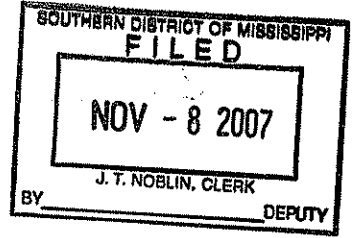


IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



JOYCE MARIE THOMAS GATLIN
and ARCHIE W. WILKINS, SR. (as
Administrator of the Estate of Mark Aven Wilkins)

PLAINTIFFS

V.

CIVIL ACTION NO. 3:07cv051 TSL-JL

TNEMEC COMPANY, INC.

DEFENDANT

COMPLAINT

(JURY TRIAL DEMANDED)

Joyce Marie Thomas Gatlin, being the widow of the late Mozell Gatlin, and Archie W. Wilkins, Sr., being for this purpose the Court-appointed Administrator and Personal Representative of the Estate of his deceased son Mark Aven Wilkins, hereby allege for themselves and on behalf of all other surviving family members entitled to have an interest in this action by virtue of Mississippi's "Wrongful Death" statute, *Mississippi Code* § 11-7-13, the following against the Defendant Tnemec Company, Inc., given the diversity of citizenship between the parties:

1. Plaintiff Joyce Marie Thomas Gatlin, having been lawfully married to Mozell Gatlin in 1986, and such marriage never having been lawfully terminated prior to the death of Mozell Gatlin in November of 2004, is the surviving spouse and widow of Mozell Gatlin, within the meaning of *Mississippi Code* § 11-7-13. Plaintiff Gatlin is an adult citizen of the United States, and a resident of the State of Louisiana.

2. Plaintiff Archie W. Wilkins, Sr., being the surviving father of Mark Aven

Wilkins, files this action as the Court-Appointed Administrator (and thus as the Personal Representative) of the Estate of Mark Aven Wilkins for purposes of the pursuit of such a claim, and likewise has standing to bring this action on behalf of the two minor children of Mark Aven Wilkins as statutory beneficiaries within the meaning of *Mississippi Code* § 11-7-13. Archie W. Wilkins, Sr. is an adult citizen of the United States, and a resident of Amite County in the State of Mississippi.

3. Defendant Tnemec Company, Inc. (hereafter "Tnemec"), is a private corporation organized and chartered under the laws of the State of Missouri, which throughout all times relevant to this proceeding has maintained its corporate headquarters and principal place of business at 6800 Corporate Drive, Kansas City, Missouri. No surviving family member of either Mozell Gatlin or Mark Aven Wilkins resides, or has resided at any time relevant to this proceeding, in the State of Missouri.

4. This action is between citizens of different States, and is otherwise within the subject matter jurisdiction of this Court, within the meaning of 28 U.S.C. § 1332.

5. On or about November 11, 2004, Mozell Gatlin was required, in order to perform his job for his employer, Diamond Enterprise, Inc. (a painting contractor based in Gloster, Mississippi), to enter the interior of an above-ground, horizontal, enclosed water storage tank located on Barlow Road in Hazlehurst, Copiah County, Mississippi (located within the Jackson Division of this Court).

6. Mozell Gatlin was also required on that date to apply and spray, from within the enclosed water storage tank and with use of a static discharge sprayer supplied by his employer, a coating substance known as polyamide epoxy Series 020 Pota-Pox (also referred to as Series F020-11WHA), which shall hereafter be referred to

as "Series 020 Pota-Pox".

7. The designer, manufacturer, distributor and seller of the Series 020 Pota-Pox used by Mozell Gatlin in November of 2004 was Defendant Tnemec. Tenemec was also a merchant with respect to goods of that kind, within the meaning of *Mississippi Code Ann.* § 75-2-314(1), and authored the instructions or warnings contained on the cans in which those goods were packaged and contained.

8. As Mozell Gatlin on November 11, 2004, proceeded to spray the Series 020 Pota-Pox coating substance onto the interior lining of the water tank, dangerously flammable vapors or gases accumulated within the tank.

9. Upon the accumulation of dangerously flammable vapors within the enclosed water storage tank, the risk or danger of an explosion substantially increased. Mozell Gatlin, consistent with the warnings and instructions included by Tnemec on the Series 020 Pota-Pox container, applied the Series 020 Pota-Pox to the tank lining with use of an air spray system, which Tnemec knew to be notoriously vulnerable to static build-up and discharge. When an entirely foreseeable static discharge occurred from the air spray system being used by Mozell Gatlin, an intense explosion resulted inside the tank on the same date of November 11, 2004.

