6/11/68

FILED
JUL 8 - 1968
James R. Cooney, Clerk, U. S. Court
By Mildred C. Verret
DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

CLAUDE J. TOMPLAIT :

VS. : CIVIL NO. 5402

COMBUSTION ENGINEERING, INC., ET AL :

PLAINTIFF'S THIRD AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CLAUDE J. TOMPLAIT, hereinafter called plaintiff, complaining of COMBUSTION ENGINEERING, INC., R & I REFRACTORY AND INSULATION CORPORATION, JOHNS-MANVILLE PRODUCTS CORPORATION, JOHNS-MANVILLE FIBER GLASS, INC., OWENS-CORNING FIBER GLASS CORPORATION, PITTSBURGH CORNING CORPORATION, GUSTIN-BACON MANUFACTURING COMPANY, PITTSBURGH PLATE AND GLASS COMPANY, FIBREBOARD PAPER PRODUCTS CORPORATION and EAGLE-PICHER INDUSTRIES, INC., hereinafter called defendants, and for cause of action, plaintiff alleges:

1.

That the ground upon which the 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 ($10,000.00) Dollars, exclusive of interest and costs.

3.

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

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4.

That defendant COMBUSTION ENGINEERING, INC. is and during all of the times herein mentioned was a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware; that such defendant has an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas.

5.

That defendant, R & I REFRACTORY AND INSULATION CORPORATION is and during all of the times herein mentioned was a corporation duly organized, created and existing under and by virtue of the laws of some State, with an agent for service; however at this time plaintiff does not know the name and address of such agent for service.

6.

That defendants JOHNS-MANVILLE PRODUCTS CORPORATION and JOHNS-MANVILLE FIBER GLASS, INC. were and during all of the times herein mentioned were corporations duly organized, created and existing under and by virtue of the laws of the State of Delaware; that all of such defendants have an agent for service, to-wit: Prentice-Hall Corporation System, Littlefield Building, Austin, Travis County, Texas. That plaintiff is suing both of these corporations and alleges that he is suing whichever one is responsible for the manufacture, production and distribution of the insulation materials hereinafter mentioned, but it is not known by plaintiff at this time which of said corporations is responsible.

7.

That defendant OWENS-CORNING FIBER GLASS CORPORATION is and during all of the times herein mentioned was a

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corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware; that such defendant has an agent for service, to-wit: C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas.

8.

That defendant PITTSBURGH CORNING CORPORATION is and during all of the times herein mentioned was a corporation duly organized, created and existing under and by virtue of the laws of the State of Pennsylvania; that such defendant has an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas.

9.

That defendant GUSTIN-BACON MANUFACTURING COMPANY is and during all of the times herein mentioned was a corporation duly organized, created and existing under and by virtue of the laws of the State of Missouri; that such defendant has an agent for service, to-wit, Paul O. Craig, 5531 Armour Drive, Houston, Harris County, Texas.

10.

That defendant PITTSBURGH PLATE AND GLASS COMPANY is and during all of the times herein mentioned was a corporation duly organized, created and existing under and by virtue of the laws of the State of Pennsylvania; that such defendant has an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas.

11.

That defendant FIBREBOARD PAPER PRODUCTS CORPORATION is and during all of the times herein mentioned was a

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corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware; that such defendant has an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas.

12.

That defendant EAGLE-PICHER INDUSTRIES, INC. is and during all of the times herein mentioned was a corporation duly organized, created and existing under and by virtue of the laws of the State of Ohio; that such defendant has an agent for service, to-wit, C. T. Corporation System, Republic National Bank Building, Dallas, Dallas County, Texas.

13.

That defendants during all times herein mentioned and for a long time prior thereto, have been and now are engaged in the manufacture of materials used for insulation, such materials containing fiber glass, rock wool, foam glass, magnesium insulation, mineral wool, calcium silicate and asbestos; that the products manufactured, compounded and prepared by defendants, acting through their servants, employees, representatives and agents were and are placed on the market to be purchased and used by the public.

14.

