

COPY

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JAN 18 2001

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

Plaintiffs,

vs.

GAF CORPORATION
HOLDINGS, INC.), ET AL.

Defendants.

IN THE DISTRICT COURT OF

PLAINTIFF'S EXHIBIT

USG-561

CAMERON COUNTY, TEXAS

197TH JUDICIAL DISTRICT

**MEMORANDUM OF LAW OF DEFENDANT UNITED STATES
GYPSUM COMPANY IN SUPPORT OF MOTION IN LIMINE TO
EXCLUDE EVIDENCE AND ARGUMENT RELATING TO MIRIELLO ISSUE**

Defendant United States Gypsum Company ("U.S. Gypsum") hereby submits this memorandum of law in support of its motion *in limine* for an order excluding any evidence or argument relating to a Ben Miriello, a letter written by him or the matters raised in that letter.

I. INTRODUCTION

Plaintiff may seek to introduce a copy of a letter written by Mr. Miriello to U.S. Gypsum, dated June 8, 1950 (attached as Exhibit A). In that letter, Mr. Miriello asserts that his father worked in a U.S. Gypsum facility, was occupationally exposed to raw asbestos fibers and died as a result of his exposure.

Plaintiff presumably offers this letter to demonstrate U.S. Gypsum's knowledge in 1950 of the alleged danger of exposure to asbestos. This evidence, however, is inadmissible for the following reasons: (1) Mr. Miriello is not competent to testify to the matters discussed in his letter due to his lack of personal knowledge; (2) the letter consists of multiple layers of hearsay;

(3) the letter is irrelevant to any material issue in this case due to the striking differences between plaintiff's alleged exposure and the alleged exposure of Mr. Miriello's father; and (4) any probative value the letter may have is substantially outweighed by its potential to unfairly prejudice, confuse, and inflame the jury.

II. ARGUMENT

A. The Miriello Letter Should Be Excluded Because Mr. Miriello Is Not Competent To Testify To The Matters Discussed Therein.

The letter should be excluded because Mr. Miriello is not competent to testify to the matters discussed therein. He lacks both the personal knowledge necessary to form a foundation for lay testimony and lacks the expertise to testify to the medical conclusions expressed in his letter. A witness may not testify to a matter as to which he lacks personal knowledge. Rather, the witness must actually have perceived or observed the event or condition about which he seeks to testify. Accordingly, Mr. Miriello is not competent to testify regarding his father's employment and alleged exposure to asbestos, due to his lack of personal knowledge regarding these allegations.

In addition, Mr. Miriello's assertions regarding the cause of his father's death must be excluded due to plaintiff's inability to qualify Miriello as an expert in the field of medicine. An expert witness is one who brings to bear scientific, technical, or other specialized knowledge that will assist the jury in understanding the evidence or in determining a fact in issue. There is no evidence that Miriello had any medical training or was in any qualified to provide a medical opinion on the causes or nature of his father's condition. Moreover, as discussed below, due to the dissimilarity of conditions, any opinion, even assuming that expert qualifications could be established, would be inadmissible as it could not be applied to the evidence in this trial.

B. The Miriello Letter Should Be Excluded Because It Contains Multiple Layers Of Hearsay.

In instances in which hearsay is included within hearsay, the statement is inadmissible unless each part of the combined statement conforms with an exception to the hearsay rule. The Miriello letter is itself hearsay, in that it is an out-of-court statement submitted for the truth of the matters asserted. Moreover, the letter contains additional layers of hearsay in that it repeats statements made by persons other than its author. Specifically, to the extent that the letter purports to recite information that may have been obtained from a physician, it must be excluded as no hearsay exception justifies its admission. In short, admission of the Miriello letter into evidence would allow plaintiff to introduce the conclusions of an unidentified and unavailable physician through an equally unavailable, and medically unqualified, declarant. This would wholly defeat the protections provided by the hearsay rule and the right to cross-examine adverse witnesses.

Other courts have found that the Miriello letter is inadmissible hearsay. *See State of Maryland v. Keene Corp.*, No. 1108600, Tr. at 6016 (Md. Cir. Anne Arundel Cty., Jan. 8, 1991) (attached as Exhibit B). There, the court found that the letters lacked the necessary indicia of reliability, and could not properly be admitted to show notice. *See also Jacobs v. Owens-Corning Fiberglas Corp.*, No. 97-4-13222 (Tex. Dist., Calhoun Cty.) (excluding letter, which "is talking about the grief of somebody and that's basically in the nature of hearsay anyway . . ."). For the same reasons, this Court should exclude the Miriello letter.

C. The Miriello Letter Should Be Excluded Because It Is Not Relevant.

The Miriello letter does not tend to prove or disprove any fact at issue in this action and is, therefore, irrelevant. The issue in this proceeding is whether U.S. Gypsum committed a tortious act in selling construction products that contained, as one ingredient, some

amount of asbestos. Accordingly, one potentially relevant issue is what U.S. Gypsum knew, prior to the sale of the products allegedly at issue, about any alleged dangers associated with application of the products. Knowledge relating to dissimilar factory conditions is simply irrelevant. See *County of Anderson v. United States Gypsum Co.*, No. CIV-3-83-511, Tr. at 1324-25 (E.D. Tenn. Feb. 26, 1985) (noting lack of probative value of Miriello letter due to extreme levels of exposure suggested by document) (attached as Exhibit C), *defense verdict aff'd sub nom. Anderson County Bd. of Educ. v. National Gypsum Co.*, 821 F.2d 1230 (6th Cir. 1987).

