



FILED
at 12:40 p.m.
Clerk of District Court

CAUSE NO. 19785*BH02 MAY 10 2002

KELLY-MOORE PAINT COMPANY INC.

Plaintiff

VS.

DOW CHEMICAL COMPANY, Individually
and as Successor to Union Carbide Corporation;
UNION CARBIDE CORPORATION;
COOPER INDUSTRIES, INC., Individually §
and as Successor to PNEUMO ABEX
CORPORATION and THE FLINTKOTE
COMPANY

Defendants.

IN THE DISTRICT COURT OF
Brazoria County, Texas
JERRY DEERE
Clerk of District Court

BRAZORIA COUNTY, TEXAS

23rd JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

PLAINTIFF'S EXHIBIT

KG-497b

COMES NOW, Plaintiff KELLY-MOORE PAINT COMPANY, INC., hereinafter referred to as "KM" and files this Original Petition complaining of, DOW CHEMICAL COMPANY, Individually and as SUCCESSOR BY MERGER TO UNION CARBIDE CORPORATION, UNION CARBIDE CORPORATION, COOPER INDUSTRIES, INC., Individually and as SUCCESSOR BY MERGER TO PNEUMO ABEX CORPORATION and THE FLINTKOTE COMPANY and would show unto the Court as follows.

I.

Plaintiff requests that this lawsuit be governed by Discovery Plan Level 2 pursuant to Rule 190.3 of the Texas Rules of Civil Procedure.

II.

Plaintiff is a corporation incorporated under the laws of the State of California, with its principal place of business in California.

Defendant **DOW CHEMICAL COMPANY**, Individually and as **SUCCESSOR BY MERGER TO UNION CARBIDE CORPORATION**, may be served with process through its registered agent, C.T. Corporation Systems, 350 North St. Paul Street, Suite 2900, Dallas, Texas 75201.

Defendant **UNION CARBIDE CORPORATION**, may be served with process through its registered agent, C. T. Corporation, 1021 Main Street, Suite 1150, Houston, Texas 77002.

Defendant **COOPER INDUSTRIES, INC.**, Individually and as **Successor-In-Interest to Pneumo Abex Corporation** may be served with citation by serving its registered agent, to wit: C.T. Corporation System, 721 Main Street, Suite 1150, Houston, Texas 77002. Defendant Cooper Industries, Inc. maintains its principal place of business in Houston, Texas.

Although Defendant **THE FLINTKOTE COMPANY** has at all times relevant to this litigation conducted business in this State and is required to maintain a registered agent for service of process, it has not designated such an agent. Therefore, said corporation may be served with process through its home office address, Three Embarcadero Center, Suite 1190, San Francisco, California 94111-4047, pursuant to the Texas Long-Arm Statute, Tex. Civ. Prac. & Rem. Code §§ 17.041-.045. Defendant **THE FLINTKOTE COMPANY** may be served with process through the Secretary of State of Texas.

III.

This court has jurisdiction over this case, and the damages sought are within the jurisdictional limits of this Court. Venue is proper in this county because the cause of action and/or a part thereof accrued in this county. Additionally, Defendant DOW CHEMICAL COMPANY resides in this county and/or maintains a principal place of business in this county.

IV.

This is a commercial dispute that includes allegations of fraud, negligent misrepresentation, conspiracy and other causes of action. KM is and always has been principally a manufacturer of paint products. During the 1960's and 1970's, in a departure from its principal business, KM manufactured certain asbestos-containing joint compounds under the PACO brand name.

Defendant UC engaged in the mining and sale of raw asbestos fiber, sold under the brand name Calidria, from 1958 until 1986. Defendant UC sold tons of raw asbestos fiber to KM between 1963 and 1978 for use in KM's joint compounds. Defendant UC was a charter member of the Industrial Hygiene Foundation, a key player in the conspiracy to suppress knowledge regarding the hazards of asbestos.

Defendant Cooper Industries is the legal successor and/or is contractually liable for the negligent acts of Pneumo Abex Corporation. Pneumo Abex Corporation, through its predecessor American Brake Shoe Company, entered into an agreement in 1936 with the Saranac Laboratory to conduct research on asbestos. Pneumo Abex Corporation conspired along with Johns-Manville, Raybestos-Manhattan and others to delete all references to asbestos causing cancer in the published account of the Saranac studies. As a result, the published medical and scientific literature, upon

which KM relied, was distorted.

