

**IN RE: ALL ASBESTOS-RELATED
PERSONAL INJURY OR DEATH
CASES FILED IN OR BE FILED IN
DALLAS COUNTY, TEXAS**

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**IN THE CIVIL DISTRICT COURTS
OF DALLAS COUNTY, TEXAS**

**THE DOW CHEMICAL COMPANY'S
FIRST SUPPLEMENTAL MOTION IN LIMINE**

PLAINTIFF'S EXHIBIT

DOW-2029

The Dow Chemical Company ("Dow"), pursuant to the Texas Rules of Civil Procedure, files this First Supplemental Motion in Limine to exclude incompetent testimony and/or evidence that is irrelevant or prejudicial to the material issues in all already filed and to be filed asbestos-related cases. Dow's original Motion in Limine was filed on September 5, 2001. In support of its Supplemental Motion, Dow respectfully shows the Court as follows:

PREAMBLE

Defendant Dow requests that, before the commencement of *voir dire* examination of the jury panel and the introduction of any evidence, the Court enter an order instructing and directing all parties, witnesses, and attorneys to refrain from making any reference to the matters set forth in the specific paragraphs enumerated below. Defendant further requests that if counsel for Plaintiff proposes a theory of admissibility concerning any of the following matters, then Plaintiff's counsel be required to request a ruling on such theories from the Court, out of the presence of the jury, and prior to any attempt to bring these matters to the attention of the jury.

If Plaintiffs inject these matters into the trial of this case through a party, an attorney, or a witness, before the preliminary determination outside the presence of the jury, Plaintiffs will cause irreparable harm to Dow's case, which no jury instruction could cure. If any of these matters are brought directly or indirectly to the attention of the jury, Dow would be compelled to

move for a mistrial. In an effort to avoid prejudice and a mistrial, Defendant urges this Motion in Limine.

I.

The matters described below are not admissible in evidence for any purpose and have no bearing on the issues or the rights of the parties. Even if it can be shown that a matter described may be relevant to a fact of consequence in this case, any probative value is far outweighed by the prejudice, confusion, and delay that would result from allowing its admission into evidence.

II.

Permitting interrogation of witnesses, comments to jurors or prospective jurors, or offers of evidence concerning any of these matters would unfairly prejudice the jury. Sustaining objections to such questions, statements, or evidence will not prevent prejudice but will reinforce the development of questionable and inadmissible evidence.

III.

Dow asks the Court to instruct Plaintiffs and all counsel not to mention, refer to, interrogate about, or attempt to convey to the jury in any manner, either directly or indirectly, any of these matters without first obtaining the courts permission outside the presence and hearing of the jury, and to instruct Plaintiffs and all counsel to warn and caution each of their witnesses to follow the same instructions.

SPECIFIC EXCLUSIONS AND PROHIBITIONS

Dow asks the Court to prohibit Plaintiffs, their attorneys, or witnesses from offering any of the following evidence without first asking for a ruling from the Court, outside of the presence of the jury, on the admissibility of the evidence:

1. Any reference to any changes in designation of "lead counsel" or counsel of record by a defendant. TEX. R. EVID. 401, 402, and 403.

Agreed _____

Granted _____

Denied _____

2. That Dow or any other companies have settled prior asbestos-related claims or have participated in mediation. TEX. R. EVID. 401, 402, 403, and 410.

Agreed _____

Granted _____

Denied _____

3. Any references or suggestions that Dow's premises are a "death trap" or other similar language. TEX. R. EVID. 401, 402, and 403.

Agreed _____

Granted _____

Denied _____

4. Any attempt of any party to turn venire persons into witnesses during *voir dire* should not be allowed to elicit statements from potential jurors about key elements of the case.

Agreed _____

Granted _____

Denied _____

5. That statement or appeals be made to the jury invoking it as the "conscious of the community" in this case with respect to this verdict or that the jury should do something with respect to this verdict to make the community proud.

