IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CLARENCE BOREL	§	
	§	
VS.	§	CIVIL ACTION NO. 6449
	§	
FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL	§	

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUN 22 1970
JAMES R. COONEY, CLERK
BY DEPUTY Margaret Brewer

REPLY OF DEFENDANT STANDARD ASBESTOS MANUFACTURING & INSULATING COMPANY TO PLAINTIFF'S OPPOSITION TO SAID DEFENDANT'S MOTION TO SUPPRESS DEPOSITION OF CLARENCE BOREL TAKEN MAY 28, 1970

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Standard Asbestos Manufacturing & Insulating Company, and in reply to plaintiff's opposition to the motion to suppress the deposition testimony of Clarence Borel taken on May 28, 1970, would respectfully represent unto the Court the following:

I.

Defendant is not attempting, as suggested by plaintiff's counsel, to take advantage of the fact that the notice for the taking of this deposition was not delivered. As heretofore pointed out in the original motion, this defendant must accept the consequences of such lack of delivery and actual receipt, regardless of how it came about, as a matter of law, since it is well settled that service is complete upon the placing of the notice in the United States Mail. On the contrary, defendant's entire argument is based upon an acceptance of the proposition that the fact that the notice was not received makes no difference. Defendant contends, however, that, even so, the deposition was improperly and prematurely taken and must be suppressed. In defense of the office procedure of

649

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defendant's counsel, however, it might be mentioned that, as near as can be determined, the yellow slip referred to by plaintiff's counsel, which is supposed to be left at the addressee's place of business when certified mail cannot be delivered because of the unavailability of anyone to receipt for the same, was not left at the office of the undersigned attorneys, and for that reason no effort was made to obtain this particular piece of certified mail.

Be that as it may, the deposition was taken prematurely, in that it was actually taken before the expiration of the time within which this defendant could have filed cross interrogatories or could have taken any other action contemplated by the Rules. As the Court will recall, the Rules provide, in the case of service by mail, for a total of thirteen (13) days from the date of the mailing of the notice within which such action, including the filing of cross interrogatories or the filing of a motion to permit oral cross examination, or other action, may be taken. The deposition in fact was taken before the expiration of <u>six</u> (6) days, and actually on the sixth day following the mailing of the notice. Not only is this true, but Mr. Borel died prior to the expiration of the time given to this defendant by law within which to prepare and serve cross interrogatories. As indicated above, this time was thirteen (13) days. Mr. Borel died on the twelfth day following the mailing of the notice. Thus, even if defendant, acting strictly within the Rules, had propounded cross interrogatories on the thirteenth day, they could not have been answered.

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II.

Plaintiff asserts that defendant was not prejudiced by this incident, since defendant had submitted interrogatories under Rule 33 seeking essentially the same information.

The vice in this argument is that interrogatories submitted under Rule 33 are for discovery purposes, and may not be used by the answering party as primary evidence. To do so would be to deprive the party propounding such interrogatories of the right of cross examination. It has frequently been held that under the provisions of Rule 33, answers are admissible only as against the answering party, not as primary evidence for the answering party. Town of River Junction v. Maryland Casualty Company, 110 Fed.2d 278 (CCA 5th, 1940); Haskell Plumbing & Heating Co. v. Weeks, 237 Fed.2d 263 (CCA 9th, 1956); Grace & Co. v. City of Los Angeles, 278 Fed. 2d 771 (CCA 9th, 1960). The theory here is that the answers to the interrogatories, in addition to serving their purpose as discovery, are also admissible as against the answering party as constituting an admission against interest. As such, they are not binding on the party propounding the interrogatories, but only against the party answering them. Gridiron Steel Co. v. Jones & Laughlin Steel Corp., 361 Fed.2d 791 (CCA 6th, 1966); Giaraffa v. Moore-McCormack Lines, 270 Fed. Sup.342 (Dist. Ct. N.Y., 1967).

Plaintiff's attorney also points out that this defendant's attorney did not propound any questions at the taking of the oral deposition of Mr. Borel. This is true. However, as the Court will recall, severe limitations were

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placed upon the taking of this deposition, including the limitation that only two attorneys could interrogate Mr. Borel. Further, it was not necessary to ask any questions at the time of the deposition insofar as this defendant was concerned, since Mr. Borel had testified that he had worked with Standard Asbestos Manufacturing & Insulating Company products at the Cit-Con Refinery at Lake Charles, Louisiana in 1949. This was the only time he said that he worked with products manufactured by this defendant during the entire deposition. See Borel's deposition taken on April 30, 1970, page 12. This testimony is attached hereto, marked Exhibit "A". As will be pointed out later, there was obviously no need to interrogate him further on that point.

