May 14 1969

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED

MAY 14 1969

James R. Cooney, Clerk, U. S. Court

By Hazel E. Studdard DEPUTY

CLAUDE J. TOMPLAIT

VS.

COMBUSTION ENGINEERING, INC., ET AL

CIVIL ACTION NO. 5402

DEMAND FOR SUBMISSION OF OMITTED ISSUE OR ISSUES UNDER RULE 49(a)

NOW COMES defendant before retirement of the jury and on submission by the Court to counsel of the special verdict prepared by the Court, and objects to the omission of the following issue or issues therefrom, and demands that such issue or issues be submitted to the jury. The issue or issues omitted are attached.

DATED this 14th day of May, 1969.

WELLER, WHEELUS & GREEN
P. O. BOX 350
BEAUMONT, TEXAS 77704

BY Geo. A. Weller
GEO. A. WELLER

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May 14 1969

INSTRUCTION NO. ____

The term "proximate cause" means a cause which, in a natural and continuous sequence, unbroken by any new and independent cause, produces an event, and without which such event would not have occurred. To be a proximate cause of an event, the cause must be such that a reasonably prudent person, in the exercise of ordinary care, should have reasonably foreseen or anticipated that such event or a similar event would follow such cause as a natural and probable consequence in the light of attending circumstances. There may be more than one proximate cause of an event.

The term "new and independent cause" as used in the definition of "proximate cause" means an act or omission of a separate and independent agency which breaks the sequence and destroys the causal connection between the original act or omission of the defendants, or any of them, and the accident and injury complained of and which of itself is sufficient to and does produce the accident or injury complained of and thereby becomes the immediate cause of the injury.

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DEFENDANT'S REQUESTED INSTRUCTION/~~SPECIAL INTERROGATORY~~ NO. 1

GIVEN:

REFUSED:

ATTORNEY FOR DEFENDANT

JUDGE PRESIDING

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INSTRUCTION NO. _____

LADIES AND GENTLEMEN OF THE JURY:

You are instructed in this case that if you should find that the plaintiff's physical condition is produced or caused or has been produced or caused by the smoking of cigarettes and that such condition and/or disability would not have occurred except for the smoking of cigarettes or the combination of the smoking of cigarettes and the inhalation of asbestos dust, then you will find for the defendant.

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DEFENDANT'S REQUESTED INSTRUCTION/[redacted] NO. 2

GIVEN:

REFUSED:

ATTORNEY FOR DEFENDANT

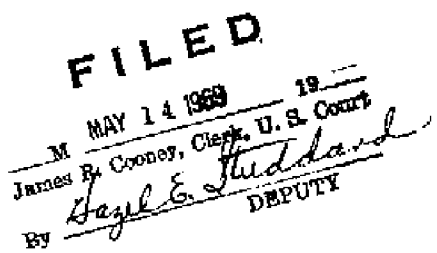
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CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INSTRUCTION NO. _____

LADIES AND GENTLEMEN OF THE JURY:

You are instructed that proof of mere injury furnishes no rational basis for inferring that the product was defective for its intended use.



DEFENDANT'S REQUESTED INSTRUCTION/~~SPECIAL INTERROGATORY~~ NO. 3

GIVEN:

REFUSED:

ATTORNEY FOR DEFENDANT

JUDGE PRESIDING

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INSTRUCTION NO. _____

You are further instructed in this case that the insulation product containing some asbestos manufactured by the defendant, Fibreboard, was exactly as intended by the defendant and there is no evidence of any miscarriage or defect in the production of the product and no foreign substance was in the product.

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DEFENDANT'S REQUESTED INSTRUCTION/~~SPECIAL INTERROGATORY~~ NO. 4

GIVEN:

REFUSED:

ATTORNEY FOR DEFENDANT

JUDGE PRESIDING

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INSTRUCTION NO. _____

You are instructed that for a product to be "unreasonably dangerous" to the contractor or professional insulator, the product when sold must be in a "defective condition," which means there must be a miscarriage or defect in the production of the product or a foreign substance which was not intended to be placed in the product and the product must be not reasonably fit for the intended use for which it was sold, and dangerous to an extent beyond that which would be contemplated by an insulation contractor or professional insulator, and in determining whether such product is unreasonably dangerous and unfit for its intended use, you will take into consideration the knowledge available to the contractor or professional insulator as to the characteristic of the product, and you will also take into consideration and weigh the utility and need of the product to the industrial community, against the probability of harm arising from its use.

