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DISTRICT COURT OF CAMERON COUNTY, TEXAS
Elvira S. Ortiz DEPUTY

CAUSE NO. 2000-05-1962-C

ROBERT HENRY VILLARREAL, Individually and as Personal Representative of the Heirs and Estate of JOHN HENRY VILLARREAL	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
vs.	§	CAMERON COUNTY, TEXAS
GAF CORPORATION HOLDINGS, INC.), ET AL.	§	
Defendants.	§	197TH JUDICIAL DISTRICT

PLAINTIFF'S EXHIBIT
USG-563

MEMORANDUM OF LAW IN SUPPORT OF MOTION *IN LIMINE* OF DEFENDANT UNITED STATES GYPSUM COMPANY TO EXCLUDE ALL POST-SALE EVIDENCE AND ALL EVIDENCE RELATING TO PRODUCTS NOT AT ISSUE

Defendant U.S. Gypsum Company ("U.S. Gypsum") respectfully submits this memorandum of law in support of its motion *in limine* to exclude all post-sale evidence and all evidence relating to products not at issue.

I. INTRODUCTION

At the trial of this case, plaintiff may attempt to introduce evidence concerning U.S. Gypsum's post-sale conduct or knowledge and evidence relating to products not at issue in this litigation. Plaintiff may attempt to offer this evidence to show that the products at issue were defective, or that U.S. Gypsum was negligent. This evidence may include evidence regarding (1) U.S. Gypsum's actions or conduct after the alleged exposure to the asbestos-containing U.S. Gypsum product at issue, (2) knowledge acquired by U.S. Gypsum post-sale regarding the alleged health risks associated with asbestos (post-sale evidence), or (3) products not at issue in this litigation (other-product evidence).

Exhibits for:

Memorandum of Law in Support of Motion *In Limine* of Defendant United States Gypsum Company to Exclude All Post-Sale Evidence and All Evidence Relating to Products Not at Issue



Exhibit A

DEPT. 310

DATE APR 18, 1994

HONORABLE JAMES E SATT, Retired, JUDGE | E A DESPOL DEPUTY CLERK

HONORABLE JUDGE PRO TEM

P REES CT ATT / REPORTER | E SOTTILE (Parties and counsel checked if present)

1

C 728 816 C/W WEC 137 826 (Trans to Central)
J H SNYDER CO, ETC.

Counsel for Plaintiff: MORENO-PURCELL-SCHINDLER
by GILBERT L PURCELL ✓ 1
PATRICK A DeBLASE ✓ 2

CAREY CANADA, INC., ETC., ET AL

FILED: 6-26-89
TYPE: PD/OTHER/ASBESTOS
AT-ISSUE: 07-22-92/30-40 days

Counsel for Defendant: BREIDENBACH-SWAINSTON-WAY
by THOMAS C CORLESS ✓ 3
MORGAN LEWIS & BOCKIUS
by RAYMOND T CULLEN ✓ 4
KEVIN M DONOVAN ✓

NATURE OF PROCEEDINGS: CIVIL TRIAL/JURY PD/O/ASBESTOS

Cause resumes from APR 17, 1994, with all counsel present as heretofore. Also present is JEREOME SNYDER and MICHAEL WISE representying J H SNYDER CO.

OUTSIDE THE PRESENCE OF THE ELECTRONIC RECORDING MONITOR: The Court and counsel further confer regarding possible settlement. The Court finds that there is no possibility of settlement.

IN THE PRESENCE OF THE ELECTRONIC RECORDING MONITOR: Motions in limine are argued and ruled upon as follows:

Plaintiff's motion 10, previously partially argued, is further argued and DENIED:

11) To exclude all Evidence that jurors are breathing asbestos fibers is argued and GRANTED as prayed for;

12) To exclude all evidence concerning other potential chemicals or Hazardous substances in plaintiff's buildings is GRANTED except the final subdivision public report, if used for impeachment;

13) To exclude all evidence which differentiates asbestos by fiber type is DENIED — under §352 Evidence Code the probative value outweighs the prejudicial;

14) To exclude references to treshold limit values or any equivalent term is argued and DENIED -- under§352 Evidence Code the probative value outweighs the prejudicial;

15) To exclude evidence concerning comparative and/or quantitative risk assessment evidence and limiting defendant expert KENNETH S CRUMP testimony GRANTED.

