

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

CONWED CORPORATION,

Civil No. 5-92-88 (DDA/RLE)

Plaintiff,

vs.

**SPECIAL VERDICT
(PHASE ONE)**

UNION CARBIDE CORPORATION,

Defendant.

We, the jury, being duly sworn and impaneled for the trial of the above-entitled action, answer the questions submitted as follows:

1. Was the Calidria asbestos Union Carbide sold to Conwed in a defective condition unreasonably dangerous to the users of that asbestos because Union Carbide failed to provide adequate warnings and instructions for the safe use of that asbestos?

YES
YES/NO

2. Was Conwed negligent with respect to the safety of its employees?

YES
YES/NO

3. Was Conwed a sophisticated user of Calidria asbestos?

NO
YES/NO

Dated: October 10, 2003

Donna Glasrud.

Jury Foreperson

JURY INSTRUCTIONS
Conwed Corp. v. Union Carbide Corp.
Civil No. 5-92-88

Now that you have heard the evidence in this case and the arguments of the attorneys, it becomes my duty to give you the instructions regarding the law applicable to this case. My instructions will cover three areas: first, some instructions on general rules that define and control your duties; second, the instructions that supply the law applicable to the claims and defenses in the case; and third, some guidelines and rules for your deliberations. A copy of these instructions will be available for you in the jury room to consult if you find it necessary.

Let me first give you a few general rules about your duties.

It is your duty as jurors to follow the law as stated in these instructions, and to apply the rules of law that I give you to the facts as you find them from the evidence in the case.

You must follow the law as I give it to you, whether you agree with it or not. And you must do your duty as jurors regardless of any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. And you must not read into these instructions, or into anything the court may have said or done, any suggestion from the court as to how the questions on the verdict form should be answered.

Deciding questions of fact is your exclusive responsibility. In doing so, you must consider all the evidence you have heard and seen in this trial, and the reasonable inferences to be drawn from that evidence. You must disregard anything you may have seen or heard elsewhere about this case. Whether or not a particular answer is favorable to one party or the other should not concern you.

Conwed and Union Carbide are corporations. A corporation can act only through its officers and employees. The conduct of an officer or employee of a corporation acting within the scope of his or her employment is the conduct of the corporation.

Evidence consists of the sworn testimony of the witnesses, regardless of who may have called them; all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated.

Objections to questions are not evidence. Lawyers have an obligation to their clients to make an objection when they believe the evidence being offered should not be admitted under the rules of evidence. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. By receiving evidence to which objection was made, I did not intend to indicate the weight to be given such evidence. You must not concern yourselves with the reasons for my rulings since they are controlled by rules of law. You are to disregard all evidence ordered stricken.

Attorneys are officers of the court. It is their duty to present evidence on behalf of their clients and to make such objections as they deem proper, and to argue fully their client's cause. However, the arguments or other remarks of the attorneys are not evidence in this case.

If the attorneys have made, or if I have made or should make, any statement as to what the evidence is, which differs from your recollection of the evidence, then you should disregard the statement and rely solely upon your own memory. If the attorneys' arguments contain any statements of the law which differ from the law which I give you, you should disregard their statements. Statements and arguments of the attorneys are not evidence.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists for "expert witnesses." An expert witness is a person who, by education and experience, has become expert in some art, science, profession or calling. Expert witnesses may state their opinions as to matters in which they profess to be an expert and may also state the reasons for their opinions.

You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

During the trial, certain testimony has been presented by way of deposition. A deposition consists of sworn, recorded answers to questions asked of the witness in advance of the trial by one or more attorneys. The testimony of a witness who, for some reason, is not present to testify from the witness stand may be read to you in open court or may be presented on a videotape. Such testimony is entitled to the same consideration and is to be judged as to credibility, weighed, and otherwise considered by you, insofar as possible, in the same way as if the witness had been present and had testified from the witness stand.

You, as jurors, are the sole judges of whether a witness is to be believed and of the weight to be given to the testimony of each. There are no hard and fast rules to guide you in this respect. In determining believability and weight you may take into consideration as to each witness the following:

1. The witness's interest or lack of interest in the outcome of the case.
2. The witness's relationship to the parties.
3. The witness's ability and opportunity to know, remember, and relate the facts.
4. The witness's manner and appearance.
5. The witness's age and experience.
6. The witness's frankness and sincerity, or lack thereof.
7. Any hostility or bias toward one side or the other as shown by the witness.
8. The reasonableness or unreasonableness of the witness's testimony in light of all the other evidence in the case.
9. Any impeachment of the witness's testimony.
10. Any other factors that bear on believability and weight.