Agreed _____

Granted _____

Denied _____

6. That Plaintiffs, whether through their counsel, witnesses, or exhibits, directly or indirectly, or in any other manner, not mention workman's compensation claims, motions, briefs and pleadings from other suits and reports, studies, or compilations with regard to these defendants. TEX. R. EVID. 401, 402, and 403

Agreed _____

Granted _____

Denied _____

7. Any comments or references to the effect that the plaintiffs, or any one of them, are or may be under any financial burden or hardship, as such evidence is not probative to the issues herein, and would be calculated to confuse the issues and prejudice the jury. TEX. R. EVID. 401, 402, and 403.

Agreed _____

Granted _____

Denied _____

8. That there has been any finding or stipulation of liability in this or any other case. TEX. R. EVID. 401, 402, and 403.

Agreed _____

Granted _____

Denied _____

9. Any testimony of an industry wide "conspiracy of silence."

Agreed _____

Granted _____

Denied _____

10. Any reference that these cases have been previously tried and appealed, and the decisions of these causes of action. TEX. R. EVID. 401, 402, and 403.

Agreed _____

Granted _____

Denied _____

11. Any references to "Multibestos" or "Dewey and Almy" documents dated before 1954, for the reason that same are irrelevant and inadmissible and reference to same would unfairly prejudice Dow. TEX. R. EVID. 401, 402, and 403.

Agreed _____

Granted _____

Denied _____

12. Any testimony from any non-party witness presented by Plaintiffs regarding the witness' own physical condition, medical diagnosis or mental anguish and/or any testimony related to the settlement or trial of the witness' own asbestos-related claim. TEX. R. EVID. 401, 402, and 403.

Agreed _____

Granted _____

Denied _____

13. Any comment by counsel for the Plaintiffs that they know or have learned from their past experience that Dow or other Defendants are unwilling to fully cooperate with discovery, or any other comment regarding the manner in which Dow may have defended lawsuits in the past based upon the personal knowledge of counsel for plaintiffs. Further, any comment that Dow has "hidden documents" or other evidence from the plaintiffs "as counsel for plaintiffs knew they would." TEX. R. EVID. 401, 402, and 403.

Agreed _____

Granted _____

Denied _____

14. Any reference to the special issues ultimately submitted to the jury as Plaintiffs' issue or this Dow's issue or otherwise identifying the issues with a particular party.

Agreed _____

Granted _____

Denied _____

15. Any references to, or attempts to display, demonstrative charts, exhibits or evidence to the jury, or to the jury panel during *voir dire*, without first tendering same outside the presence of the jury, and obtaining a ruling from the Court permitting same.

Agreed _____

Granted _____

Denied _____

16. That no photographs, newspaper articles or any other exhibits in any form be shown, exhibited or placed in such position that prospective jurors or the impaneled jury can in any way view or see such items without their being properly admitted into evidence.

Agreed _____

Granted _____

Denied _____

17. That Plaintiffs, their witnesses, and their attorneys be precluded from bringing into the courtroom any diseased or resected lung or any tissue whatsoever. The probative value, if any, of such an exhibit is far outweighed by the prejudice, horror and sympathy-evoking effect such an exhibit would have upon the jury.

Agreed _____

Granted _____

Denied _____

18. That Plaintiffs be precluded from displaying or referring to any pictures, diagrams, videotapes or offer similar documents which show plaintiffs' bodies or bodily organs or any person, body, or body organ allegedly depicting any asbestos-related condition.

Agreed _____

Granted _____

Denied _____

19. That neither Plaintiffs, their witnesses or counsel be permitted to display, show, mention or refer in any way to any pictures, movies, videotapes, or other electronic reproductions of any sort showing or intending to show Plaintiffs, or other victims of any disease in a condition of ill health or weakness without first displaying said pictures, movies, videotapes or electronic reproductions to the judge and defense counsel outside the presence of the jury or any prospective juror, in order that Dow may have an opportunity to examine said items and make objections prior to the time that any juror or prospective juror is allowed to see or hear of said items.

