IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JAN 14 1972
JAMES R. COONEY, CLERK
BY DEPUTY Beatrice N. Bryan

SAMUEL R. POTTER X

V. X CIVIL ACTION NO. 6329

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL X

PRE-TRIAL STIPULATION AND ORDER

It is STIPULATED between the parties that the following matters are being agreed upon and there will be no necessity for the Court to have trial on any of the following uncontested facts:

1.

The following jurisdictional questions were raised and disposed of as hereinafter indicated: N O N E.

2.

The following disposition was made of pending motions or other similar matters preliminary to trial:

3.

In general, plaintiff claims: That for approximately twenty-seven years he worked as an insulator and asbestos worker; that throughout these years in the course of his

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employment for various employers, he was required to work with, work around, and come in contact with, materials used in the insulating industry containing asbestos; that such materials were compounded, prepared, distributed and manufactured by the defendants herein, and that such materials containing asbestos were highly poisonous, dangerous and harmful to human beings and that such materials were defective and not suitable for the purposes for which they were intended; that as a result of the plaintiff working with, working around, and coming in contact with such materials containing asbestos, the plaintiff contracted the disease asbestosis. That the defendants were guilty of negligence and carelessness in the following particulars and breach of warranties and strict liability to the plaintiff, directly and proximately causing the plaintiff's injuries and resulting incapacity and disability:

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

(b) The defendants knew or in the exercise of ordinary care ought to have known that their insulation was deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health, and that the plaintiff would not know of such dangerous character, notwithstanding which defendants failed and omitted to provide the plaintiff

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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) 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 the 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, the plaintiff would come in contact with such deleterious, poisonous and highly harmful compound substances and other material contained in said defendants' insulation.

(d) 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 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) The defendants knew or in the exercise of reasonable care ought to have known that their insulation contained deleterious and highly harmful substances to the 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 the plaintiff would not know of the dangerous characteristic of their said insulation,

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notwithstanding which defendants negligently failed to take reasonable precautions or exercise reasonable care to warn the 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 the plaintiff from harm and negligently failed to adopt and enforce a reasonably safe plan and method of handling and installing said insulation.

(f) 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.

(g) 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 market upon ascertaining that such products would cause asbestosis.

(h) 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 contacting asbestosis if the defendants would not remove such products from sale to the public.

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

(j) 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 plaintiff and would be relied on by such persons to safely do the job for which they were manufactured and that

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defendants and each of them knew that the insulating products containing asbestos manufactured and distributed by them would cause harm to the plaintiff, and 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 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 defendants were a proximate cause of the injuries and resulting incapacity and disability of the plaintiff; that as a result of the use of the defendants' products by plaintiff, he suffers serious, severe, disabling and permanent injuries, and as a result thereof, defendants and each of them are strictly liable to the plaintiff for their failure to deliver a product to the plaintiff that would not cause him harm.

(k) Further, plaintiff says that over a period of years in which he was employed as an insulator, the manufacture, sale and distribution of insulation materials with which he came in contact, was under the exclusive control of defendants, their agents, servants and employees, and that had the defendants herein not been guilty of negligence as above set forth, the plaintiff would not have sustained his injuries which resulted in his incapacity and disability, and plaintiff would not have sustained his damages as herein set forth, and plaintiff says that he is entitled to recover from the defendants under the doctrine of res ipsa loquitur.

(l) All of the contentions of the plaintiff in his

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pleadings and motions on file are adopted and included herein.

4.

In General, the Defendants Contend:

(1) Defendants deny plaintiff worked with any product made, manufactured or sold by said defendants.

(2) Defendants deny that the plaintiff sustained any injuries as a result of contact or use of any products manufactured by them.

(3) Each of the defendants deny that any product made, manufactured or sold by any defendant contained any injurious, harmful or dangerous substances.

(4) Defendants contend that the products manufactured and sold by them were at all times reasonably fit and suitable for the purposes for which they were manufactured and sold, and deny that the same were in anywise defective for the use for which they were manufactured.