This brings up the question which undoubtedly arises in the mind of the Court as to why this defendant considers this particular matter of such importance. In all candor, this defendant feels that the Court should know the importance of the matter, as well as why it developed as it did.

With the Court's indulgence, and, we are confident, with plaintiff's counsel's consent, we would like to explain this, even though it is, at the moment, dehors the record.

After the oral deposition of Mr. Borel was taken, in which, as indicated above, he indicated that he worked around this defendant's products on only one job, an investigation was undertaken to determine by whom he was employed. This investigation revealed that the insulating sub-contractor on that job was none other than this defendant, Standard Asbestos Manufacturing & Insulating Company. Payroll records

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reveal that Mr. Borel was employed directly by this defendant on that job. Thus, if we would accept the testimony given by Mr. Borel in his oral deposition, there could be no liability whatever on the part of this defendant, since, of course, it can be shown that Standard Asbestos Manufacturing & Insulating Company was a subscriber to the Workmen's Compensation Act at that time. It was this defendant's intention to file a motion for summary judgment on these points, and the interrogatories under Rule 33 were propounded in order to make the situation crystal clear in connection with the motion for summary judgment, that is, to establish beyond any shadow of doubt that the only time Mr. Borel was exposed to this defendant's products was when he was on this very defendant's payroll. In short, while defendant felt that the testimony on oral deposition was fairly clear, this defendant also felt that to support a motion for summary judgment, it should negative the possibility of any other occasion involving an exposure to defendant's products. Had the interrogatories under Rule 33 been answered in a different manner than Borel's oral deposition suggested, and even if the same information had been given as was given in the oral deposition, there still would have been no fact issue as against this defendant (see cases cited above), and this defendant could and would have pursued the matter further by filing additional interrogatories or in some other manner getting the information precise enough to enable it to check on the correctness thereof. Further, had the written deposition been taken as required by law, and had Mr. Borel been available, cross interrogatories could and would have been filed, this being in the nature of

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cross examination, and designed to pinpoint the times and places where Borel had been exposed to Standard Asbestos Manufacturing & Insulating Company products. In this written deposition, as the Court may observe, the testimony is wholly vague and is not susceptible to verification. A copy of the interrogatory and Mr. Borel's answers is attached hereto, marked Exhibit "B". For example, it is impossible to determine from Mr. Borel's testimony exactly when or on what job he actually used this defendant's product, nor the name of the insulating company by whom he was employed at the time. Had this information been obtained, as it most assuredly would have been, then this defendant could and would have investigated in order to determine if the particular sub-contractor on the particular job at the particular time used this defendant's products.

As the matter now stands, however, this defendant is confronted with testimony, without cross examination, of such a vague nature that this tupe of investigation cannot be performed. The cross examination of which this defendant has been deprived would have remedied this very defect. Thus, if this testimony is not suppressed, and if it is offered in evidence, a fact issue might be raised as against this defendant and by testimony which this defendant has bever been able to test by cross examination.

As the Court can see, this is a matter of paramount importance to the rights of this defendant. On the other hand, one cannot help but wonder why plaintiff's counsel considers this particular matter of importance at all, since the evidence clearly shows beyond any question repeated exposure to the products manufactured by many of the remaining defendants. In

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short, it would seem that the suppression of this testimony would in no way really hurt the plaintiff's case, but would cause irreparable injury to the rights of this defendant.

One other point might be made. Plaintiff's counsel seems to feel that because of Mr. Borel's condition, he should be permitted to violate the Rules concerning the taking of a deposition on written interrogatories. The Rules take care of this contingency by permitting the shortening of the time within which a deposition on written interrogatories may be taken, upon application to the Court. (Rule 30) However, plaintiff's counsel did not avail himself of this opportunity, but simply proceeded in clear violation of the Rule to take a deposition before the time for the filing of cross interrogatories had elapsed. By his own action, plaintiff's counsel has deprived defendant of the right of cross examination. As indicated above, this is not a mere technical complaint, but one of utmost importance to this defendant.