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DEFENDANT'S REQUESTED INSTRUCTION/~~SPECIAL INTERROGATORY~~ NO. 5

GIVEN:

REFUSED:

ATTORNEY FOR DEFENDANT

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INSTRUCTION NO. _____

You are instructed that a manufacturer of a product is not an absolute insurer or guarantor against consequences or physical hurts occurring in the course of the normal use of the product of which no developed human skill and foresight developed at or prior to the time of the occurrence could afford knowledge.

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DEFENDANT'S REQUESTED INSTRUCTION/SPECIAL INTERROGATORY NO. 6

GIVEN:

REFUSED:

ATTORNEY FOR DEFENDANT

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INSTRUCTION NO. _____

You are instructed that the insulation product contains asbestos, which is the ingredient and quality which makes the insulation product fit for the purpose for which it was manufactured, and in the instant case the asbestos in the product is claimed to be harmful. Asbestos is a natural and necessary ingredient of the product and where the user of the product knows that it contains some asbestos and knows that he is working with an asbestos product which will produce dust when sawed or cut, such product is not defective.

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DEFENDANT'S REQUESTED INSTRUCTION NO. 7

GIVEN:

REFUSED:

ATTORNEY FOR DEFENDANT

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INSTRUCTION NO. _____

The plaintiff contends in this case that Fibreboard, a manufacturer of insulation products, which contain some percentage of asbestos, for sale to insulation contractors or industry, impliedly warrants that such product is reasonably fit for the purpose for which the product is sold and that such product is defective in that it contains "asbestos" which is harmful to insulation workers employed as applicators by contractors, and particularly Claude J. Tomplait, and that the defendant was negligent in not warning the plaintiff and other users that the use of their product containing asbestos would cause the disease of asbestosis. The mineral, "asbestos," is a well known term and the plaintiff in this case, as well as his employers, at all times knew that the insulation product or products which they were applying, and particularly the product of this defendant, contained asbestos, and therefore the plaintiff is charged with notice of the fact that he was working with asbestos. The plaintiff likewise knew that the insulation product with which he was working created a dusty condition when the product was sawed and installed and he knew that he would breathe such dust when he was working in crowded conditions. As a fundamental principle of law, before a manufacturer can be charged with negligence of this sort it must be established that at the time and date of the occurrence complained of that he had knowledge of some inherent danger or defective condition resulting from the use of his product. This knowledge may be either actual knowledge or such knowledge as a reasonably prudent manufacturer should have acquired under the circumstances. Plaintiff must prove that defendant knew or should have known before Mr. Tomplait's asbestosis started that their product could cause that disease, and it must be established that Tomplait worked with a product manufactured by this defendant containing some asbestos during the year 1959 or 1960, or prior to August 1, 1961. Under the circumstances of this case, such knowledge can only be had by this defendant if medical science also had it and had made it publicly known at the time that Mr. Tomplait's asbestosis started. You will also take into consideration the fact that American Conference of Governmental Industrial Hygienists Committee had determined that if people working with asbestos were subjected on the average to five million particles of dust per cubic foot that such conditions were reasonably safe and that persons working in asbestos construction on the average worked under conditions where the dust exposure was less than the recommended average.

The plaintiff in this case knew that the product contained asbestos and that he was working in asbestos dust and that dust was harmful, but he contends that the defendant was negligent in failing to warn him that if he worked in asbestos dust over a long period of time that he would sustain the disease known as asbestosis.

DEFENDANT'S REQUESTED INSTRUCTION/~~SPECIAL INTERROGATORY~~ NO. 3

GIVEN:

REFUSED:

ATTORNEY FOR DEFENDANT

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JUDGE PRESIDING

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INSTRUCTION NO. _____ (Cont'd.)

The mere failure to warn against the result which could not have been reasonably anticipated by this defendant, is not actionable negligence. This defendant cannot be held guilty of negligence on the basis of medical opinion, surveys, or other similar materials which were not recognized and which were not announced until after the time of the alleged exposures and contraction of asbestosis.

You should not consider the defendant's knowledge alone but you can consider the knowledge generally among the manufacturers of insulation products containing asbestos. In this connection, the burden is on the plaintiff to establish that the defendant knew or should have known of the medical or scientific results before it is held responsible for some medical or scientific knowledge which has been developed at a later date.

DEFENDANT'S REQUESTED INSTRUCTION/~~SPECIAL INTERROGATORY~~ NO. 8 (cont'd.)