(5) That if plaintiff did sustain any injury as a result of the use of any product manufactured by each individual defendant, which is expressly denied by each, 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 (alleged to be twenty-seven 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 the owner of the premises on which he was working to provide facilities for the elimation of dust-laden air, and from products supplied by manufacturers other than these defendants, and therefore any such injury as he may have sustained was some occupational disease, if any, resulting from his long continued occupation

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as an insulator and not as a result of any isolated incident or contact with any product manufactured by defendants. De- defendants say that they are not legally liable or responsible for any occupational disease which was suffered or sustained by plaintiff in the course of his employments over a number of years, and further defendants deny that the plaintiff worked with products manufactured by them.

(6) Defendants each deny that it is legally responsible for any alleged injury or accumulation of exposure to the products of others and the conditions in which plaintiff worked or lived.

(7) Defendants deny that any product or products which they manufactured and sold for insulation purposes in anywise caused or brought about any injury or illness, if any, to plaintiff, and defendants say that any physical conditions of which plaintiff complains were in nowise caused or brought about by any products manufactured or sold by the defendants, 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, for which these defendants are not responsible.

(8) Defendants, while denying that the plaintiff sustained any injury as a result of contact or use of their products, if he did sustain injury or did sustain an occupational disease as a result of the use of insulation products manufactured by the defendants, separately, or in conjunction with products manufactured by other defendants, then defendants say that the plaintiff was guilty of various acts, wrongs and omissions, each and all of which amounted to negligence in the performance of his work and occupation, which acting together or separately was a proximate cause of his injury. In this connection, defendants say that plaintiff failed to use and utilize any safety devices such as masks and respirators for breathing; that he failed to request the use of such masks and respirators; that he failed to request his employer to furnish blowers and other equipment to remove the

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dust-laden air and he worked in dust-laden air containing some asbestos with full knowledge that he was inhaling such dust-laden air; that he continued to work with insulation materials containing some asbestos after he knew, or in the exercise of ordinary care should have known, that it was affecting his dealth.

(9) Defendants contend that if plaintiff sustained any injury as a result of the use of any materials manufactured by defendants, which is denied, the danger, if any, arising from the continued use of such materials was open and obvious and well known to the plaintiff, or should have been known to him, but nevertheless, he continued to work as an insulator and continued to subject himself to air which was laden with insulation material. In the alternative, if there was any danger and such was not open and obvious and apparent to plaintiff at all times, nevertheless, he knew at all times of the dangers involved with insulation materials containing some asbestos and in working in dust-laden air where insulation materials were in use, and he continued to use and to work with such materials and under such conditions with such knowledge, and therefore, the defendants owed him no duty to warn him of any potential dangers involved, and the plaintiff is also barred from any recovery under the theory of violenti non fit injuria.

(10) If plaintiff has any cause of action then such action was barred by the two year statute of limitation of the State of Texas. Defendants further contend that if plaintiff sustained any injury as a result of use of their products in any other state of the union other than the State of Texas, defendants contend that such cause of action is also barred by the respective statutes of limitation of the respective states where the alleged cause of action arose. Defendants further contend that any exposure to a defendant's product in the states of California and Louisiana are barred by a one year statute of limitations of such states, and the filing of a workman's compensation claim does not toll such statutes of limitations.

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(11) If plaintiff has any cause of action, which is denied, then such occurred more than four years prior to the filing of this suit on the 27th day of May, 1969, and such cause of action is barred by the four year statute of limitation of the State of Texas.

(12) That plaintiff is 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 at all times knew that they were working with insulation materials which contained some asbestos, and said employers had knowledge of the fact that particles of said products could enter the air when said products were cut or applied, and his employers 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 and the knowledge of the employer was imputed to plaintiff, and further, it is common knowledge that if an individual works in an area where the air is laden with dust, that the individual will breathe this dust into his nose and body system unless the employee uses some masks, respirator or some protective device, or unless the employer provides some means whereby the dust is removed from the air as a safety measure.

(13) Defendants deny the existence of any warranty on the part of the defendants and deny any fault or breach of warranty on the part of the defendants, but to the contrary, say the insulation products manufactured by them 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 plaintiff's injury, if any, did

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did not result from any defect in said products. Further, any and all dust conditions which resulted from use of the products were cut or changed from the original form in which they were manufactured by defendants, and the conditions under which the plaintiff worked were at all times prescribed by his employer or the owner of the premises where the plaintiff was employed. Defendants contend they had no responsibility for the condition or conditions at the place of work where plaintiff was performing his work.