In deciding the believability and weight to be given the testimony of a witness, you may consider evidence of a statement by the witness on some prior occasion that is inconsistent with the witness's present testimony. The evidence of a prior inconsistent statement may also be considered as evidence bearing on the issues in this case.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

You should in the last analysis rely upon your own experience, good judgment, and common sense.

A fact may be proved by either direct or circumstantial evidence, or by both. The law does not prefer one form of evidence over the other.

A fact is proved by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced, or by physical evidence of the fact itself. A fact is proved by circumstantial evidence when its existence can be reasonably inferred from other facts proved in the case.

The Plaintiff, Conwed Corporation, claims in this case that the Defendant, Union Carbide Corporation, failed to provide warnings and instructions necessary for the safe use of Calidria asbestos, which Union Carbide sold to Conwed. Union Carbide claims that it provided all warnings and instructions necessary for Conwed to use Union Carbide's Calidria asbestos safely. Union Carbide also claims that Conwed was negligent with respect to the safety of Conwed's employees. Union Carbide further claims that Conwed was itself a sophisticated user of Calidria asbestos.

The questions that you must decide will be submitted to you in the form of a special verdict consisting of three questions. You must answer the questions on the verdict form by applying the facts as you may find them from the evidence. I shall give to you the rules of law that apply to these questions and you must apply them in arriving at your answers. After your answers are returned to the Court, it becomes my duty to proceed according to the law and the answers you have returned.

Your verdict depends upon whether you find that certain facts have been proven. In this case, the burden of proving a fact is on the party claiming that fact is true. The party who has the burden of proving a fact must prove it by the greater weight of the evidence.

You will be asked to answer “yes” or “no” to the questions on the verdict form. You must answer “yes” to a question on the verdict form if you find that the greater weight of the evidence supports a “yes” answer. If you do not so find, you must answer that question “no.”

“Greater weight of the evidence” means that all of the evidence by whomever produced must lead you to believe it is more likely that the claim is true than not true. If the evidence does not lead you to believe it is more likely that the claim is true than not true, then the claim has not been proved by the greater weight of the evidence. The greater weight of the evidence does not necessarily mean the greater number of witnesses or the greater number of exhibits a party has presented. Any believable evidence may be a sufficient basis to prove a fact.

These instructions and the Special Verdict refer to “the hazards of Calidria asbestos,” “the harm resulting from the use of Calidria asbestos,” and similar phrases. Those phrases refer to the condition called asbestosis.

Question 1 on the verdict form asks whether Union Carbide’s Calidria asbestos was in a defective condition unreasonably dangerous to the users of that asbestos because Union Carbide failed to provide adequate warnings and instructions for the safe use of that asbestos. A manufacturer has a duty to provide reasonably adequate warnings and instructions for its products to those who use the product when the product is used as intended or is used in a way that the manufacturer reasonably could have anticipated.

A manufacturer must keep up with scientific knowledge and advances in the field. This duty to provide reasonably adequate warnings and instructions must be judged according to the knowledge and advances that existed at the time the product was manufactured.

In deciding whether the manufacturer's warnings and instructions were reasonably adequate, consider all the facts and circumstances, including, among others:

1. The likelihood that harm would result from use of the product
2. The seriousness of the harm that would result
3. The cost and ease of providing warnings and instructions that would avoid the harm
4. Whether the warnings and instructions are in a form the ordinary user could reasonably be expected to notice and understand
5. Whether the manufacturer considered the scientific knowledge and advances in the field.

A product that is not accompanied by reasonably adequate warnings and instructions is unreasonably dangerous to whomever uses or is affected by the product. The product must be reasonably safe for use if the warnings and instructions are followed.

If you find by the greater weight of the evidence that Union Carbide's Calidria asbestos was in a defective condition unreasonably dangerous to the users of that asbestos because Union Carbide failed to provide adequate warnings and instructions for the safe use of that asbestos, then you must answer Question 1 "yes." If you do not so find, then you must answer Question 1 "no."