GIVEN:

ATTORNEY FOR DEFENDANT

REFUSED:

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James R. Cooney, Clerk, U. S. Court

By Hazel E. Stoddard Deputy

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, INC., ET AL

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INSTRUCTION NO. _____

If there is any unreasonable risk or danger from using Fibreboard's products containing some asbestos, which risk or danger must be the risk or danger beyond that which would be contemplated by an insulation contractor or professional insulator with the knowledge available to him as to the characteristic of the product, such unreasonable risk or danger from using defendant's product must have been reasonably foreseen by the manufacturer. When the risk or danger itself is unknown at the time complained of, there is no proximate cause. If you find that plaintiff came in contact with defendant's product, and developed asbestosis thereafter, and at such time of contact, the product containing asbestos manufactured by the defendant was usable as such, and that the state of known medical knowledge was then such that the defendant could not have anticipated in the exercise of reasonable care that its product would cause the plaintiff to develop asbestosis, then your verdict must be in favor of the defendant.

Under the circumstances of this case, such knowledge can only be had by this defendant if medical science also had it and had made it publicly known at the time that Mr. Tomplait's disease of asbestosis started.

Lartique v. R. J. Reynolds Tobacco Company, 317 F. 2d 19 (5th Cir. 1963). Case cited with approval by Cudmore v. Richardson-Merrell, Inc., 398 S. W. 2d 640 (Civ. App. Tex. 1965, rehearing denied 1966).

O. M. Franklin Serum Company v. C. A. Hoover & Son, et al, 437 S.W. 2d (Civ. App. Tex. 1969).

DEFENDANT'S REQUESTED INSTRUCTION/~~SPECIAL INTERROGATORY~~ NO. 9

GIVEN:

REFUSED:

ATTORNEY FOR DEFENDANT

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MAY 14 1969

James R. Cooney, Clerk, U. S. Court

By Hazel B. Haddard DEPUTY

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING ET AL

INSTRUCTION NO. _____

LADIES AND GENTLEMEN OF THE JURY:

You are instructed that it is a well recognized principal of law that a person cannot voluntarily encounter a danger or potential danger, and then recover damages because of his voluntary exposure to this danger or potential danger.

The plaintiff cannot recover any damage for those exposures to products containing asbestos and asbestos dust from such products after he had knowledge that he has suffered injury, if any, as a result of contact with such products, and that further contact with asbestos dust would further affect his health.

You are further instructed that the plaintiff, Tomplait, was advised by his physician on or prior to August 1, 1961, that he should not expose himself further to asbestos dust, and to "get out" of the insulation work. If a person receives injury to his person by the act or acts of another, he must exercise reasonable care and diligence to avoid loss and to minimize the consequences of his injury.

If a person fails to exercise reasonable care and diligence to avoid loss and minimize the consequences of his injury, and by reason of his failure to do so his injury or damage becomes aggravated, he may not recover damages for such part of the injury as may be attributed to his omission to take preventive measures, and his recovery, if any, will be limited to those damages that would have resulted had he fulfilled his duty.

Authorities:

Brief filed with this Court on Motion to Certify.

DEFENDANT'S REQUESTED INSTRUCTION/SPECIAL INTERROGATORY NO. 10

GIVEN:

REFUSED:

ATTORNEY FOR DEFENDANT

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James B. Cooper, Clerk, U. S. Court

By Hazel E. Studdard
DEPUTY

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that Tomplait worked in the year 1959 or 1960 or in 1961 prior to August 1, 1961, with an insulation product containing asbestos manufactured by Fibreboard?

Answer: "Yes" or "No,"

ANSWER: _____

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DEFENDANT'S REQUESTED INSTRUCTION/SPECIAL INTERROGATORY NO. 1

GIVEN: _____

REFUSED: _____

ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If your answer to Interrogatory No. 1 is "Yes," then answer this interrogatory:

INTERROGATORY NO. 2

When and where did Tomplait work with an insulation product containing asbestos which was manufactured by Fibreboard Paper Products Corporation?

Answer by giving the date or dates and the place.

ANSWER: _____

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DEPUTY

This interrogatory should be predicated on a "Yes" answer to defendant's requested interrogatory No. 1.

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 2

GIVEN: _____
ATTORNEY FOR DEFENDANT

REFUSED:

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If your answer to Interrogatory No. 1 is "Yes," and you have answered Interrogatory No. 2, then answer this interrogatory:

INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that Tomplait had a disease described as asbestosis on or prior to August 1, 1961?

Answer: "Yes" or "No."

ANSWER: _____

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DEFENDANT'S REQUESTED INSTRUCTION/SPECIAL INTERROGATORY NO. 3

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered Interrogatory No. 3 "Yes," then answer this interrogatory:

INTERROGATORY NO. 4

Do you find that Tomplait had the disease described as asbestosis prior to the year 1959?

Answer: "Yes" or "No."