(14) Defendants say 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 defendants are in nowise liable or responsible; or in the alternative, if plaintiff sustained any injury from the use of any 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 of each of these defendants.

(15) Defendants say the plaintiff's claims in injury and damage, if any, were the result of an unavoidable accident as to the defendants.

(16) Defendants contend that there is and was no legal liability on their part because of the fact that the alleged happenings in question were brought about or caused by transitory conditions arising in the course of the work which plaintiff was doing, and ordinarily incident thereto; and plaintiff and his employers used their own manner, method and means of performing such work and defendants owed no duty with respect to such work, nor was there any relationship as between plaintiff and defendants which created any duty on the part of defendants as to the manner or method

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in which the work was done or the conditions under which the plaintiff performed such work.

(17) Defendants say that during the period of time for which plaintiff is asserting a claim and injury that the State of Texas had enacted a workmen's compensation law which provided that the disease of asbestosis is an occupational disease for which a person engaged in the occupation of an asbestos worker or working with asbestos products can claim workmen's compensation benefits against his last employer at the time the disease is discovered; that according to plaintiff's pleadings, he worked with asbestos and asbestos products over a period of some 27 years, and if plaintiff has asbestosis, such is due to the nature of his occupation and was acquired over a long period of time and was not the result of working with any particular products but was due to the nature of his employment. Further, the Texas Workmen's Compensation Act provides workmen's compensation benefits for the incapacity of an employee if the incapacity resulted from an injury or occupational disease incurred or sustained in the course of his employment.

(18) Each of the defendants deny the existence of any facts or law which would entitle the plaintiff to recover exemplary damages.

(19) Defendants contend there were no express warranties and the only implied warranty is that the product of each defendant was reasonably fit for the purpose for which it was manufactured, i.e., insulation.

(20) The state of medical knowledge was such that manufacturers had no reason to foresee any injury to construction or insulation workers from application of insulation products containing some asbestos.

(21) Defendants each claim they are entitled to contribution against other defendants if any judgment is entered

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jointly and severally against each defendant.

(22) All of the contentions of each of the defendants in their pleadings and motions on file are adopted and included herein.

(23) In addition, defendant, Owens-Corning Fiberglas Corporation contends that during the period of time that plaintiff is alleged to have been injuriously exposed to asbestos dust, he was an employee of Owens-Corning Fiberglas Corporation in the State of Californis, at which times Owens-Corning Fiberglas Corporation was a subscriber, under the Workmen's Compensation Law of Californis and Occupational Disease Act of California, and that plaintiff is therefore, precluded thereunder from any recovery herein against said defendant because of the alleged injuries sustained by the plaintiff.

5.

The contested issues of facts if raised by the evidence, or the fact is not established as a matter of law, are:

(1) Did plaintiff work with any product manufactured by each of the defendants containing asbestos?

(2) When did the plaintiff work with each of the defendants' products containing asbestos?

(3) Where did plaintiff work with each of the defendants' products?

(4) Did plaintiff sustain any injury or disease from the use of or by exposure to such product ?

(5) If so, did such injury or disease result in his incapacity or disability?

(6) Were any of the products containing asbestos manufactured by any one of the defendants in a reasonably unsafe condition when they left the hands of the manufacturer?

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The defendants contend that this issue is: Were any of the products containing asbestos manufactured by any one of the defendants in a defective condition when they left the hands of the manufacturer?

(7) Are the defendants guilty of negligence in the respects set forth in Plaintiff's contentions above?

(8) Whether plaintiff was guilty of contributory negligence as follows:

(a) Failed to use and utilize a mask or respirator or other safety device for breathing;

(b) Failed to request his employer to furnish masks or respirators for his use;

(c) Failed to request his employer to furnish blowers or other equipment to remove dust-laden air;

(d) Continuing to work in dust-laden air with knowledge that he was inhaling it;

(e) Continuing to work with insulation material after he knew or in the exercise of ordinary care should have known that it was affecting his health.