Agreed _____

Granted _____

Denied _____

20. That Plaintiffs be prohibited from offering any prior deposition or trial transcript testimony from any proceeding to which Dow either was never a party defendant, or was not a defendant at the time of the testimony. Dow is a premises defendant and is/was not in the same position as a seller/manufacturer and is subject to a different standard of care.

Agreed _____

Granted _____

Denied _____

21. Any reference to, or comments reflecting the personal opinions of opposing counsel as to the justness of the Plaintiffs' cause, the evidence admitted by either party, Defendant's products, or the use of asbestos in general.

Agreed _____

Granted _____

Denied _____

22. Any reference to any prior personal experience of any of the attorneys for the Plaintiffs that related to physical injuries or illnesses and/or their treatment.

Agreed _____

Granted _____

Denied _____

23. That the Plaintiffs have not made a claim or been involved in a lawsuit for personal injuries prior to this lawsuit. This information is not material or relevant to any issue to be submitted to the jury in this cause and such information would be highly prejudicial to Dow. Therefore, Dow moves the Court to instruct Plaintiffs and counsel not to inform the jury of such information in any manner.

Agreed _____

Granted _____

Denied _____

24. That no statement or argument be made with respect to a span of time being broken down into smaller units such as weeks, days or even hours and then multiplying it by a dollar amount.

Agreed _____

Granted _____

Denied _____

25. That any Plaintiff or fact witness testifying in any Plaintiffs' case has been told anything by any doctor or other medical witness concerning Plaintiffs or Plaintiffs' decedents physical and/or medical condition.

Agreed _____

Granted _____

Denied _____

26. Any reference to additional research done or additional opinions not previously expressed, or modifications of any previously expressed opinion by any of the plaintiffs' expert witnesses, all of which should have been provided by the Plaintiffs' expert witnesses or the Plaintiffs' attorneys in the expert witness reports or provided during the deposition of the expert witnesses. Any additional research and any new or modified opinion to be expressed by these expert witnesses would serve as a surprise to Dow.

Agreed _____

Granted _____

Denied _____

27. Any attempt during *voir dire* or opening statement to detail the evidence which Plaintiffs intend to offer, or to read or describe in detail the documents the Plaintiffs' attorney proposed to offer, or anything else that seeks to place matters before the jury without the Court having an opportunity to examine the admissibility of same. *See, Ranger Ins. Co. v. Rogers, et al*, 530 S.W.2d 162, 170 (Tex.Civ.App. - Austin 1975 ref d n.r.e.).

Agreed _____

Granted _____

Denied _____

33. Any attempt to elicit any comments from any juror during *voir dire* concerning the details of any asbestos-related illness, claims or lawsuit of that juror or the juror's family members, co-workers or friends since such details constitute unsworn testimony which should be elicited only outside the presence of the jury panel so as not to prejudice the jury panel prior to their hearing any sworn testimony.

Agreed _____

Granted _____

Denied _____

34. Any attempt to elicit from any juror during *voir dire* any specifics concerning the juror or any other person working with or around asbestos-containing materials, precautions which may or may not have been taken, and what the juror did or did not see, since the same is the equivalent of unsworn testimony which should be elicited only outside the hearing of the jury panel so as not to prejudice the jury panel prior to the time they hear any sworn testimony.

Agreed _____

Granted _____

Denied _____

35. Any attempt to elicit from any juror during *voir dire* the specifics of the basis for any opinion expressed by the juror concerning any danger or hazard of asbestos-containing materials, since the same is the equivalent of unsworn testimony which should be elicited only outside the hearing of the jury panel so as not to prejudice the jury panel prior to the time they hear any sworn testimony.

Agreed _____

Granted _____

Denied _____

36. That asbestos-containing products have been declared defective or unreasonably dangerous by any court or other official entity, or by a jury. TEX. R. EVID. 401, 402, and 403.

