and in answer to the defendants' replies to motion for partial summary judgment, and would respectfully show unto the Court the following:

1.

The defendants are now labeling their products advising of the dangerous nature of such products. The defendants have all denied that there is any established threshold limits. The defendants have all advised that they made no dust count studies, made no scientific or medical research of the exposure their products would cause to those using them and in general, all


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admit that they have done nothing to see that their products were not injurious to those using them.

2.

In answer to Paragraph 2, plaintiffs say that this is not a defense the fact that the defendants did not have and do not have such relationship and control over construction workers, because each of the defendants have an obligation to give warnings on their boxes and on their products to anyone using the products of the very dangerous nature of such products. It is no defense to a breach of warranty or strict liability case that someone else should have taken action and thereby absolve the defendants from fault.

3.

Contributory negligence is not a defense in a breach of warranty case.

4.

The fact that defendants had no knowledge is immaterial. The cases are clear on the point that the defendants cannot plead ignorance as an escape from liability.

5.

Whether or not the Asbestos Workers Union or any third party are charged with judicial knowledge, this does not relieve the manufacturers from their obligation. This particular defense has been repudiated in products liability cases.

6.

The defendants have denied as mentioned above, that there was any threshold limit which was agreed upon by the various authorities, and in addition, the undisputed testimony is that



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use of the asbestos products made by the defendants would expose the workers to far more than five million particles per cubic feet of air. In addition, the plaintiffs say that the various states' Workmen's Compensation Acts made no distinction between plant workers and installation workers in the construction trade, and that it cannot be seriously questioned that the workers in the field do by the hundreds and perhaps thousands contract the disease asbestosis. The substance of this defensive argument is that since the defendants did nothing to find out the danger, they are absolved from fault. This defense is too antagonistic with our law to warrant further discussion.

7.

The federal statutes referred to in Paragraph 7 of the Defendants' Replies do certainly cover products in question. They are used by homeowners for insulation, people are exposed to asbestos dust in demolition of buildings, even though they have no work connection with such demolition, there are authenticated cases of children contracting asbestosis by using the asbestos cement to make their kindergarden toys. The federal statutes referred to give clear indication of Congressional intent which has been clearly violated by the defendants herein.

8.

Paragraph No. 8 of the Defendants' Replies flies in the face of the warning currently being placed by the defendants on their boxes to the effect that inhalation of this product is dangerous. And the undisputed evidence is that by just opening the boxes, dust is created. In any event, however, the defendants all well know and knew at



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all times that in order to apply their products, such products would have to be cut, sawed and scribed, cement would have to be mixed with water in a mixing box, and this, of course, therefore cannot constitute any defense.

9.

Furthermore, by way of final word, the question has arisen as to how these cases will be submitted to the jury if the Court grants plaintiffs' motion for partial summary judgment. In this regard, plaintiffs say that the jury could be asked the question whether or not the plaintiffs have used the products of each of the defendants or been in contact with the products. The question could then be asked whether or not such use or exposure was a proximate cause of plaintiffs' contracting the disease asbestosis. The additional issue could then be asked as to what sum of money should be paid to the plaintiffs. These lawsuits could thereby be materially shortened and the issues substantially lessened if the Court would grant the motion for partial summary judgment as requested.

Respectfully submitted,

STEPHENSON AND THOMPSON

By_____
Attorneys for Plaintiffs
Stephenson Building
Orange, Texas 77630



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POTTER
BOREL
CRAWFORD

## CERTIFICATE OF SERVICE BY MAIL

I, Ward Stephenson, hereby certify that a true and correct copy of the foregoing instrument was on this the 4th day of December, 1970, mailed to the following named attorneys:

Mr. George E. Duncan
Attorney at Law
P. O. Box 3708
Beaumont, Texas 77704
Attorney for Defendant
PITTSBURGH CORNING CORP.

Mr. W. N. Arnold, Jr.
Attorney at Law
Fulbright, Crooker, Freeman,
Bates & Jaworski
Bank of the Southwest Bldg.
Houston, Texas 77002
Attorney for Defendant
ARMSTRONG CORK COMPANY

Mr. W. N. Arnold, Jr.
Attorney at Law
Fulbright, Crooker, Freeman,
Bates & Jaworski
Bank of the Southwest Bldg.
Houston, Texas 77002

Mr. Robert E. Barnes
Attorney at Law
P. O. Box 5098
Beaumont, Texas 77706
Attorney for Defendant
RUBEROID COMPANY, DIVISION
OF GAF CORPORATION

Mr. Charles S. Pipkin
Attorney at Law
P. O. Box 1632
Beaumont, Texas 77704
Attorney for Defendant
COMBUSTION ENGINEERING, INC.

Mr. Dale Dowell
Attorney at Law
707 Beaumont Savings Bldg.
Beaumont, Texas 77701
Attorney for Defendant
OWENS-CORNING FIBERGLAS
CORPORATION

Mr. George A. Weller
Attorney at Law
P. O. Box 350
Beaumont, Texas 77704
Attorney for Defendant
FIBREBOARD PAPER PRODUCTS
CORPORATION

Mr. Gerald P. Coley
Attorney at Law
Vinson, Elkins, Searls & Connally
First City National Bank Bldg.
Houston, Texas 77002
Attorney for Defendant
UNARCO INDUSTRIES, INC.

Mr. James W. Mehaffy
Attorney at Law
San Jacinto Building
Beaumont, Texas 77701
Attorney for Defendant
STANDARD ASBESTOS MANUFACTURING
AND INSULATING COMPANY

Mr. Ben L. Reynolds
Attorney at Law
Royston, Rayzor and Cook
877 San Jacinto Building
Houston, Texas 77002
Attorney for Defendant
EAGLE-PICHER INDUSTRIES, INC.

Mr. Gordon R. Pate
Attorney at Law
1119 Beaumont Savings Bldg.
Beaumont, Texas 77701
Attorney for Defendant
JOHNS-MANVILLE PRODUCTS
CORPORATION

Mr. John Tucker
Attorney at Law
Beaumont Savings Building
Beaumont, Texas 77701
Attorney for Defendant
JOHNS-MANVILLE PRODUCTS
CORPORATION

Mr. Frank E. Bean
Attorney at Law
Room 2010, 500 Jefferson Street
Houston, Texas 77002
Attorney for Defendant
ARMSTRONG CORK COMPANY

Mr. George E. Murphy
Attorney at Law
615 San Jacinto Building
Beaumont, Texas 77701
Attorney for Intervenors

WARD STEPHENSON


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