Defendants' motions in limine are argued and ruled upon as follows:

A) - To exclude all post-sale evidence and evidence relating to products - not at-issue in this case is argued and GRANTED as more fully reflected in the records of the Electronic Recording Monitor, which are incorporated herein by reference;

CONTINUED ON MINUTE ORDER PAGE 1A

MINUTES ENTERED 310/CCW DEPT. APR 18, 1994 COUNTY CLERK

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH,	DOCKET NO. CA 85-1606
PLAINTIFF	WASHINGTON, D.C. MAY 6, 1988 9:30 A.M.
VS.	
UNITED STATES GYPSUM COMPANY, ET AL.,	
DEFENDANTS	

VOLUME X
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOYCE HENS GREEN
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

FOR THE PLAINTIFF: ASHCRAFT & GEREL
BY: PETER T. ENSLEIN, ESQ.
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MICHELLE A. PARFITT,
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KARL N. MARSHALL, ESQ.
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ESQ.
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FREEMAN & HAWKINS
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ATTORNEY-AT-LAW
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[illegible]

APPEARANCES (CONTINUED):

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PHILADELPHIA, PA 19103

OFFICIAL COURT REPORTER: GORDON A. SLODYSKO
4806-A U.S. COURTHOUSE
WASHINGTON, D.C. 20001
(202) 535-3404

Betz & Strouse, Inc.

tell them they can go home.

Nonetheless, I wanted to see if we could do any movement because we have three days next week, that's it. And however much we accomplish, that's all to be given to the cause.

MR. ENSLEIN: Your Honor, the only thing that occurs to me is a short deposition of Mr. Clark, three or four pages, which is I think the only other thing we have by way of testimony to be put in.

MR. KENWORTHY: I would like to address Mr. Clark.

THE COURT: Can we have the deposition or a copy or do you have a copy, Joe?

MR. ENSLEIN: It was one of our designations.

THE COURT: Could you tell me what number?

MR. ENSLEIN: It was listed as -- one moment, your Honor -- we filed designations.

THE COURT: Thank you, Joe.

MR. ENSLEIN: It is our designation number 11, which is I think in our second binder there.

THE COURT: Thank you so much. Number 11. All right. Richard Clark. Now, tell me what is being proffered as to Mr. Clark, and then you'll have a chance to speak to it, Mr. Kenworthy, if you

believe it is appropriate.

MR. ENSLEIN: This deposition is a deposition of a principal in a company called Mechanical Asbestos Removal, Inc., which several years ago did some removal of asbestos from an U.S. Gypsum facility outside of Baltimore.

And our intention of putting this deposition in is to show in part that U.S. Gypsum, even in its own facilities, has removed asbestos, recognizing the fact that -- to show awareness on the part of this defendant of a potential hazard of this material in place.

THE COURT: Its own facility of course is -- what kind of a facility of U.S. Gypsum, I don't want to guess at it.

MR. ENSLEIN: I believe it is a manufacturing facility.

THE COURT: An industry type, in any event?

MR. ENSLEIN: Yes.

THE COURT: Manufacturing what in particular?

MR. ENSLEIN: Some form of building product, as I understand it. I am not sure this deposition goes into the specifics of that.

THE COURT: Did he address any differences

that there might be between that kind of a facility and the facility that we have at issue in this case?

MR. ENSLEIN: As I read the deposition, that was not addressed in the deposition. It was merely a deposition taken to establish that this removal in fact took place, which is why we want to offer it.

THE COURT: Why don't I just glance through it. It is a very short deposition. Why don't I skim the pages, then I'll hear whatever argument you have to make with a little more reinforcement of knowledge.