(9) Were defendants' products unreasonably dangerous to professional insulation mechanics?

(10) Was the product of each individual defendant at the time it left hands of manufacturer in a condition not contemplated by the insulation contractor?

(11) Was the product of each defendant reasonably suitable for the purpose for which it was manufactured, i.e. insulation purposes?

(12) Did plaintiff know that the inhalation of dust containing some asbestos was causing some injury to his health?

(13) Whether plaintiff should have known that he was inhaling dust containing some asbestos which was causing some injury to his health.

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(14) Did Plaintiff continue to work with insulation products containing some asbestos after he knew it was causing some injury to his health?

(15) Was defendants' negligence or breach of warranty the proximate cause of the plaintiff's injuries?

(16) Was plaintiff's injuries caused solely by acts or omissions of his employers in failing to provide him with adequate ventilation, protective clothing, masks, safety devices and respirators, if any such were necessary?

(17) Did plaintiff voluntarily assume the risk and is plaintiff's claim barred by the doctrine of volenti non fit injuria?

(18) The amount of damages.

(18a) That Plaintiff was an employee of Owens-Corning Fiberglas Corporation in 1963 in the State of California, and that at the time plaintiff was so employed, Owens-Corning Fiberglas Corporation was a subscriber under the Workmen's Compensation Law and Occupational Disease Act of The State of California.

THE PLAINTIFF CONTENDS THAT THE FOLLOWING ARE ISSUES OF FACT BUT THE DEFENDANTS DO NOT AGREE. IF THEY ARE ISSUES OF FACT, THEN DEFENDANTS CONTEND THEY MUST BE SUBMITTED TO THE JURY:

(19) The disease asbestosis is acquired only through the inhalation of asbestos dust.

(20) There is no respirator or device in common use which will prevent the inhalation of asbestos dust.

(21) That these defendants made no medical or scientific studies of the affects of the inhalation of their products containing asbestos on those that might use such products at any time material to the case above.

(22) That the disease asbestosis has been written about for more than fifty years.

(23) That the defendants contend that the asbestos in their insulating products does not cause the disease asbestosis.

(24) That the defendants have never devised any method of applying their products which would prevent the worker from inhaling asbestos dust arising from such products.

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(25) That it was practicable for the defendants to have placed warnings on their cartons which contained asbestos insulating products of the dangerous nature and potential harm by exposure prior to 1966, but did not do so.

(26) That prior to 1966, none of the defendants through written warnings warned the users of their asbestos insulating products that such users might be exposed to danger.

(27) That none of the defendants ever advised the workers prior to 1966 of any precautions such workers should take to protect himself from the inhalation of asbestos dust coming from such insulating products.

(28) That prior to 1966, none of the defendants tested their products to determine the degree of exposure workers might be subjected to who used their insulating products containing asbestos.

(29) That when the defendants ascertained that their asbestos insulating products could be harmful to the user, none of such defendants removed their products from the market.

(30) That none of the defendants ever devised a safe method of application of their asbestos insulating products so as to prevent the worker from inhaling asbestos dust.

(31) That the manufacture, sale and distribution of insulating products with which the plaintiff came in contact was under the exclusive control of the defendants as it relates to their particular product.

6.

The contested issues of law are:

(1) Whether defendants had any duty to plaintiff under theories of negligence or strict liability which would permit a recovery.

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(2) Is plaintiff's claim barred by the two year statute of limitation and the four year statute of limitation and by the statutes of limitations of the various states where injurious exposure occurred?

(3) Did defendants owe to the plaintiff the duty to warn him? Defendants say that if plaintiff knew he was breathing dust containing some asbestos and such was harmful to his health, defendants, and each of them, owed no duty to warn the plaintiff.

(4) Did plaintiff voluntarily assume the risk, and is his claim barred by the dectrine of volenti non fit injuria?

(5) Plaintiff contends that there was an implied warranty, as well as an express warranty, of merchantability of defendants' products and that it was breached. Defendants deny there was an implied warranty, or express warranty, and deny the breach thereof.