ANSWER: _____

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DEFENDANT'S REQUESTED ~~INTERROGATORY~~/SPECIAL INTERROGATORY NO. 4

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered Interrogatory No. 1 "Yes," and have answered Interrogatory No. 2, then answer this interrogatory:

INTERROGATORY NO. 5

Do you find that Tomplait sustained asbestosis as a proximate cause or one of the proximate causes of using a product manufactured by Fibreboard containing asbestos, in his work during the year 1959, 1960 or 1961 prior to August 1, 1961?

Answer: "Yes" or "No."

ANSWER: _____

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DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 5

GIVEN:

_____

ATTORNEY FOR DEFENDANT

REFUSED:

_____

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If you have answered Interrogatory No. 1 "Yes" and No. 5 "Yes," then answer this:

INTERROGATORY NO. 6

Taking into consideration the instruction below defining "unreasonably dangerous," do you find from a prependerance of the evidence that the insulation product containing asbestos manufactured by the defendant, Fibreboard Paper Products Corporation, at the time of delivery, was in a defective condition and "unreasonably dangerous" for use by experienced insulation contractors or experienced insulators as pipe insulation or insulation material?

Answer: "Yes" or "No."

ANSWER: _____

In considering your answer to this issue you will take into consideration Instruction No. 5 attached.

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James R. Cooney, Clerk, U. S. Court

By Hazel E. Stoddard DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 6

GIVEN:

REFUSED:

_____
ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

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INSTRUCTION NO. _____

You are instructed that for a product to be "unreasonably dangerous" to the contractor or professional insulator, the product when sold must be in a "defective condition," which means there must be a miscarriage or defect in the production of the product or a foreign substance which was not intended to be placed in the product and the product must be not reasonably fit for the intended use for which it was sold, and dangerous to an extent beyond that which would be contemplated by an insulation contractor or professional insulator, and in determining whether such product is unreasonably dangerous and unfit for its intended use, you will take into consideration the knowledge available to the contractor or professional insulator as to the characteristic of the product, and you will also take into consideration and weigh the utility and need of the product to the industrial community, against the probability of harm arising from its use.

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DEPUTY

DEFENDANT'S REQUESTED INSTRUCTION/[redacted] NO. 5

GIVEN:

REFUSED:

_____
ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered Interrogatory No. 6 "Yes," then answer this interrogatory:

INTERROGATORY NO. 6-A

Do you find from a preponderance of the evidence that the defendant, Fibreboard Paper Products Corporation, prior to August 1, 1961, could by the reasonable application of human skill and foresight have known that construction workers, such as the plaintiff, Tomplait, applying its insulation product (which contained some asbestos) in construction work under usual and ordinary conditions in construction, would sustain asbestosis by working with its product?

Answer: "Yes" or "No."

ANSWER: _____

In considering your answer to this issue you will take into consideration Instruction No. 9 attached.

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DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 6-A

GIVEN: _____

REFUSED: _____

ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

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INSTRUCTION NO. ____

If there is any unreasonable risk or danger from using Fibreboard's products containing some asbestos, which risk or danger must be the risk or danger beyond that which would be contemplated by an insulation contractor or professional insulator with the knowledge available to him as to the characteristic of the product, such unreasonable risk or danger from using defendant's product must have been reasonably foreseen by the manufacturer. When the risk or danger itself is unknown at the time complained of, there is no proximate cause. If you find that plaintiff came in contact with defendant's product, and developed asbestosis thereafter, and at such time of contact, the product containing asbestos manufactured by the defendant was usable as such, and that the state of known medical knowledge was then such that the defendant could not have anticipated in the exercise of reasonable care that its product would cause the plaintiff to develop asbestosis, then your verdict must be in favor of the defendant.

Under the circumstances of this case, such knowledge can only be had by this defendant if medical science also had it and had made it publicly known at the time that Mr. Tomplait's disease of asbestosis started.

Lartigue v. R. J. Reynolds Tobacco Company, 317 F. 2d 19 (5th Cir. 1963). Case cited with approval by Cudmore v. Richardson-Merrell, Inc., 398 S.W. 2d 640 (Civ. App. Tex. 1965, rehearing denied 1966).

O. M. Franklin Serum Company v. C. A. Hoover & Son, et al, 437 S.W. 2d (Civ. App. Tex. 1969).

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DEPUTY

DEFENDANT'S REQUESTED INSTRUCTION/SPECIAL INTERROGATORY NO. 9

GIVEN:

ATTORNEY FOR DEFENDANT

REFUSED:

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INTERROGATORY NO. 7

Do you find from a preponderance of the evidence that Tomplait worked in either of the years 1959 through 1964, inclusive, with an insulation product containing asbestos manufactured by Johns-Manville Products Corporation?

Answer: "Yes" or "No."