(Pause.)

THE COURT: Mr. Enslein, was the entire project there -- I may be just looking at a portion of it. Was the entire project there removing approximately 970 feet of piping insulation?

MR. ENSLEIN: I believe that's right.

THE COURT: That was the one project that the witness said he was aware of?

MR. ENSLEIN: Yes.

THE COURT: All right. With that in mind, let me keep looking through here.

MR. ENSLEIN: Your Honor, I may have misspoken.

THE COURT: The last page, did we just reach the last page at the same time, both of us? February 6, 1986, 4 p.m., job canceled by U.S. Gypsum, no asbestos abatement was done.

MR. ENSLEIN: Yes. But that was not the point I was referring to.

THE COURT: Sorry.

MR. ENSLEIN: Page 82, I think they talk about 8 million for linear square feet of pipe insulation being removed on page 82 of the deposition.

THE COURT: What I am looking at is Plaintiff's Exhibit 820; is that right?

MR. ENSLEIN: Yes.

THE COURT: And the pages that I have -- oh, yes, I am sorry. You are talking about 82?

MR. ENSLEIN: Page 82.

THE COURT: All right. 870 linear feet of pipe insulation, main gas line, U.S. Gypsum six-inch gas line $8,400.

MR. ENSLEIN: I think it is a typographical error. I think they put a dollar sign in front of that number.

THE COURT: It is confusing when was it performed late December 1985 then the last sheet I

just referred to may have been talking about a different work order, but it was 1986 date that indicated the job had been canceled.

MR. ENSLEIN: Yes, I think it refers to another job.

THE COURT: All right. Let me hear now from you, Mr. Kenworthy.

MR. KENWORTHY: I still have not seen why Mr. Enslein suggests that is in any way relevant to this breach of warranty case with acoustical plaster. It is an entirely different product. It was not manufactured by United States Gypsum, it has absolutely nothing to do with the issues in this case about this product under these conditions.

The deposition wasn't taken in this case, it wasn't taken with reference in mind to being relevant to the product in this case. It is a situation where, pursuant to law, you are required to separately remove under the NESHAPs regulation this type of material. There is no suggestion even as to that particular product that it is a recognition that under its circumstances is even defective.

And even if it were, certainly public policy would never permit that type of action, even

if it were done for a safety purpose in 1986 to be used to suggest that there is in fact a defect with an entirely different product that was sold in 1958. Every court that has addressed this issue of allowing that has excluded it.

THE COURT: It has been asked before?

MR. KENWORTHY: Not this particular one, but other ones for all of those reasons of prejudice, it is totally different from the product in issue and it would be against public policy certainly to allow something that even might address a safety problem that was done in 1986 to be suggestive of a defect in a product that was sold in 1958.

MR. ENSLEIN: Your Honor, it is my understanding that in the City of Greenville case, similar testimony was offered and allowed against W. R. Grace where Grace was removing asbestos-bearing materials from its own facilities to establish the fact Grace -- in fact, Grace's awareness of the fact that material posed a potential health hazard.

That is our intention of offering this testimony to establish an awareness within United States Gypsum Company that asbestos-bearing materials in a building pose a potential health hazard, not to show knowledge -- not to show

knowledge in the 1950s of -- that it posed a hazard, but rather to show that, in fact, contrary to the representations at length to the jury in the witnesses that material once in place does not pose a hazard, an awareness that in fact it does.

MR. KENWORTHY: Your Honor, we made no representations in this case about the hazards of pipe insulation. The case that Mr. Enslein represents is entirely different. United States Gypsum tried the last case tried against United States Gypsum which is the only other case that has been a pure warranty case other than this. It was tried before the exact same judge that had heard the Anderson -- the City of Greenville City Hall case. He excluded this testimony in a breach of warranty case, and he particularly distinguished the fact that that was not NESHAPs mandated, and there was some showing of similarity and it was in close proximity to the installation, those were both in the early 1970s that the sale took place in Greenville City Hall and that the removal took place in Greenville City Hall.