Agreed _____

Granted _____

Denied _____

37. Mentioning or introducing into evidence the videotape of Plaintiff taken by Plaintiffs' counsel because the videotape was not timely produced by Plaintiff's counsel, the videotape was taken prior to Dow becoming a party to this case, was not taken under oath, Dow was deprived of an opportunity to cross-examine Plaintiff regarding the statements on the videotape, the videotape constitutes (in whole or in part) inadmissible hearsay and the probative value, if any of the videotape is "substantially outweighed" by the danger of unfair prejudice. TEX. R. EVID. 403. Plaintiffs' failure to produce the videotape until shortly before the trial setting of this case precludes plaintiffs' use of the videotape. The failure to produce the videotape contravenes the supplementation requirements of Rule 193; *Sharp v. Broadway National Bank*, 784 S.W.2d 669 (Tex. 1990); *Foster v. Cunningham*, 825 S.W.2d 806 (Tex. App. - Fort Worth 1992, writ denied).

Agreed _____

Granted _____

Denied _____

38. Inquiring of the jurors as to any connection with the insurance industry. If counsel is sincerely interested in determining whether or not there is any such connection for purposes of exercising strikes, such information is available on the juror information cards or a generic inquiry can be made by asking each individual juror his occupation and past occupations. This will provide the relevant information without interjecting insurance into this case. *A.J. Miller Trucking Co. v. Wood*, 474 S.W.2d 763 (Tex. Civ. App. - Tyler 1971, writ ref d n.r.e.); *Brockett v. Tice*, 445 S.W.2d 220 (Tex. Civ. App. Houston [1st Dist.] 1969, writ ref d n.r.e.); *Green v. Ligon*, 190 S.W.2d 742 (Tex. Civ. App. - Fort Worth 1945, writ ref d n.r.e.).

Agreed _____

Granted _____

Denied _____

39. Using or referencing the terms "insurance adjuster," "adjuster," "claims man," or any other term that would lead the jury to believe that liability insurance is or has been involved in this case for the reason that the same improperly interjects insurance into the case. *Atchison, Topeka & Santa Fe Ry. v. Acosta*, 435 S.W.2d 539, 549 (Tex. Civ. App. - Houston [1st Dist.] 1968, writ ref d n.r.e.).

Agreed _____

Granted _____

Denied _____

40. Questioning the jury panel as to whether they would answer an issue of damages in accordance with the evidence, regardless of who pays the damages or when (or if) they will be paid, or any similar version of such inquiry for the reason that the same improperly injects the implication of insurance into the suit, or making any such reference injury argument of similar vein. *Griffith v. Casteel*, 313 S.W.2d 149 (Tex. Civ. App. - Houston 1958, writ ref d n.r.e.); *Hurley v. McMillan*, 268 S.W.2d 229 (Tex. Civ. App. - Galveston 1954, writ ref d n.r.e.).

Agreed _____

Granted _____

Denied _____

41. Mentioning or referencing that Plaintiffs do not have insurance to compensate them for any injuries and/or damages.

Agreed _____

Granted _____

Denied _____

42. Mentioning or referencing the presence or absence of a corporate representative on behalf of Defendants. The Texas Rules of Civil Procedure specifically provide that a party may prosecute or defend either in person or through an attorney. TEX. R. CIV. P. 7. The presence or absence of a corporate representative has no tendency to make the existence of any, fact that is of consequence to the determination of the fact more or less probable. TEX. R. EVID. 401, 402, and 403; MCCORMICK - EVIDENCE § 185 at 433-35 (2d ed. 1972).

Agreed _____

Granted _____

Denied _____

42. Mentioning or referencing the number of attorneys or legal assistants or the location of Dow's attorneys' law firm.

Agreed _____

Granted _____

Denied _____

43. Mentioning, referencing or inferring anything which might tend to inform the jury of the effect of their answers to the questions posed in the charge, including any comments to the effect that if questions are not answered in a certain way that no recovery would be had. *Mayes v. City of Midland*, 780 S. W.2d 903 (Tex. App. - El Paso 1989, writ denied); *Cooper v. Argonaut Ins. Co.*, 430 S.W.2d 35 (Tex. Civ. App. - Dallas 1968, writ ref'd n.r.e.).