ANSWER: _____

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By Hazel E. Studdard DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 7

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____

JUDGE PRESIDING

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If you have answered the foregoing Interrogatory No. 7 "Yes" and Interrogatory No. 3 "Yes," then answer this interrogatory:

INTERROGATORY NO. 8

Do you find that Tomplait sustained asbestosis as the proximate cause or one of the proximate causes of using a product manufactured by Johns-Manville Products Corporation containing asbestos in his work during either of the years 1959 or 1960 or 1961 or 1962 or 1963 or 1964?

Answer: "Yes" or "No."

ANSWER: _____

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DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 8

GIVEN: _____

REFUSED: _____

ATTORNEY FOR DEFENDANT

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered the foregoing Interrogatory No. 8 "Yes," then answer this interrogatory:

INTERROGATORY NO. 9

Do you find from a preponderance of the evidence that Johns-Manville Products Corporation, prior to August 1, 1961, could by the reasonable application of human skill and foresight, have known that construction workers, such as the plaintiff, Tomplait, applying its insulation product (which contained some asbestos) in construction work under usual and ordinary conditions, would sustain asbestosis by working with its product?

Answer: "Yes" or "No."

ANSWER: _____

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DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 9

GIVEN: _____

REFUSED: _____

ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

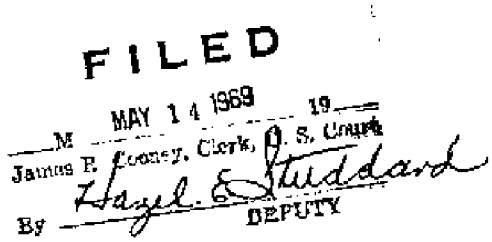
CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INTERROGATORY NO. 19

Do you find from a preponderance of the evidence that Tomplait worked in either of the years 1959 through 1964, inclusive, with an insulation product containing asbestos manufactured by Eagle-Picher Industries, Inc.?

Answer: "Yes" or "No."

ANSWER: _____



DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 19

GIVEN: _____

REFUSED: _____

ATTORNEY FOR DEFENDANT

_____

JUDGE PRESIDING

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If you have answered the foregoing Interrogatory No. 10 "Yes" and Interrogatory No. 3 "Yes," then answer this interrogatory:

INTERROGATORY NO. 11

Do you find that Tomplait sustained asbestosis as the proximate cause or one of the proximate causes of using a product manufactured by Eagle-Picher Industries, Inc. containing asbestos in his work during either of the years 1959 or 1960 or 1961 or 1962 or 1963 or 1964?

Answer: "Yes" or "No."

ANSWER: _____

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By Hazel E. Stoddard Dep.

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 11

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered the foregoing Interrogatory No. 11 "Yes," then answer this Interrogatory:

INTERROGATORY NO. 12

Do you find from a preponderance of the evidence that Eagle-Picher Industries, Inc., prior to August 1, 1961, could by the reasonable application of human skill and foresight, have known that construction workers, such as the plaintiff, Tomplait, applying its insulation product (which contained some asbestos) in construction work under usual and ordinary conditions, would sustain asbestosis by working with its product?

Answer: "Yes" or "No."

ANSWER: _____

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DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 12

GIVEN:

REFUSED:

_____
ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INTERROGATORY NO. 13

Do you find from a preponderance of the evidence that Tomplait worked in either of the years 1959 through 1964, inclusive, with an insulation product containing asbestos manufactured by Owens-Corning Fiber Glass Corporation?

Answer: "Yes" or "No."

ANSWER: _____

FILED

M MAY 14 1969 19__

James R. Cooney, Clerk U. S. Court

By Hazel E. Stoddard DEPUTY

DEFENDANT'S REQUESTED ~~XXXXXXXXXX~~ INSTRUCTION/SPECIAL INTERROGATORY NO. 13

GIVEN:

REFUSED:

_____
ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered the foregoing Interrogatory No. 13 "Yes" and Interrogatory No. 3 "Yes," then answer this interrogatory:

INTERROGATORY NO. 14

Do you find that Templait sustained asbestosis as the proximate cause or one of the proximate causes of using a product manufactured by Owens-Corning Fiber Glass Corporation containing asbestos in his work during either of the years 1959 or 1960 or 1961 or 1962 or 1963 or 1964?

Answer: "Yes" or "No."