This defendant wishes to re-emphasize the point that regardless of what might or might not have transpired, this defendant had an absolute right under the Rules of Civil Procedure to submit cross interrogatories, make objections, or to take any other action, for a period of thirteen (13) days following May 22, 1970. Any deposition taken prior to the expiration of the thirteen (13) days given to this defendant by the Rules would be premature. Not only was the deposition premature, but, as the facts developed, it could never have been taken properly, since Mr. Borel died prior to the expiration of this thirteen (13) day period.

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We should look at this case, therefore, as one in which the deposition was taken prematurely. Having been taken in violation of the Rules, it must be suppressed.

WHEREFORE, PREMISES CONSIDERED, defendant prays that the Court suppress the deposition testimony of Clarence Borel taken on written interrogatory on May 28, 1970.

Respectfully submitted,

MEHAFFY, WEBER, KEITH & GONSOULIN
Attorneys for Defendant Standard
Asbestos Manufacturing & Insulating Co.

By _____
Of Counsel

1400 San Jacinto Building

Beaumont, Texas 77701

CERTIFICATE OF SERVICE
BY MAIL

I, James W. Mehaffy, hereby certify that a copy of the foregoing instrument was on this the 19th day of June, 1970, mailed to Mr. Ward Stephenson, Stephenson Building, Orange, Texas, attorney for plaintiff, and to all other counsel of record at their respective addresses.

_____
JAMES W. MEHAFFY

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EXHIBIT "A"

your work life Unibestos pipe insulation and block?
A. Yes, sir.
Q. Did you use Insubestos Felt?
A. I don't know. I can't recall.
Q. Did you use Unarco board?
A. Yes, I used Unarco.
Q. Did you use Wovenstone?
A. I don't remember.
Q. All right. Did you use Insutape?
A. I don't remember that.
Q. Did you use Insutube?
A. I don't remember that one.
Q. Insulating cements that were made by Unarco?
A. Yes, sir, what they call one-kote.
Q. All right, sir.
Have you had occasion to work for Standard Asbestos Manufacturing and Insulating Company?
A. Yes, sir. It was Cit Con Refinery in Lake Charles, Louisiana.
MR. PATE: What refinery is that?
MR. STEPHENSON: Cit Con.
A. Cit Con. -- that plant.
Q. What year was that?
A. Oh, that was about in '49.
Q. All right, sir.
A. If I remember right.

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657

EXHIBIT "B"

PAGE

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CIVIL ACTION NO. 6449

ANSWERS TO WRITTEN INTERROGATORIES

Clarence Borel,
(Doctors Hospital, Groves)

The following deposition was taken before the undersigned at the Doctors Hospital in Groves, Texas, on the 28th day of May, 1970, the same being taken upon interrogatories duly certified by the Clerk of the Court in which said cause is pending.

The witness, CLARENCE BOREL, being duly sworn to tell the truth by me, deposed as follows:

INTERROGATORY NO. 1:

Mr. Borel, you have stated that you have worked with products manufactured by Standard Asbestos Manufacturing and Insulating Company. If you will, please state to the court reporter where you worked with these products, giving her the approximate dates, your employer, if you recall the name of your employer, and the job site.

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658

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EXHIBIT "B"

A. I have used Standard Asbestos let me see it was 1949 it was Standard Asbestos, one of the Harvey Leggett jobs at Magnolia. This was in 1949 or 1950, it was Harvey Leggett, yes, Harvey Leggett.

And see I worked at Magnolia, Lummus in 1962. I worked twice at Magnolia, but it was Lummus in '62.

1949 I worked for Cit Con, it was in Lake Charles, Cit Con. And I used it, I know at Koppers - - I don't know the year - - that I don't know. They were doing their own contracting.

In 1953 and 1954 I worked at Jefferson Chemical plant, was it for the Aber Company, yes, the Aber Company. They used them all, Kaylo, Foam glas and Standard Asbestos.

There was a Henry DeKerlegand in '61 or '62 too at Magnolia. Used asbestos, Standard Asbestos couple times at Magnolia.

_____
Clarence Borel

SWORN TO AND SUBSCRIBED BEFORE ME this the ____ day of _____, 1970.

_____
Notary Public in and for Jefferson County.

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659

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