Agreed _____

Granted _____

Denied _____

44. Mentioning, referencing, or offering any evidence regarding exposure at work sites not divulged to Dow in the Plaintiffs' deposition, work history sheets, or in response to written discovery. In addition, Plaintiffs and co-workers should be prevented from testifying about or mentioning work sites or products not disclosed in their responses to discovery or depositions. This tactic would unfairly surprise Defendants by interjecting fact situations not disclosed in discovery. *Sharp v. Broadway National Bank*, 784 S.W.2d 669 (Tex. 1990); *E.F. Hutton & Co., Inc. v. Youngblood*, 741 S.W.2d 363 (Tex. 1987); *Yeldell v. Holiday Hills Ret. & Nursing*, 701 S.W.2d 243 (Tex. 1985).

Agreed _____

Granted _____

Denied _____

45. Referencing or making disparaging remarks, including use of the terms "murderers," "criminals," "greedy," "liars," "frauds," "cheats," "fakers," "imposters" or any inference that Dow manufactured or generated evidence for the reason that said terms and allegations have been held to be improper and prejudicial appeals to the passions and sympathies of the jury. *Bridges v. City of Richardson*, 354 S.W.2d 366 (Tex. 1962); *Circle Y of Yoakum v. Blevins*, 826 S.W.2d 753 (Tex. App. - Texarkana 1992, writ denied); *Texas Employers Insurance Assn v. Guerro*, 800 S.W.2d 859 (Tex. App. - San Antonio 1990, writ denied).

Agreed _____

Granted _____

Denied _____

46. Mentioning or referencing that Dow may have been involved in any prior suits, or that a party has never been involved in a prior suit. *McClintock v. Travelers Insurance Company*, 393 S.W.2d 421 (Tex. Civ. App. - Amarillo 1965, writ ref d n.r.e.). Additionally, evidence of other prior or pending cases "is substantially outweighed" by the danger of unfair prejudice, confusion of the issues, misleading the jury, and by considerations of delay. TEX. R. EVID. 403.

Agreed _____

Granted _____

Denied _____

47. Mentioning or commenting to the jury that there were incidents or claims subsequent to the date of the incident at issue for the reason that evidence of the same is not relevant and would be irreparably prejudicial. Alternatively, the argument that events subsequent to the incident would be relevant on the issue of gross negligence under Texas law was expressly rejected by the Supreme Court in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (1994). In *Moriel*, the Court stated that the essential element of gross negligence "requires an examination of the events and circumstances from the viewpoint of the defendant *at the time the events occurred, without viewing the matter in hindsight.*" *Id.* at 23 (emphasis added). Evidence regarding subsequent incidents, claims and actions would impermissibly permit the jury to infer gross negligence from events which occurred long after the events at issue in this case.

Agreed _____

Granted _____

Denied _____

48. Mentioning or introducing any expert testimony based on inadmissible hearsay when there has been no predicate that the inadmissible hearsay is reasonably relied upon by experts in the expert's field. TEX. R. EVID. 703. The Court should prohibit reference to any such evidence, even if it is relevant, because its probative value is lowered if offered only to show the basis of the expert's opinion. The low probative value is substantially outweighed by its prejudicial effect. TEX. R. EVID. 403.

Agreed _____

Granted _____

Denied _____

49. Mentioning, referencing, or introducing any evidence of alleged legal duty issues for the reason that the existence and scope of any legal duty is a legal issue for the Court. *Greater Houston Transportation Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); TEX. R. EVID. 403.