10. The flammable atmosphere generated by the concentrated vapors from the spraying application of the Series 020 Pota-Pox substantially and proximately caused the explosion, which in turn caused third-degree burns on most of the body of Mozell Gatlin, and which resulted in the death of Mozell Gatlin on or about November 20, 2004. Between the explosion inside the water tank on November 11, 2004, and the resulting death of Mozell Gatlin on November 20, 2004, Mozell Gatlin continuously

suffered extremely great pain and suffering, and incurred hospital and other medical bills substantially in excess of the jurisdictional amount of \$75,000.00.

11. Mark Aven Wilkins on November 11, 2004 was also engaged, on behalf of and as an employee of the same employer, in assisting the process of the spraying application being performed inside the same enclosed water tank by Mozell Gatlin. Mr. Wilkins was standing immediately outside of the entrance or opening to the water tank when the same explosion resulted from within the tank, for the reasons and causes described above and below. The same explosion caused substantial third-degree burns on most of the body of Mark Aven Wilkins, resulting in extremely great pain and suffering, and the incurring of hospital and other medical bills substantially in excess of the jurisdictional amount of \$75,000.00, between the time of that explosion and the time of the resulting death of Mark Aven Wilkins approximately five days later on November 16, 2004. The tortious conduct and defective product of Tnemec as described below proximately caused the explosion and the resulting deaths of both Mozell Gatlin and Mark Aven Wilkins. Both such victims died while being treated at great expense at the Delta Burn Center in Greenville, Mississippi.

12. As Tnemec knew (and in the exercise of reasonably available knowledge should have known), at the time the Series 020 Pota-Pox material ultimately used by Mozell Gatlin had left the control and possession of Tnemec, the composition of the Series 020 Pota-Pox had been designed by Tnemec to produce substantially higher and more flammable emissions of Volatile Organic Compounds ("VOC"), than were produced by the application of other competing coatings which had the same or a similar utility, usefulness, practicality and desirability for purposes of being applied to

the lining of a water storage tank in order to deter corrosion, to protect water from coating contamination, and to achieve the other purposes of such water tank coatings. The properties of the Series 020 Pota-Pox included a VOC in pounds per gallon of 3.135, for instance, whereas competing coatings with equivalent utility had properties which reflected a negligible VOC of less than 1.0 pounds per gallon.

13. Tnemec similarly designed the composition of Series 020 Pota-Pox so that it had a substantially lower and less tolerant flashpoint (of under 90 degrees F) relative to the higher and thus safer flashpoints of other competing coatings with equivalent utility. Such other coatings produce few or no vapors upon application, and likewise do not emit dangerously flammable gases within the interior of the enclosed water storage tanks in which all such competing coatings are designed to be applied.

14. Had any such safer competing coating product been used by Mozell Gatlin and Mark Aven Wilkins on November 11, 2004, rather than the Series 020 Pota-Pox coating designed, manufactured and sold by Tnemec, the explosion which caused the deaths of both Mr. Gatlin and Mr. Wilkins would not have occurred.

15. As Tnemec knew at the time the subject Series 020 Pota-Pox left its control as manufacturer and distributor, the design of that substance rendered it defective and unreasonably dangerous to a user applying (or to a person assisting in the application of) the substance to the interior lining or walls of the very kinds of enclosed water storage tanks for which the substance was designed by Tnemec. As competing coating compositions designed by companies other than Tnemec had by 2004 demonstrated in the marketplace, Tnemec could have designed a coating material to be substantially less likely to produce a concentration of flammable vapors

within such tanks, without substantially compromising the coating product's usefulness, desirability, or fitness for the particular purposes for which Series 020 Pota-Pox was designed and sold.

16. In designing and offering the Series 020 Pota-Pox for sale, Tnemec implicitly warranted (to Diamond Enterprise, Inc. and other buyers from Tnemec or distributors of Tnemec) that such goods were merchantable, and thus that they were fit for the ordinary purposes for which such goods were to be used, including application inside of contained water tanks during periods of foreseeably limited ventilation. That implied warranty of merchantability also included a warranty that the Series 020 Pota-Pox was adequately packaged and labeled, and that such goods were otherwise merchantable within the meaning of *Mississippi Code Ann.* § 75-2-314(2).

17. In designing and offering the Series 020 Pota-Pox for sale, Tnemec implicitly warranted (to Diamond Enterprise, Inc. and other buyers from Tnemec or distributors of Tnemec) that such goods were fit for the particular purpose of application by spraying within the interior of a contained water tank during periods of foreseeably limited ventilation, within the meaning of *Mississippi Code Ann.* § 75-2-315.

18. Tnemec breached its implied warranty of merchantability and its implied warranty of fitness for particular purpose through its defective and unreasonably dangerous design of its Series 020 Pota-Pox product as described above, proximately causing the resulting explosion and thus the deaths of Mozell Gatlin and Mark Aven Wilkins.