We are dealing here with a period of a 30-year difference in an entirely different product in a warranty case. And for the reasons previously

stated, it clearly should be excluded.

THE COURT: All right. It shall be excluded, and these selected pages from the deposition of Mr. Richard Clark will not be used in this case, the relevancy, confusing different type of facility, not one of defendant's products.

Public policy, I will not go that far, Mr. Kenworthy, but it certainly would be confusing and misleading and inappropriate to develop before this jury. So be it.

Let me tell the jury that when I told them that I thought we had abbreviated the testimony substantially, I didn't know how true that was. This will be a surprise to them.

Why don't you just bring them in here, and they don't have to take their seats. It will be 10:15 on Monday. And Monday we can go up to just shy of 4:30. I think there is a 4:30 meeting with lawyers who want to talk about Rule 11. I think you all heard about that subject. So they are getting their little interviews with judges a few at a time.

THE COURT: Yes, Mr. Enslein.

MR. ENSLEIN: After the jury is excused, I have one more matter.

(Jury present.)

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

SPARTANBURG COUNTY SCHOOL DISTRICT SEVEN, PLAINTIFF, vs. NATIONAL GYPSUM COMPANY AND UNITED STATES GYPSUM COMPANY, DEFENDANTS.	C.A. 83-1744-3
	ANDERSON, SC APRIL 17, 1987 9:55 A. M.

TRANSCRIPT OF PRETRIAL CONFERENCE

BEFORE THE HONORABLE G. ROSS ANDERSON, JR.
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR PLAINTIFF:
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FOR NATIONAL GYPSUM:
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ERIC B. HENSON, ESQ.
GAETAN J. ALFANO, ESQ.
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FOR U.S. GYPSUM:
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THOMAS B. KENWORTHY, ESQ.
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2000 ONE LOGAN SQUARE
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COURT REPORTER: GERI M. DUNN, P. O. BOX 1752, ANDERSON, SC 29622
(803) 226-2034
These proceedings taken by machine shorthand, transcribed by reporter.

THE COURT: Well, you've got to file a copy of it.

MR. DUFFY: Judge, does the same rule apply to testimony from the transcript of the first trial of this case? How do we handle that? Same way?

THE COURT: Same way.

MR. KENWORTHY: The only other thing I'd bring to the Court's attention, I think we probably all agree -- we've gotten the exhibit lists, subject to the Court's rulings, and the witnesses. I don't think there's going to be much question -- it probably looks like we could be able to be done, even on normal trial days, on Wednesday. I think that is a fair -- certainly Thursday morning. I just wanted to bring that to the Court's attention and see if you really still felt you wanted to schedule the night sessions.

THE COURT: Well, to help you out, I'm going to rule on number six. I'm ready to rule on that. Now removal from their own premises of the unsound product, I'm going to exclude that. The advertising documents have been stipulated. I have got to -- on your other documents, I'm going to allow, which is the biggest group or so I'm informed, number seven, communication with the defendants and building owners, it is going to come in for the limited purpose of showing that the breach -- notice of the breach would have been futile, that they already knew it and that is the limited purpose of it,

Exhibit D

IN RE:	BALTIMORE CITY	*	IN THE
	PERSONAL INJURY	*	CIRCUIT COURT
	AND WRONGFUL DEATH	*	FOR
	ASBESTOS CASES	*	BALTIMORE CITY
* * * * * * *			
ABATE, et al.		*	
	Plaintiffs	*	CONSOLIDATED
vs.		*	FILE NO.
ACandS, INC., et al.		*	89236704
	Defendants	*	

* * * * * * * * * * * * *

DOCUMENT DISPUTE HEARING REGARDING
DEFENDANT UNITED STATES GYPSUM COMPANY

A Document Dispute Hearing Regarding the Defendant United States Gypsum Company in the above-entitled action was held on Monday, January 27, 1992, commencing at 9:35 a.m., at Room 232, Courthouse East, Baltimore, Maryland 21202, before The Honorable Marshall A. Levin, and reported by Barbara J. Evans, a Notary Public.