Agreed _____

Granted _____

Denied _____

50. Mentioning or referencing any statements made to Plaintiffs by medical personnel or conversations with any other medical practitioner for the reason that the same are inadmissible hearsay and improper opinion evidence. *Brown v. Bettinger*, 882 S. W.2d 953, 957 (Tex. App. - Beaumont 1994, no writ) (doctor's discussion with patient regarding surgical procedures was hearsay); *Lopez v. Link*, 757 S. W.2d 449, 451 (Tex. App. - Houston [1st Dist.] 1988, no writ) (doctor's out of court statement to plaintiff as to her condition was inadmissible hearsay); *Massey v. Aztec Life Insurance Co.*, 532 S.W.2d 701, 707 (Tex. Civ. App. - Fort Worth 1976, no writ) (statements by a doctor to plaintiff were inadmissible hearsay and opinion testimony); TEX. R. EVID. 802. Mentioning or referencing any statements made by Plaintiffs to medical personnel or conversations with any other medical practitioner for the reason they are inadmissible hearsay and not pathologically germane. TEX. R. EVID. 803(4); *Wilson v. Zapata Off Shore Co.*, 939 F.2d 260,272 (5th Cir. 1991).

Agreed _____

Granted _____

Denied _____

51. Mentioning, inquiring or suggesting that the jury should consider the net worth or financial status of Dow or disparity in size of the parties. Additionally, such evidence should not be admitted unless and until the Court should find that such matters are relevant and their probative value outweighs the prejudicial effect. *Transportation Insurance Company v. Moriel*, 879 SW.2d 10 (1994); *Otto Vehle and Reserve Law Officers v. Brenner*, 590 S.W.2d 147 (Tex. Civ. App. - San Antonio 1979, no writ).

Agreed _____

Granted _____

Denied _____

52. Mentioning any action by the Court in ruling upon any matter prior to the actual trial of this case or that the pleadings or other matters filed by defendants were in a particular form or of a particular nature.

Agreed _____

Granted _____

Denied _____

53. Mentioning or commenting to the jury that the judge or an appellate court may have a right, duty or ability to alter or change the ultimate verdict of the jury in this cause or to review the verdict in any manner

Agreed _____

Granted _____

Denied _____

54. Mentioning that this Motion in Limine has been filed and/or granted in whole or in part. *Cody v. Mustang Oil Tool Co.*, 595 S.W.2d 214, 215 (Tex. Civ. App - Eastland 1980, writ ref d n.r.e.); *Burdick v. York Oil Co.*, 364 S.W.2d 766, 770 (Tex. Civ. App. - San Antonio 1963, writ ref d n.r.e.)

Agreed _____

Granted _____

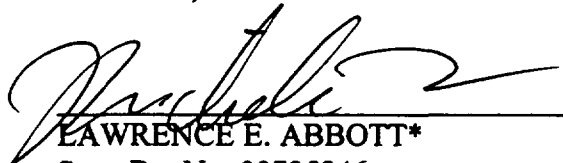
Denied _____

55. Mentioning, arguing or suggesting to the jury that Dow committed "gross negligence" and therefore, is liable for punitive damages. Plaintiffs have absolutely no evidence that Dow's conduct constituted gross negligence. Dow is/was not a manufacturer, distributor or supplier of asbestos. *See, e.g., In re New York Asbestos Litigation*, 847 F.Supp. 1086, 1103 n.7 (S.D.N.Y. 1994) (non-manufacturer had no responsibility to learn of characteristics of asbestos). Because Dow was unaware and had no duty to learn of the characteristics of asbestos, Plaintiffs will not be able to claim or establish that Dow acted in conscious indifference to the safety or welfare of others.

Dow respectfully prays that the Court grant its First Supplemental Motion in Limine and for such other and further relief, both general and special, legal and equitable, to which it may show itself justly entitled.

Respectfully submitted,

ABBOTT, SIMSES, KNISTER & KUCHLER



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Attorneys for Defendant,
The Dow Chemical Company

*signed by permission
Michele D. Allen

Admitted *Pro Hac Vice* in these matters

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that true and correct copies of the foregoing were served upon all attorneys of record via facsimile and/or United States Mail, properly pre-addressed and postage prepaid, on this 1st day of October 2001, in accordance with Texas Rules of Civil Procedure.

A handwritten signature in black ink, appearing to be "J. H. [unclear]", written over a horizontal line.

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