Defendant Flintkote owned and operated an asbestos mine in Canada from 1946-1970. During that time, Flintkote was a member of the Quebec Asbestos Mining Association. QAMA participated in the suppression of the Saranac study, as well as the suppression and alteration of the Braun/Traun study in 1957 and 1958.

Defendants Dow, UC, Cooper and Flintkote conspired with Johns-Manville, Raybestos-Manhattan, members of the Industrial Hygiene Foundation, members of the Quebec Asbestos Mining Association and others, hereinafter referred to as "the Conspirators", to suppress, distort and misrepresent information concerning health risks to users of asbestos products. UC, in furtherance of this conspiracy, advised KM that the use of Calidria was safe and would not result in physical harm to users of PACO products. UC's representations were false and were made intentionally with the purpose of inducing KM to buy UC's asbestos fiber.

COUNT ONE

NEGLIGENT MISREPRESENTATION

Defendants are liable to Plaintiff under Section 522 of the RESTATEMENT (SECOND) OF TORTS, in supplying false information for the guidance of others in their business transactions. Said statements were made by Defendants in the course of their business or in transactions in which they had a pecuniary interest; said representations were false and made for the guidance of others in their business; said statements involved a material fact concerning the character or quality of the product in question; and upon which representation justifiably KM relied. Defendants failed to exercise reasonable care in communicating this information and as a result KM suffered pecuniary losses.

Defendants made misrepresentations and actively concealed adverse information at a time when the Defendants knew, or should have known, that asbestos fiber had defects, dangers, and

characteristics that were other than what the Defendants had represented to KM and the consuming public. Specifically, Defendants misrepresented to and/or actively concealed from Plaintiff and the consuming public that:

1. The use of asbestos-containing products involved tremendous risk of physical injury to users and bystanders of the users of the asbestos-containing products;
2. As early as the 1930's, Defendants and their fellow conspirators had studied asbestos in animals and determined that asbestos caused lung cancer. To the contrary Defendants and their fellow conspirators changed the results of published studies by Dr. Leroy Gardner and others and affirmatively stated that asbestos did not cause cancer in any form.
3. The use of asbestos at levels below the TLV or threshold limit value would result in physical injury to users of PACO and other asbestos-containing products. The Conspirators were aware since the 1930's that the TLV of 5 million particles per cubic foot was inadequate and would not protect users of asbestos-containing products. Nevertheless, the Conspirators continued to represent to the public and to KM that the TLV was a "safe level of exposure". The Conspirators knew at the time of these representations that asbestos could cause disease at far lower levels and that mesothelioma could result from brief and relatively low levels of exposures to asbestos.

At the time KM purchased asbestos fiber from the Conspirators, the Conspirators knew that KM would use the fiber in asbestos-containing products. The Conspirators knew that their knowledge regarding health risks of asbestos was more accurate and complete than the information available in the published medical and scientific literature and than the knowledge possessed by KM.

The Conspirators owed a duty to KM to reveal what they knew to be the truth regarding the health risks of asbestos. Instead of revealing this information, the Conspirators suppressed it and in fact were responsible for disseminating information that was absolutely contrary to their internal knowledge.

KM was injured by the Conspirators' negligent misrepresentations in that KM bought fiber from Union Carbide and used Calidria asbestos fiber in KM's PACO products. But for the acts of the Conspirators, KM would not have entered into the production of asbestos-containing PACO products. Had KM foregone commercial production of asbestos-containing PACO, KM could have redirected its resources to other ventures. Further, KM has spent millions of dollars in asbestos litigation costs and other damages which proximately resulted therefrom.

COUNT TWO

CIVIL CONSPIRACY

Plaintiff further alleges that Defendants and/or their predecessors-in-interest knowingly agreed, contrived, combined, confederated and conspired among themselves to willfully misrepresent and suppress the truth as to the risks and dangers associated with the use of and exposure to asbestos. During the time that KM purchased asbestos fiber from the Conspirators, the Conspirators interfered with the development of the medical and scientific literature by suppressing and altering scientific publications, distorting the published medical and scientific literature and underwriting scientific research into the health hazards of asbestos, only to suppress and misrepresent the results.