19. In designing, manufacturing, and selling the Series 020 Pota-Pox coating product, Tnemec undertook a duty to exercise reasonable care with respect to the

safety of persons foreseeably using that coating product in the course of applying it to the interior of enclosed water storage tanks, a duty which Tnemec recklessly breached through designing the product with an absence of reasonable care and with a composition which Tnemec knew unnecessarily produced very flammable vapors upon such foreseeable applications. Tnemec further breached its duty of reasonable care by including inadequate and ineffective warnings on the container in which it sold the Series 020 Pota-Pox, including in fine print on the container vague and conclusory language to the effect that users were to “keep away from heat, sparks and flame,” or were to use “explosion-proof” electrical equipment, or were to “turn off” any “sources of ignition” during use, when in fact Tnemec knew that because of the composition of the Series 020 Pota-Pox flammable fumes would inherently be produced during any application of the product, that application would be made within confined storage tanks which often would be difficult or impossible fully to ventilate, and that application would typically be made with electrically-powered spraying equipment which Tnemec itself invited users to employ in applying its product. That negligence by Tnemec proximately caused the explosion described above, and thus the injuries to and deaths of Mozell Gatlin and Mark Aven Wilkins.

20. By 2003, Tnemec had actual knowledge that its Series 020 Pota-Pox coating product created, as to the safety of persons foreseeably using and applying that product in a foreseeably enclosed water storage tank with limited ventilation, a substantially lower flash point, substantially higher flammability, and a substantially greater concentration of extremely flammable vapors, than competing coating products of comparable utility. Tnemec also knew that its container warnings and instructions

were ineffective and inadequate to prevent explosions, and that its warnings would have the effect of lulling users into believing that their conduct could remove significant risks of explosions. Yet Tnemec failed and refused to change and alter the composition of its Series 020 Pota-Pox product or the content of its warnings and instructions, and continued recklessly and intentionally to market that product to water system engineers and coating contractors as “the industry standard” and as uniquely delivering “benchmark performance” and safety relative to those competing products. In doing so, it knew that its continuation of its conduct would cause an undetermined number of explosions and resulting burns and deaths to workers applying that product inside confined water tanks, explosions and deaths which it knew would not be caused by use of competing coating products. In nevertheless continuing its defective design and marketing as described above, Tnemec demonstrated and practiced gross negligence to an extent evidencing a willful, wanton and reckless disregard for the safety of others, within the meaning of *Mississippi Code Ann.* § 11-1-65, and is accordingly liable to the Plaintiffs herein in an amount of punitive damages sufficient to deter such conduct by Tnemec and its competitors in the chemical and coating industries. That amount of punitive damages should be assessed against Tnemec which is economically sufficient to deter and avoid the further deaths likely to result from a continuation of Tnemec’s conduct, should reflect the degree of reprehensibility of Tnemec’s past reckless and intentional conduct, should reflect the duration of that conduct over many years, and should reflect the current financial condition and net worth of Tnemec.

Count 1: Strict Products Liability (Mississippi Code Ann. § 11-1-63)

21. The Plaintiffs hereby re-assert and incorporate within Count 1 hereof all of

the foregoing factual allegations, as if each was set forth again within this Count.

22. By virtue of its conduct, product and warnings as described above, Tnemec is liable to the Plaintiffs, and to all of the surviving family members of Mozell Gatlin and Mark Aven Wilkins authorized to recover for such torts causing wrongful death by *Mississippi Code Ann.* § 11-7-13, under the law of strict products liability pursuant to the elements described above and otherwise set forth in *Mississippi Code Ann.* § 11-1-63.

23. The Plaintiffs and those statutory beneficiaries are entitled to a monetary judgment against Tnemec in an amount equal to the total of all losses and injuries proximately caused by the conduct and product of Tnemec as described above, including the value of all lost wages, medical expenses, funeral expenses, property losses, pain and suffering on the part of the deceased, loss of companionship, and all other categories of compensable losses for which awards are authorized under *Mississippi Code Ann.* § 11-7-13, together with sufficient punitive damages to fulfill the deterrence and other public purposes authorized by *Mississippi Code Ann.* § 11-1-65 and pre-judgment interest, court costs and attorneys' fees.

Count 2: Breach of Implied Warranty of Merchantability

(Mississippi Code Ann. § 75-2-314)

24. The Plaintiffs hereby re-assert and incorporate within Count 2 hereof all of the foregoing factual allegations, as if each was set forth again within this Count.

25. By virtue of its conduct and product as described above, Tnemec is liable to the Plaintiffs, and to all of the surviving family members of Mozell Gatlin and Mark

Aven Wilkins authorized to recover for such torts causing wrongful death by *Mississippi Code Ann.* § 11-7-13, for the damages cause by its breaches of its implied warranty of merchantability pursuant to the elements described above and set forth in *Mississippi Code Ann.* § 75-2-314.