That the various types of insulation compounded, manufactured and placed in containers and sold by the defendants contained chemicals and minerals and deleterious substances and matter which were highly poisonous, dangerous and harmful to human beings and to the health of man; that such materials were defective and were not suitable for the purpose for which they were intended. That each of

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the defendants knew, or should have known, that the chemical compounds and deleterious substances and matter in said insulation as compounded, prepared and manufactured by defendants were highly poisonous, dangerous and harmful to human beings and to the health of man and that such materials were defective and were not suitable for the purposes for which they were intended.

15.

The plaintiff says that in the year 1959, the exact dates being unknown, he was employed by B & B Engineering and Supply Company at the DuPont Plant in Orange, Texas, and that in the course of his employment as an insulator, he was required to come in contact with the following materials: Foamglas, magnesium and fireproofing.

16.

The plaintiff says that in the year 1959, for approximately nine to ten months, he was employed by Brooks-Fisher Insulating Company at the Gallitan Power House in Gallitan, Tennessee, and that in the course of his employment as an insulator, he was required to come in contact with the following materials: Asbestos and magnesium.

17.

The plaintiff says that in the year 1960, for approximately two months, he was employed by The Fluor Corporation, Ltd. at Kaplan, Louisiana on the Cow Island Job, and that in the course of his employment as an insulator, he was required to come in contact with magnesium.

18.

The plaintiff says that in the year 1960, the exact dates being unknown, he was employed by B & B Engineering & Supply Company, Inc., at the DuPont Plant in Orange, Texas,

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and that in the course of his employment as an insulator, he was required to come in contact with foamglas, magnesium and fireproofing.

19.

The plaintiff says that in the year 1960, the exact dates being unknown, he was employed by Armstrong Contracting and Supply Corporation at the Firestone Plant in Orange, Texas, and that in the course of his employment as an insulator, he was required to come in contact with magnesium.

20.

The plaintiff says that in the year 1961, the exact dates being unknown but being for approximately nine months, he was employed by Armstrong Contracting and Supply Corporation at the Firestone Plant in Orange, Texas, and that in the course of his employment as an insulator, he was required to come in contact with magnesium and Careytempt.

21.

The plaintiff says that in the year 1961, from September, 1961, to January, 1962, he was employed by The Aber Company, Inc., at the Gulf States Power House, in Bridge City, Texas, and that in the course of his employment as an insulator, he was required to come in contact with the following materials: Kaytherm (calcium silicate); Aber 2 to 3 (cement); Sealfas 3149 (mastic); Aluminum ells (mastic); Foamglas (foamed silicate); aluminum rolls (foamed silicate); Overkote (asphalt emulsion); Unibestos (asbestos fiber); Chimaseal (mastic); Steel bands (Mastic); and aluminum seals (mastic).

22.

The plaintiff says that from March, 1962, to May, 1962, he was employed by The Aber Company, Inc., at the Gulf

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Oil Refinery, in Port Arthur, Texas, and that in the course of his employment as an insulator, he was required to come in contact with the following materials: Kaytherm (calcium silicate); Aber 2 to 3 (cement); Sealfas 3149 (mastic); aluminum ells (mastic); Foamglas (foamed silicate); aluminum rolls (foamed silicate); Overkote (asphalt emulsion; Unibestos (asbestos fiber); Climaseal (mastic); steel bands (mastic); and aluminum seals (mastic).

23.

The plaintiff says that during the year 1962, he worked for Sabine Insulation Company, Inc., at the Firestone Plant in Orange, Texas, and at Levingston Shipbuilding Company in Orange, Texas, and that in the course of his employment as an insulator, he was required to come in contact with the following materials: Calcium silicate, mineral wool insulating cement and aluminum jacketing.

24.

The plaintiff says that during the year 1962, he worked for Armstrong Contracting and Supply Corporation, the exact dates being unknown to him, at the Firestone Plant in Orange, Texas, and that in the course of his employment as an insulator, he was required to come in contact with magnesium.

25.