(6) Defendants have alleged acts and omissions on the part of insulating contractors and as a matter of law, plaintiff is charged with the knowledge of the contractors. It is plaintiff's position that this does not constitute a defense absent warning or advice by the manufacturers of the dangerous nature of such products.

(7) Defendants contend that they are not legally liable for the development of an occupational disease which develops over a long period of time. Plaintiff contends that occupational disease has supported actions against manufacturers where such products were unsafe.

(8) The defendants have pled contributory negligence as a defense, and it is the position of the plaintiff that contributory negligence is not a defense as to a products liability and strict liability case.

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(9) The defendants do not agree to the following statement: The defense of open and obvious is not available to the defendants unless they establish that the plaintiff knew and recognized and appreciated the danger of contracting asbestosis.

The defendants contend that the defense of open and obvious is available to the defendants if they establish that the plaintiff knew he was breathing dust containing some asbestos and such was harmful to his health.

The defendants likewise contend: As to the defense of open and obvious, the burden of proof is on the plaintiff to establish that he did not know he would sustain some injury or harm to his health from inhaling dust which contained some asbestos and that he did not appreciate the danger to health of inhaling dust containing some asbestos.

(10) The defendants have pled various statutes of limitation and have submitted a brief to the Court as to their legal contentions. It is plaintiff's position that the statute of limitation does not bar recovery until the time when he knew and appreciated his illness and the harm resulting therefrom, and consequently, this case does not come under any statute of limitation.

(11) Defendants have alleged wrongful acts and negligence of third parties as a cause of the plaintiff's injuries and damages. It is plaintiff's position that this is a plea of acts or omissions by some party other than a party to this suit; without any warning or advice of the dangerous nature to such third parties the defendants are not entitled to such defensive contention.

(12) It is plaintiff's position that unavoidable accident is not a defense to a case such as this.

(13) It is the position of defendants that there is no proximate cause as a matter of law between the occupational disease which he allegedly sustained from exposure

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over many years to many different products and environments, and the conduct of defendants, and certainly not such causation as would warrant the rendition of a joint and several judgment.

(14) It is the position of plaintiff that the defendants-manufacturers will be held to the standard of an expert in their particular business, to an expert's knowledge of the arts, materials, and processes, and are bound to keep reasonably abreast of scientific knowledge and discoveries concerning their field.

(15) In addition, whether plaintiff is precluded under the Workmen's Compensation Law and Occupational Disease Act of California from any recovery in the instant action against Owens-Corning Fiberglas Corporation.

(16) Each separate defendant contends it is not liable or jointly and severally liable for the exposure to or injury of the plaintiff from the product of another defendant, or the cumulative effect from exposures to a product or products of other defendants.

7.

State of Uncontested facts:

(1) That some states of the United States have had workmen's compensation laws covering the disease asbestosis for more than forty years, and that Texas has had such law since 1947.

(2) The defendants knew that many of their insulating products containing asbestos had to be cut, scribed, sawed, and manipulated in order to be applied as they were designed.

(3) It is agreed that all x-rays, hospital and medical records, identified by deposition, or obtained by authorization and exchanged between the parties shall be admissible without further proof of authentication, with each party reserving the right to object to admissibility on any other ground.

(4) That the following complaint in intervention has been filed herein: Complaint in intervention of The Charter Oak Fire Insurance Company, seeking to recover against defendants and the plaintiff in sum of $7,617.90, reasonable

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attorney's fees and costs of Court.

(5) That all actuarial and life expectancy tables and charts may be introduced without testimony.

(6) It is agreed that a stipulation has been filed as to the manner of proving laws of foreign states.

(7) Owens-Corning Fiberglas Corporation has only been engaged in the manufacture of products containing asbestos and which are commonly used by insulators and asbestos workers since May of 1958.

(8) Pittsburgh Corning Corporation has only been engaged in the manufacture of products containing asbestos and which are commonly used by insulators and asbestos workers since August of 1962.

8.

The probable length of the trial of this case is _____ days.

APPROVED, SIGNED AND ENTERED this the 14th day of January, 1972.

CHIEF JUDGE, UNITED STATES DISTRICT COURT

APPROVED:

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By: _____
Attorneys for Plaintiff

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