26. The Plaintiffs and those statutory beneficiaries are entitled to a monetary judgment against Tnemec in an amount equal to the total of all losses and injuries proximately caused by the conduct and product of Tnemec as described above, including the value of all lost wages, medical expenses, funeral expenses, property losses, pain and suffering on the part of the deceased, loss of companionship, and all other categories of compensable losses for which awards are authorized under *Mississippi Code Ann.* § 11-7-13, together with sufficient punitive damages to fulfill the deterrence and other public purposes authorized by *Mississippi Code Ann.* § 11-1-65 and pre-judgment interest, court costs and attorneys' fees.

Count 3: Breach of Implied Warranty of Fitness for Particular Purpose

(Mississippi Code Ann. § 75-2-315)

27. The Plaintiffs hereby re-assert and incorporate within Count 3 hereof all of the foregoing factual allegations, as if each was set forth again within this Count.

28. By virtue of its conduct and product as described above, Tnemec is liable to the Plaintiffs, and to all of the surviving family members of Mozell Gatlin and Mark Aven Wilkins authorized to recover for such torts causing wrongful death by *Mississippi Code Ann.* § 11-7-13, for all damages and losses proximately caused by its breaches of its implied warranty of fitness for particular purpose pursuant to the elements set forth

above and in *Mississippi Code Ann.* § 75-2-315.

29. The Plaintiffs and those statutory beneficiaries are entitled to a monetary judgment against Tnemec in an amount equal to the total of all losses and injuries proximately caused by the conduct and product of Tnemec as described above, including the value of all lost wages, medical expenses, funeral expenses, property losses, pain and suffering on the part of the deceased, loss of companionship, and all other categories of compensable losses for which awards are authorized under *Mississippi Code Ann.* § 11-7-13, together with sufficient punitive damages to fulfill the deterrence and other public purposes authorized by *Mississippi Code Ann.* § 11-1-65 and pre-judgment interest, court costs and attorneys' fees.

Count 4: Negligence

30. The Plaintiffs hereby re-assert and incorporate within Count 4 hereof all of the foregoing factual allegations, as if each was set forth again within this Count.

31. By virtue of its conduct, product and warnings as described above, Tnemec is liable to the Plaintiffs, and to all of the surviving family members of Mozell Gatlin and Mark Aven Wilkins authorized to recover for such torts causing wrongful death by *Mississippi Code Ann.* § 11-7-13, for all damages and losses proximately caused by its failure to act within, and its breaches of, its duty of reasonable care owed to Mr. Gatlin and Mr. Wilkins as foreseeable users and appliers of its product, and thus under the common law of negligence.

32. The Plaintiffs and those statutory beneficiaries are entitled to a monetary judgment against Tnemec in an amount equal to the total of all losses and injuries

proximately caused by the grossly and recklessly negligent conduct of Tnemec as described above, including the value of all lost wages, medical expenses, funeral expenses, property losses, pain and suffering on the part of the deceased, loss of companionship, and all other categories of compensable losses for which awards are authorized under *Mississippi Code Ann.* § 11-7-13, together with sufficient punitive damages to fulfill the deterrence and other public purposes authorized by *Mississippi Code Ann.* § 11-1-65 and pre-judgment interest, court costs and attorneys' fees.

Relief Requested

WHEREFORE, the Plaintiffs each pray unto the Court for the following relief, on their behalf and on behalf of all statutory beneficiaries as set forth above:

- (1) a trial by jury of all relevant and admissible facts pertaining to the allegations set forth above;
- (2) a monetary judgment against Tnemec in an amount equal to the total of all losses and injuries proximately caused by Tnemec and its product, including the value of all lost wages, medical expenses, funeral expenses, property losses, pain and suffering on the part of the deceased, loss of companionship on the part of the statutory beneficiaries, and all other categories of compensable losses for which awards and recovery are authorized under *Mississippi Code Ann.* § 11-7-13;
- (3) a further monetary judgment for punitive damages in an amount sufficient to fulfill the deterrence and other public purposes authorized by *Mississippi Code Ann.* § 11-1-65;

- (4) pre-judgment interest, post-judgment interest, court costs and reimbursement of reasonable attorneys' fees; and
- (5) all such further relief as the Court and jury may find to be justified by the evidence to be presented at the trial hereof.

This the 27th of November, 2007.

Respectfully submitted,
Joyce Marie Thomas Gatlin and
Archie W. Wilkins, Sr. (Administrator),

By their Attorneys:
PIGOTT REEVES & JOHNSON

By: 

J. Brad Pigott

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