Question 2 on the verdict form asks whether Conwed was negligent with respect to the safety of its employees. Negligence is the failure to use reasonable care. "Reasonable care" is the care a reasonable person would use in the same or similar circumstances. Ask yourself what a reasonable person would have done in these circumstances. Negligence occurs when a person:

1. Does something a reasonable person would not do; or
2. Fails to do something a reasonable person would do.

Conwed had a duty to provide a safe work environment for its employees.

A person has certain legal duties that are created by regulations. If a person violates a regulation relating to his conduct, he is negligent. I will read certain regulatory sections to you. Reading such a regulation does not automatically mean that this regulation applies or that it has been violated. Those decisions are up to you.

The following are the regulatory sections that you may consider:

The following are the safety standards and regulations adopted by the Industrial Commission of Minnesota in 1950 and remained in effect until December of 1971.

8865 SEC.1.

- (g) **Employer Responsibility.** Every employer shall provide, install and maintain in good repair such control measures and protective equipment as is required in accordance with the provisions of this Code, and shall inform affected employees regarding the nature of the hazards and the reasons for and the methods of use of control measures and protective equipment.

8868 CONTROL OF ATMOSPHERIC CONTAMINANTS.

- (a) Workers shall not be exposed to concentrations of atmospheric contaminants hazardous to health.
- (d) Except where specifically provided for in this Code, control of atmospheric contaminants may be accomplished by any of the following methods:
 - 2. Local exhaust ventilation so that the contaminant is removed from the workroom atmosphere.
 - 6. Increase the general ventilation so that the contaminant is diluted to a safe concentration.
- (e) The following lists of maximum concentrations shall be used to guide in appraising health hazards and in evaluating control of atmospheric contaminants:

Asbestos	5 million particles per cubic foot of air, standard field count
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- (f) Maximum concentrations shall not be used as the sole criterion for establishing evidence of hazards to health or well-being, but the evaluation of a possible hazard shall also be subject to other pertinent factors such as the nature of the contaminant, and the frequency and duration of the exposure or clinical evidence of harmful effects.

In December of 1971 OSHA adopted a standard of 5 asbestos fibers per cubic centimeter, time weighted average for an eight hour day.

If you find by the greater weight of the evidence that Conwed was negligent with respect to the safety of its employees, then you must answer Question 2 "yes."

If you do not so find, then you must answer Question 2 "no."

Question 3 on the verdict form asks whether Conwed was a sophisticated user of Calidria asbestos during the period Conwed purchased Calidria asbestos from Union Carbide. A purchaser of a product is a “sophisticated user” of that product if:

1. The purchaser of the product knows or should have known as much as the seller of the the hazards attendant upon use of the product;
2. The purchaser of the product has a greater ability than the seller to communicate a warning to the purchaser’s employees based upon the nature of the product, the nature of the purchaser’s business, and the ways in which the purchaser uses the product; and
3. The seller of the product reasonably relies on the purchaser to warn the purchaser’s employees about the hazards attendant upon use of the product.

In determining whether Conwed knew or should have known of the hazards related to Calidria asbestos, you may consider the general knowledge in the industry of the potential hazards of asbestos exposure, governmental regulations of asbestos, scientific and medical developments, and publicly available information.

In determining whether Union Carbide reasonably relied on Conwed to warn Conwed's employees about the hazards attendant upon the use of Calidria asbestos, you may consider what Union Carbide did or failed to do in attempting to discover Conwed's knowledge of the hazards attendant upon the use of Calidria asbestos.

If you find by the greater weight of the evidence that Conwed had or should have had knowledge equivalent to Union Carbide's about the hazards related to use of Calidria asbestos; that Conwed had a greater ability to communicate a warning to Conwed's employees about those hazards than did Union Carbide; and that Union Carbide reasonably relied on Conwed to communicate such warnings to Conwed's employees, then you must answer "yes" to Question 3. If you do not find that all three requirements have been proven by the greater weight of the evidence, then you must answer Question 3 "no."

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesman here in court.

You will take the verdict forms to the jury room and, when you have reached unanimous agreement as to each of your verdict questions, you will have your foreperson fill in, date, and sign the verdict, and then return with your verdict to the courtroom.

It is your duty as jurors to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case and to do essential justice.