In furtherance of said conspiracies, Defendants performed the following overt acts:

- (a) for many decades, Defendants, individually, jointly, and in conspiracy with each other, have been in possession of medical and scientific data, literature and test reports which clearly indicated that the inhalation of asbestos dust and fibers resulting from

the ordinary and foreseeable use of said asbestos-containing products was unreasonably dangerous, hazardous, deleterious to human health, carcinogenic, and potentially deadly;

(b) despite the medical and scientific data, literature and test reports possessed by and available to Defendants, Defendants individually, jointly, and in conspiracy with each other, fraudulently, willfully, and maliciously:

- (1) withheld, concealed and suppressed said medical and scientific data, literature, and test reports regarding the risks of asbestosis, cancer, mesothelioma, and other illnesses and diseases resulting from exposure to asbestos;
- (2) caused to be released, published and disseminated medical and scientific data, literature, and test reports containing information and statements regarding the risks of asbestosis, cancer, mesothelioma and other illnesses and diseases, which Defendants knew were incorrect, incomplete, outdated and misleading; and
- (3) distorted the results of medical examinations conducted upon workers who were being exposed to asbestos dust and fibers by falsely stating and/or concealing the nature and extent of the harm to which those workers were suffering from asbestos-related illnesses.

Plaintiff reasonably and in good faith relied upon the false and fraudulent representations, omissions and concealments made by the Defendants regarding the nature of asbestos and/or asbestos-containing products. The Conspirators knew that KM and other manufacturers of asbestos-containing products would rely upon the representations made by the Conspirators.

As a direct and proximate result of Plaintiffs' reliance on Defendants' false and fraudulent

representations, omissions and concealments, Plaintiffs sustained pecuniary damages.

COUNT THREE

AIDING AND ABETTING

The actions of all Defendants aided, abetted, encouraged, induced or directed the negligent and/or intentional acts of each and every other Defendant. Each of the Defendants knew or should have known that its individual actions would combine to cause Plaintiff's damages. The actions of each of the Defendants is a proximate cause of Plaintiff's damages. As a result, all Defendants are jointly liable for the damage caused by their combined actions.

The Defendants participated in a scheme to defraud purchasers of their asbestos products, including KM, by suppressing the dissemination of information about asbestos-related health hazards and by concealing what they knew about the true nature of such hazards. Defendants agreed to spread false information and omit material information regarding asbestos-related health risks. In furtherance of this scheme, Defendants edited, suppressed, altered and/or limited the publication of asbestos-related health risk studies by researchers. These actions distorted the available medical and scientific literature upon which KM relied.

COUNT FOUR

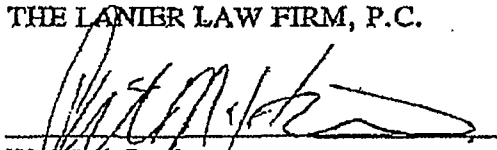
PUNITIVE DAMAGES

Defendants knowingly concealed and suppressed from KM the risks associated with the use of asbestos. Defendants' acts in furtherance of their secret conspiracy constitute knowing, fraudulent, wilful and malicious conduct. Defendants and their predecessors-in-interest, consciously and/or deliberately engaged in oppression, fraud, wilfulness, wantonness and/or malice with regard to the Plaintiff and should be held liable in punitive and exemplary damages to Plaintiff.

WHEREFORE, PREMISES CONSIDERED, Plaintiff demands judgment against the Defendants, and each of them, jointly and severally, for general damages, special damages, for punitive and exemplary damages, for their costs expended herein, for prejudgment and post judgment interest on the judgment at the rate allowed by law, and for such other and further relief, both at law and in equity, to which Plaintiff may show itself justly entitled.

Respectfully submitted,

THE LANIER LAW FIRM, P.C.



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JURY DEMAND

Plaintiff demands that all issues of fact in this case be tried to a properly impaneled jury.