The plaintiff says that during the year 1962, the exact dates being unknown to him, he worked for Johns-Manville Sales Corporation at the Bridge City Power House, in Bridge City, Texas, and that in the course of his employment as an insulator, he was required to come in contact with the following materials: Kaytherm (calcium silicate); Aber 2 to 3 (cement); Sealfas 3149 (mastic); Aluminum ells (mastic); Foamglas (foamed

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silicate); aluminum rolls (foamed silicate); Overkote (asphalt emulsion); Unibestos (asbestos fiber); Climaseal (mastic); steel bands (mastic); and aluminum seals (mastic).

26.

The plaintiff says that in the year 1962, from about June 11th to June 15th, 1962, he was employed by B & B Engineering & Supply Company, at the Big Three Welding Plant in Orange, Texas, and that in the course of his employment as an insulator, he was required to come in contact with the following materials: Foamglas, Careytemp, Thermoglas and Rock wool.

27.

The plaintiff says that from about November 30, 1962 to January 18, 1963, he was employed by The Aber Company at the Gulf States Power House in Bridge City, Texas, and that in the course of his employment as an insulator, he was required to come in contact with the following materials: Kaytherm (calcium silicate); Aber 2 to 3 (cement); Sealfas 3149 (mastic); aluminum ells (mastic); Foamglas (foamed silicate); aluminum rolls (foamed silicate); Overkote (asphalt emulsion); Unibestos (asbestos fiber); Climaseal (mastic); steel bands (mastic); and aluminum seals (mastic).

28.

The plaintiff says that in the year 1963, the exact dates being unknown, he was employed by Sabine Insulation Company, Inc., at the Firestone Plant in Orange and Levingston Shipbuilding Company in Orange, Texas, and that in the course of his employment as an insulator, he was required to come in contact with the following materials: Calcium silicate, mineral wool insulating cement, aluminum jacketing and fiberglas.

29.

The plaintiff says that in the year 1963, he was employed by B & B Engineering Company, at the DuPont Plant in Orange, Texas, the exact date being unknown to him, and that in the course of his employment as an insulator, he was required to come in contact with the following materials: Careytemp.

30.

The plaintiff says that in July and August, 1963, plaintiff was employed by Insulation Engineers, Inc., at some refinery in Pascagoula, Mississippi (the exact name being unknown to plaintiff), and that in the course of his employment as an insulator, he was required to come in contact with the following materials: Foamglas and magnesium.

31.

The plaintiff says that in the year 1963, he was employed by Triangle Insulation Company at the Houston Chemical Plant, in Beaumont, Texas, and that in the course of his employment as an insulator, he was required to come in contact with 85% magnesium.

32.

Plaintiff says that during the month of January, 1964, he was employed by B & B Engineering & Supply Company at the Big Three Welding Company plant in Orange, Texas, and that in the course of his employment he was required to come in contact with Foamglas.

33.

The plaintiff says that in the year 1964, he was employed by Triangle Insulation Company at the Houston Chemical Plant, in Beaumont, Texas, and that in the course of

his employment as an insulator, he was required to come in contact with 85% magnesium.

34.

The plaintiff says that during the year 1964, he was employed by Industrial Insulation, Inc., at the Jefferson Chemical Plant, in Port Neches, Texas, and that in the course of his employment, he was required to come in contact with asbestos insulating material, fiberglas and magnesium; and he also was employed by Industrial Insulation, Inc. at the Atlantic Refinery, in Port Arthur, Texas, and that in the course of his employment, he was required to come in contact with magnesium.

35.

The plaintiff says that during the year 1964, he was employed by Sabine Insulation Company, Inc. at the Firestone Plant in Orange, Texas, and Levingston Shipbuilding Company, in Orange, Texas, and that in the course of his employment, he was required to come in contact with calcium silicate, mineral wool insulating cement, aluminum jacketing and fiberglas.

36.

The plaintiff says that during the year 1964, he was also employed by Johns-Manville Sales Corporation at the Gulf States Power Plant, Bridge City, Texas, and that in the course of his employment, he was required to come in contact with calcium silicate, rock wool and 85% magnesium.

37.