ANSWER: _____

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MAY 14 1959

M 19

James R. Cooney, Clerk, U.S. Court

By Hazel E. Haddard DEPUTY

DEFENDANT'S REQUESTED ~~XXXXXXXXXXX~~ INSTRUCTION/SPECIAL INTERROGATORY NO. 14

GIVEN:

REFUSED:

_____
ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered the foregoing Interrogatory No. 14 "Yes," then answer this Interrogatory:

INTERROGATORY NO. 15

Do you find from a preponderance of the evidence that Owens-Corning Fiber Glass Corporation, prior to August 1, 1961, would by the reasonable application of human skill and foresight, have known that construction workers, such as the plaintiff, Tomplait, applying its insulation product (which contained some asbestos) in construction work under usual and ordinary conditions, would sustain asbestosis by working with its product?

Answer: "Yes" or "No."

ANSWER: _____

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By Hazel E. Studdard DEPUTY

DEFENDANT'S REQUESTED INSTRUCTION/SPECIAL INTERROGATORY NO. 13

GIVEN:

REFUSED:

ATTORNEY FOR DEFENDANT

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

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INTERROGATORY NO. 16

Do you find from a preponderance of the evidence that Tomplait worked in either of the years 1959 through 1964, inclusive, with an insulation product containing asbestos manufactured by Pittsburgh-Corning Corporation?

Answer: "Yes" or "No."

ANSWER: _____

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M _____ 19__
James R. Cpmer, Clerk, U. S. Court
By Hazel E. Stoddard
DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 16

GIVEN:

REFUSED:

_____
ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered the foregoing Interrogatory No. 16 "Yes" and Interrogatory No. 3 "Yes," then answer this interrogatory:

INTERROGATORY NO. 17

Do you find that Tomplait sustained asbestosis as the proximate cause or one of the proximate causes of using a product manufactured by Pittsburgh-Corning Corporation containing asbestos in his work during either of the years 1959 or 1960 or 1961 or 1962 or 1963 or 1964?

Answer: "Yes" or "No."

ANSWER: _____

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By Hazel E. Stoddard
DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 17

GIVEN: _____

REFUSED: _____

ATTORNEY FOR DEFENDANT

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered the foregoing Interrogatory No. 17 "Yes," then answer this interrogatory:

INTERROGATORY NO. 18

Do you find from a preponderance of the evidence that Pittsburgh-Corning Corporation, prior to August 1, 1961, could by the reasonable application of human skill and foresight, have known that construction workers, such as the plaintiff, Tomplait, applying its insulation product (which contained some asbestos) in construction work under usual and ordinary conditions, would sustain substantial by working with its product?

Answer: "Yes" or "No."

Answer: _____

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MAY 14 1969

James R. Cooney, Clerk, U. S. Court

By Hazel E. Haddard DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 18

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

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INTERROGATORY NO. 19

Do you find from a preponderance of the evidence that Tomplait worked in either of the years 1959 through 1964, inclusive, with an insulation product containing asbestos manufactured by Unarco Industries, Inc.?

Answer: "Yes" or "No."

ANSWER: _____

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James R. Cooney, Clerk U. S. Court
By Hazel E. Stoddard DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 19

GIVEN: _____

REFUSED: _____ ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

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If you have answered the foregoing Interrogatory No. 19 "Yes" and Interrogatory No. 3 "Yes," then answer this interrogatory:

INTERROGATORY NO. 20

Do you find that Tomplait sustained asbestosis as the proximate cause or one of the proximate causes of using a product manufactured by Unarco Industries, Inc. containing asbestos in his work during either of the years 1959 or 1960 or 1961 or 1962 or 1963 or 1964?

Answer: "Yes" or "No."

ANSWER: _____

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By Hazel E. Studdard
DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 20

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered the foregoing Interrogatory No. 20 "Yes," then answer this Interrogatory:

INTERROGATORY NO. 21

Do you find from a preponderance of the evidence that Unarco Industries, Inc., prior to August 1, 1961, could by the reasonable application of human skill and foresight, have known that construction workers, such as the plaintiff, Tomplait, applying its insulation product (which contained some asbestos) in construction work under usual and ordinary conditions, would sustain asbestosis by working with its product?

Answer: "Yes" or "No."

ANSWER: _____

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MAY 14 1969

James R. Cooney, Clerk U. S. Court

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DEFENDANT'S REQUESTED INSTRUCTION/SPECIAL INTERROGATORY NO. 21

GIVEN: _____

REFUSED: _____

ATTORNEY FOR DEFENDANT

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INTERROGATORY NO. 22

Do you find from a preponderance of the evidence that Tomplait worked in either of the years 1959 through 1964, inclusive, with an insulation product containing asbestos manufactured by Combustion Engineering, Inc. or H & I Refractory and Insulation Corporation?

Answer: "Yes" or "No."