EVANS REPORTING SERVICE
4358 Parkside Drive
Baltimore, Maryland 21206
(410) 483-2965

ORIGINAL

I understand.

MR. KELLY: Mr. Kipp, who talks about that is mentioned in the first sentence. Mr. Kipp is their insurance man at U.S. Gypsum's -- I think he was called manager of insurance.

MR. LIBOR: I still don't understand how this document relates to U.S. Gypsum's involvement or purported involvement with the Asbestos Information Committee of North America which concerns other defendants, and if they have information about other defendants involved in that committee or organization, they should put that in through other documents which concern those other documents, but not U.S. Gypsum.

THE COURT: Well, I overrule the objection primarily because, despite that argument, the people at USG seem to find the AIA Committee of North America something of interest to them in the asbestos picture.

The next number.

MR. KELLY: Next number, your Honor, is 360. And you can consider it with 362 and that will

conclude this set.

THE COURT: All right.

(Pause.)

THE COURT: What is your objection, sir?

MR. LIBOR: Your Honor, these documents concern U.S. Gypsum's compliance with NESHAPS, the National Emissions Standards for Hazardous Air Pollutants.

It only sets forth a portion of U.S. Gypsum's policy with respect to the removal of pipe insulation and other asbestos-containing products during any renovation or demolition of a facility or a plant, a U.S. Gypsum plant. It has no relevance as to whether U.S. Gypsum's products are hazardous or defective in any nature.

As a matter of fact, in the Clarksville opinion, your Honor, the Court said that the plaintiffs there; to which Mr. Berly would like to use in this case, is fraud because the regulations were enacted after the construction of the buildings at issue in the case, and they are not probative of

The argument would be that, if U.S. Gypsum was trying to take asbestos products out of their own plants where the exposure levels they typically argue are many times less than they would be to somebody who works with it, then certainly the people that worked with it that have the greater exposure are even significantly more in danger.

These are just two of the very many documents we have that show U.S. Gypsum's internal corporate policy of taking the asbestos out of their own buildings.

MR. LIBOR: Your Honor, this document 362 is misleading in that the, quote, recently developed policy, end quote, there is that the products in the buildings were to remain in place unless they were part of renovation or demolition of the facility.

Plaintiffs typically designate the testimony of Frank May, who is the person who authored Exhibit 362, and Mr. May testifies that the company's policy is that products remain in place unless they have to be removed because of NESHAPS where the company does

whether Audicote which was at issue, which the plaintiff plans to present evidence in this case was defective, reasonably dangerous or whether U.S. Gypsum was reasonably negligent.

MR. BERLY: I offer it for a different reason than what it was offered for in Clarksville, Clarksville being an asbestos property damage, this being a personal injury case, where I think that people will agree that the exposures these individual plaintiffs suffered would have been higher than that typically found in a building.

And in this instance, the reason for offering these documents is, particularly if you look at 362, you will see U.S. Gypsum had a corporate policy to go in and to remove asbestos material that is in a deteriorated condition.

I mean, that is something that they are undertaking on their own volition. That is not something that they are being mandated to do by some federal requirement somewhere, the NESHAPS or what have you.

renovation or demolition.

The issues concerning NESHAPS have no relevance at all as to whether or not products when they were constructed or installed in the building are dangerous.

THE COURT: I am going to sustain objections to 360 and 362.

THE COURT: Okay. We will take a brief recess.

(A break was taken.)

THE COURT: All right, sir.

MR. BERLY: Your Honor, the next set that we can look at together very quickly is 266, 268, 278. That's it.

THE COURT: Okay.

MR. BERLY: These all tell one brief story. And that is that, in the 1955 period, U.S. Gypsum experimented with substituting in part for its asbestos paper in its Audicote product, one of their acoustical plaster products.

And they were able to devise an Audicote