The Miriello letter is irrelevant in that, even taken at face value, it discusses the effect on a factory worker of high-level exposure to raw asbestos. Plaintiff, on the other hand, alleges exposure only to finished U.S. Gypsum asbestos-containing products. Accordingly, in light of the dissimilarities between the alleged conditions of exposure of Mr. Miriello's father and that of plaintiff, the Miriello letter is irrelevant.

In addition, Mr. Miriello's allegations themselves reveal that a manufacturer other than U.S. Gypsum was responsible for his father's exposure. Mr. Miriello's letter states that his father worked at the Jersey City facility in the early 1930s. U.S. Gypsum, however, did not acquire the facility in question until 1936.^{1/} In short, U.S. Gypsum had no way of knowing the specific conditions or the extent of the senior Miriello's exposure to asbestos. Accordingly, the Miriello letter even lacks probative value as to U.S. Gypsum's knowledge of the alleged dangers of factory conditions.

D. Even If This Evidence Is Deemed Minimally Relevant, Its Probative Value Is Far Outweighed By Its Prejudicial Effect.

^{1/} A lengthy study of the Jersey City plant, conducted only a few months after U.S. Gypsum acquired the facility, lists more than 200 employees involved in the manufacturing operations there. No one named Miriello is listed.

Courts may exclude relevant evidence where its probative value is outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. The Miriello letter should be excluded because inflammatory accusations would unfairly prejudice U.S. Gypsum and would confuse and mislead the jury.

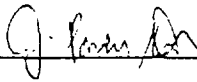
The Miriello letter has little or no probative value as to any issue in this case. However, the letter is fraught with bitter, emotional and conclusory allegations regarding his father's death, and has no foundation in Miriello's personal knowledge. In short, the letter is designed to and would serve to unfairly inflame and prejudice the jury in the present litigation, and accordingly, must be excluded. See *County of Anderson, supra*, 1325-26 ("any probative value this testimony in [Mr. Miriello's] deposition and this letter has is substantially outweighed by the danger of prejudice and confusion of the issues here and is therefore misleading to the jury"); *State of Maryland, supra* (Miriello letter would unfairly prejudice jury).

III. CONCLUSION

For the foregoing reasons, U.S. Gypsum respectfully requests the Court exclude any evidence or argument relating to Ben Miriello, the letter written by him or the matters raised in that letter.

Respectfully submitted,

POWERS & FROST, L.L.P.

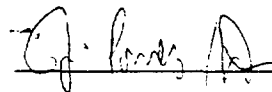


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct of Defendant United States Gypsum Company's Memorandum in Support of Motion in Limine has been forwarded to Plaintiffs' counsel of record either by first class mail, return receipt requested, delivery or facsimile on this the 12th day of January, 2001.



Exhibits for:

**Memorandum of Law of Defendant
United States Gypsum Company in
Support of Motion *In Limine* to
Exclude Evidence and Argument
Relating to Miriello Issue**

*Image
SP*

Exhibit A

218 Grand Street
Jersey City 2, New Jersey
8 June 1950

United States Gypsum Company
Foot of Henderson Street
Jersey City 2, New Jersey

Dear Sirs:

I want to congratulate you and your wonderful product, Asbestos & Asbestos Shingles. An advancement for civilization. True—we have had it around for years but I've just stopped to realize what a wonderful product it is. I like the advancement of civilization—at times I don't think we have progressed enough. Then when I think of how such advancement as yours has hindered us—I'd like to return to the Caveman era—where health was preserved and man lived beyond the 60 yr mark.

Dad worked in your plant some fifteen years ago. As I remember he had a choice of two jobs at the time—one in a cigar factory on Montgomery Street or a job in your plant. He chose your plant (in spite of the fact that it was far less pay) because it was so very close to home. I REGRET the day he set foot in your plant. Dad was a cabinet maker by trade, but due to the lack of work in his trade he took any job to keep bread

on the table for us - his children.

He was laid-off due to a slack period in your plant--some years ago. He never returned to your plant--for he had gained employment elsewhere--but the damage was done--he spent a few miserable years in your rat trap.

About two years ago we noticed my Dad's health was not up to par. He became short of breath--but he being one never to complain--kept it unto himself for a long time. Soon it became noticeable and unbearable for him. We took him to a doctor--then a chest specialist who informed us he had ASBESTOSIS. Unable to get around he quit his job. Soon he became bed ridden. His breathing becoming more and more difficult. Soon an oxygen tank was ordered by his doctor to be used when necessary. Then shortly he was using it constantly (did you ever see someone gasping for air--and not being able to help him--its not a pretty thing to see.) After suffering a good deal--Dad passed away on March 19, 1949.

The loss of Dad was an ordeal for us but more of an ordeal for Mother. She fell sick after his death and now she may leave us sooner than we know of.

I feel that your firm is wholly responsible for my Dad's death and mother's illness. Had he not worked in your plant he would be with

us today and would have fifteen years of healthy, happy life before him to enjoy. He was a picture of health--having no ailments of any kind. He never was sick a day in his life--that is until the effects of this Asbestosous hit him. It ate his lungs away. He was like a drowning man--I knew he was drowning but there was nothing I could do but pray for him.

Our home will never be the same and we have you to blame for that. The purpose of this letter is to tell you of your negligence in preventing this from happening to us and I hope to prevent it from happening to other families--and it will less you check your plant for Safety measures.

You see my Dad worked for your firm back in 1935 and suffered a lung condition after leaving your employ. His doctors--the best we could find--Dr. Matturi and Dr. Blum can bear me out that his Asbestosous condition was cause of his death.

So for the sake of God and Humanity--please check your plant for such unhealthy conditions and do all in your power to save others from suffering as my Dad did. Remember the little effort on your part will save lives and money. Precaution is better than a cure--there was none for dad.

Thank you for taking time out to read this

I remain--

Yours truly,

Mr. Ben G. Miriello