ANSWER: _____

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MAY 14 1969

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James R. Cooney, Clerk, U. S. Court

By Hazel E. Studdard DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 22

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

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If you have answered the foregoing Interrogatory No. 22 "Yes" and Interrogatory No. 3 "Yes," then answer this interrogatory:

INTERROGATORY NO. 23

Do you find that Tomplait sustained asbestosis as the proximate cause or one of the proximate causes of using a product manufactured by Combustion Engineering, Inc. or R & I Refractory and Insulation Corporation containing asbestos in his work during either of the years 1959 or 1960 or 1961 or 1962 or 1963 or 1964?

Answer: "Yes" or "No."

ANSWER: _____

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By Hazel E. Studdard DEPUTY

DEFENDANT'S REQUESTED ~~XXXXXXXXX~~ INSTRUCTION/SPECIAL INTERROGATORY NO. 23

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered the foregoing Interrogatory No. 23 "Yes," then answer this interrogatory:

INTERROGATORY NO. 24

Do you find from a preponderance of the evidence that Combustion Engineering, Inc. or K & I Refractory and Insulation Corporation, prior to August 1, 1961, could by the reasonable application of human skill and foresight, have known that construction workers, such as the plaintiff, Tomplait, applying its insulation product (which contained some asbestos) in construction work under usual and ordinary conditions, would contain asbestosis by working with its product?

Answer: "Yes" or "No."

Answer: _____

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By Hazel E. Studdard DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 24

GIVEN: _____

REFUSED: _____

ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

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INTERROGATORY NO. 25

Do you find from a preponderance of the evidence that plaintiff, Tomplait, failed to exercise ordinary care for his own safety in refusing to use a respirator or face mask while working under unusually dusty conditions with insulation products containing asbestos?

Answer: "Yes" or "No."

ANSWER: _____

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MAY 14 1969
M ____ 19 ___
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By Hazel E. Stoddard DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 25

GIVEN: _____
ATTORNEY FOR DEFENDANT

REFUSED:

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered the foregoing Interrogatory No. 25 "Yes," then answer this interrogatory.

INTERROGATORY NO. 26

Do you find that the failure of the plaintiff, Tomplait, to use a respirator or face mask while working with insulation products containing asbestos was a proximate cause of his injury, if any?

Answer: "Yes" or "No."

ANSWER: _____

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MAY 14 1969

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By Hazel E. Studdard

DEFENDANT'S REQUESTED [redacted]/SPECIAL INTERROGATORY NO. 26

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INTERROGATORY NO. 27

Do you find from a preponderance of the evidence that the plaintiff, Tomplait, failed to exercise ordinary care for his own safety in working with products containing asbestos in unusually dusty or unventilated places?

Answer: "Yes" or "No."

ANSWER: _____

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James R. Cooney, Clerk, U. S. Court
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DEFENDANT'S REQUESTED [redacted] SPECIAL INTERROGATORY NO. 27

GIVEN: _____

REFUSED: _____ ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

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If you have answered the foregoing Interrogatory No. 27 "Yes," then answer this interrogatory:

INTERROGATORY NO. 28

Do you find that the failure of Templait to exercise ordinary care for his own safety in working with asbestos products in unusually dusty or unventilated places was a proximate cause of his injury, if any you have found in answer to Interrogatory No. 3?

Answer: "Yes" or "No."

ANSWER: _____

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MAY 14 1969
M 19
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By Hazel E. Studdard DEPUTY

DEFENDANT'S REQUESTED INTERROGATORY/SPECIAL INTERROGATORY NO. 28

GIVEN:

REFUSED:

_____
ATTORNEY FOR DEFENDANT

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INTERROGATORY NO. 29

Bearing in mind that the plaintiff, Tomplait, has admitted that he knew he was working with products containing asbestos, that he knew said products would create asbestos dust when cut or sawed and that Tomplait knew he would inhale such dust from time to time, and assuming these facts to be true, then answer this interrogatory:

Do you find from a preponderance of the evidence that Claude J. Tomplait assumed the risk of working with asbestos products and working under unusually dusty conditions created by the cutting and sawing of asbestos products while knowing that he would inhale a part of such dust and that dust generally was harmful?

Answer: "Yes" or "No."

ANSWER: _____

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MAY 14 1969 — 19 —

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By Hazel E. Studdard DEPUTY

DEFENDANT'S REQUESTED SPECIAL INTERROGATORY NO. 29

GIVEN:

REFUSED:

_____

ATTORNEY FOR DEFENDANT

_____

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INTERROGATORY NO. 30

Do you find from a preponderance of the evidence that Claude J. Tomplait knew and realized that he was working with a product containing asbestos, that the product would produce an unusual amount of dust when it was cut or sawed and that he would inhale or breathe such dust and that such dust was harmful to his physical being?

