IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

NOV 13 1969

JAMES R. COONEY, CLERK
BY DEPUTY Imogene R. Jones

CLARENCE BOREL :

VS. : CIVIL ACTION NO. 6449

FIBREBOARD PAPER PRODUCTS CORPORATION ET AL :

PLAINTIFF'S REPLY TO MOTION TO STRIKE FILED BY DEFENDANT FIBREBOARD PAPER PRODUCTS CORPORATION

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the plaintiff in the above entitled and numbered cause, and in reply to the motion to strike filed by defendant Fibreboard Paper Products Corporation, and would show unto the Court the following:

1.

In a breach of warranty suit, there does not have to exist privity of contract between the parties suffering the harm and the manufacturer of the product. That sufficient and adequate grounds stating a cause of action have been set out in plaintiff's original complaint, and as stated in the plaintiff's reply to the defendant's motion for more definite statement, this is an occupational disease case, and a certain time of injury or a certain time of occurrence causing the injury is not an occupational disease, but is rather an accidental injury. According to the objections set out by defendant Fibreboard Paper Products Corporation, it would appear that this defendant believes that there exists no duty on the part of said defendant to give adequate warning, to

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provide products which are safe to be used, and if the products manufactured by the defendant are in truth dangerous to use, then the obligation lies with the defendant to devise safe techniques and proper methods of handling the products to avoid injury to those using them.

2.

Further answering, plaintiff says that regardless of whether or not the products manufactured by this defendant were for high temperatures, these products nevertheless had to be applied by human beings. They did not apply themselves, and in the process of application, the dust and subsequent danger was created, all as is set out in the plaintiff's original complaint in sufficient and adequate detail as to apprise the defendant of the grounds of liability and facts stating his cause of action.

3.

The doctrine of res ipsa loquitur does apply, because without question, the plaintiff has asbestosis, and this disease can only be contracted by inhalation of asbestos dust. The thing speaks for itself. If the products manufactured by the defendant caused the disease and the products were manufactured by the defendant, and nothing else would cause the disease, then it is inescapable that res ipsa loquitur applies, and that the thing speaks for itself. Even the wording of the name of the disease asbestosis, of course, comes from the word asbestos. If the defendant contends that the plaintiff contracted asbestosis in some other fashion than that alleged, then the burden is upon the defendant to prove this fact.

4.

In response to Paragraph 8 of said motion to strike, the plaintiff says that the disease of asbestosis has been known


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of for well over fifty years, and that this particular defendant built a plant in 1941 recognizing the dangers of the disease, but yet it did nothing to devise a safe technique of application, it did nothing to warn the workers in the field of the dangers, made no studies, and in substance, its negligence was as gross as could be imagined.

WHEREFORE, plaintiff prays that the motion to strike filed by defendant Fibreboard Paper Products Corporation be in all things denied.

STEPHENSON AND THOMPSON

By Ward Stephenson
Attorneys for Plaintiff
Stephenson Building
Orange, Texas 77630

CERTIFICATE OF SERVICE BY MAIL

I, Ward Stephenson, hereby certify that a true and correct copy of the foregoing instrument was on this the 12th day of November, 1969, mailed to George A. Weller, P. O. Box 350, Beaumont, Texas, attorney for defendant Fibreboard Paper Products Corporation, by certified mail, return receipt requested.

Ward Stephenson
WARD STEPHENSON

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