That at all times herein mentioned, the plaintiff was employed as an insulator, and that in the performance of his employment as an insulator, he was required to handle large

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quantities of the said insulation hereinabove mentioned, compounded, manufactured and prepared by the defendants. That in addition to the fact that the plaintiff actually used the products named above, and many more, as an insulator, and specifically many and various products containing asbestos, the plaintiff on many of the jobs while not using himself the specific products mentioned or perhaps not even using products containing asbestos himself, 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 the plaintiff was working.

38.

That during the period of time in which the plaintiff was employed as an insulator, 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 by defendants and its chemical compounds, delterious 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.

39.

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 or reasonable care, ought to have known that the insulation they so prepared and manufactured were deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health, and that plaintiff would

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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 the 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 plaintiff 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 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 ordinary or reasonable care, ought to have known that its insulation contained deleterious, poisonous and highly harmful substances to the human body, lungs, respiratory system, skin and health, notwithstanding which defendants negligently supplied to plaintiff containers of said insulation which were broken open and could not be transported without coming in contact with plaintiff's skin and body.

(f) 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 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 plaintiff from harm and negligently failed to adopt and enforce a reasonable safe plan and method of handling and installing said insulation.

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(g) 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.

(h) 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.

(i) 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 asbestos if the defendants would not remove such products from sale to the public.

(j) That the products of the defendants, especially 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.

40.

The plaintiff would further show unto the Court that at all the times material hereto, over the 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, the plaintiff would not have sustained his injuries and damages as herein set forth, and therefore, the plaintiff says that he is entitled to recover from the defendants under the doctrine of res ipsa loquitur.

41.

That as a direct and proximate cause of the aforesaid occurrence and circumstances and the negligence and carelessness of the defendants, plaintiff was permanently and severely injured; that he has sustained a very serious and permanent injury to his lungs and respiratory system, which has affected other parts of his body; 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 containing oxygen in order that he may be able to breathe; that the plaintiff has extreme difficulty with sleeping; that he tires easily; that he constantly coughs; that he has suffered from an extreme loss of weight; that his future outlook is over dim; that he has sought the services of many 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.

42.

That by reason of the negligence and carelessness of the defendants, and each of them, as hereinbefore alleged, and because of the harm and injury to his health and the resulting disability therefrom, 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.

43.

That in an effort to treat, relieve and heal himself of said injuries and to regain his health, the plaintiff was

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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 exact amount of which plaintiff is unable to accurately estimate at this time.

44.

That by reason of the facts hereinbefore 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.

45.

The plaintiff further says that his injuries and damages were directly and proximately caused by the gross negligence, wantonness, omission and conscious indifference on the parts of the defendants herein, their agents, servants, employees, managers, superintendents, supervisors and officers, and their utter disregard for the lives and welfare of persons coming in contact with their products; 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 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.

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46.

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.

STEPHENSON, THOMPSON AND MORRIS

By _____
Attorneys for Plaintiff
Stephenson Building
Orange, Texas 77630

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CERTIFICATE OF SERVICE BY MAIL

A copy of the foregoing notice and motion with attached amended complaint has been forwarded to the following attorneys of record on this the 11th day of June, 1968:

Mr. Ben L. Reynolds
Royston, Rayzor and Cook
Attorneys at Law
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Attorney for Defendant EAGLE-PICHER INDUSTRIES, INC.

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707 Beaumont Savings Building
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Attorney for Defendant OWENS-CORNING FIBER GLASS CORPORATION

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Attorney for Defendant GUSTIN-BACON MANUFACTURING COMPANY

Mr. George A. Weller
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Attorney for Defendant FIBERBOARD PAPER PRODUCTS CORPORATION

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Attorney for Defendants COMBUSTION ENGINEERING, INC. and REFRACTORY & INSULATION CORPORATION

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Attorney for Defendants PITTSBURGH PLATE GLASS COMPANY and PITTSBURGH CORNING CORPORATION

Mr. Gordon R. Pate
1119 Beaumont Savings Building
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Attorney for Defendants JOHNS-MANVILLE PRODUCTS CORPORATION and JOHNS-MANVILLE FIBER GLASS, INC.

Attorney for Plaintiff

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