Answer: "Yes" or "No."

ANSWER: _____

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By Hazel E. Studdard DEPUTY

DEFENDANT'S REQUESTED ~~INSTRUCTION~~/SPECIAL INTERROGATORY NO. 30

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INTERROGATORY NO. 31

Do you find from a preponderance of the evidence that the plaintiff's alleged injury and disability is produced or caused, or has been produced or caused, by the smoking of cigarettes and that such condition and/or disability would not have occurred except for the smoking of cigarettes?

Answer: "Yes" or "No."

ANSWER: _____

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M MAY 14 1969 19

James R. Cooney, Clerk, U. S. Court

By Hazel E. Stoddard Deputy

DEFENDANT'S REQUESTED [redacted]/SPECIAL INTERROGATORY NO. 31

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

If you have answered the foregoing Interrogatory No. 31 "Yes," then you need not answer this interrogatory, but if you have answered the foregoing interrogatory "No," then answer this interrogatory:

INTERROGATORY NO. 32

Do you find from a preponderance of the evidence that the plaintiff's alleged injury and disability is produced or caused, or has been produced or caused, by the smoking of cigarettes and that such condition and/or disability would not have occurred except for the smoking of cigarettes or a combination of the smoking of cigarettes and the inhalation of asbestos dust?

Answer: "Yes" or "No."

ANSWER: _____

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_____ M _____ 19 ____
James R. Cooney, Clerk, U. S. Court
By Hazel E. Studdard DEPUTY

DEFENDANT'S REQUESTED [redacted]/SPECIAL INTERROGATORY NO. 32

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INTERROGATORY NO. 33

Taking into consideration the instruction of the Court as to the design problem and the definition of "unreasonably dangerous," do you find that the asbestos insulation product manufactured by Fibreboard Paper Products Corporation is unreasonably dangerous?

Answer: "Yes" or "No."

ANSWER: _____

The instruction which you will consider is:

"You are instructed in this case that the asbestos insulation product manufactured by the defendant was exactly as was intended by such defendant, there is no evidence of any miscarriage or defect in the production of the product and no foreign substance was in the product. This case involves what has been termed a "design problem."

For the design of this product to be unreasonably dangerous, it must be so dangerous that a reasonable man would not sell the product if he knew the risk involved, and in considering whether the design is unreasonably dangerous you will take into consideration the utility and need of this product or a like product in industry and this utility and need shall be weighed against the possibility of harm.

FILED

MAY 14 1969 19...

James R. Cooney, Clerk, U. S. Court

By Hazel E. Stoddard DEPUTY

DEFENDANT'S REQUESTED [redacted] SPECIAL INTERROGATORY NO. 33

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

INTERROGATORY NO. 34

Do you find from a preponderance of the evidence that in 1959, 1960 and 1961, insulation contractors who were employers of the plaintiff knew that the insulation products installed by them contained asbestos, that the asbestos when cut or sawed would create dust and that employees would breathe or inhale such dust particles and that dust was harmful.

Answer: "Yes" or "No."

ANSWER: _____

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MAY 14 1969
M
James R. Cooney, Clerk, U.S. Court
By Hazel E. Studdard DEPUTY

DEFENDANT'S REQUESTED INSTRUCTION/SPECIAL INTERROGATORY NO. 34

GIVEN: _____

ATTORNEY FOR DEFENDANT

REFUSED:

_____
JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

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INTERROGATORY NO. 35

Do you find from a preponderance of the evidence that in 1959, 1960 and 1961, insulation contractors who were employers of the plaintiff, Tomplait, would furnish respirators or masks for those employees who requested them when he was working with asbestos insulation products under dusty conditions?

Answer: "Yes or "No."

ANSWER: _____

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MAY 14 1969

James E. Cooney, Clerk, U. S. C

By Hazel E. Studdard DEPUTY

DEFENDANT'S REQUESTED SPECIAL INTERROGATORY NO. 35

GIVEN:

ATTORNEY FOR DEFENDANT

REFUSED:

JUDGE PRESIDING

CIVIL NO. 5402 - CLAUDE J. TOMPLAIT VS. COMBUSTION ENGINEERING, ET AL

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CIVIL ACTION NO. 5402

CLAUDE J. TOMPLAIT

VS.

COMBUSTION ENGINEERING, INC., ET AL

DEMAND FOR SUBMISSION OF OMITTED ISSUE OR ISSUES UNDER RULE 49(a)

WELLER, WHEELUS & GREEN
ATTORNEYS AT LAW
GOODHUE BUILDING
BEAUMONT, TEXAS 77704