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EASTERN DISTRICT OF TEXAS
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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

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

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# BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE VERDICT, OR IN THE ALTERNATIVE, FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE JURY

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TO THE HONORABLE JUDGE OF SAID COURT:

This case was submitted to the jury on special interrogatories under Rule 49(a), Federal Rules of Civil Procedure, and not on a general verdict. Where the jury was not instructed to bring in a general verdict but only to answer special interrogatories and no form of general verdict was provided for jury use, the special interrogatories must be treated as having been submitted pursuant to rule providing for fact findings. (Federal Rules of Civil Procedure, Rule 49(a), (b), 28 U.S.C.A.). Scott v. Isbrandtsen Company, U. S. Ct. App., 4th Cir., 1964, 327 F. 2d 113, 119.

Rule 49(a) expressly provides that the court cannot make a finding on an omitted fact issue, and no fact will be

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presumed as found in support of the judgment where defendant has requested its submission to the jury and objected to the charge because of such failure. Defendant requested the submission of a special interrogatory on assumption of risk or knowledge and appreciation of risk on the part of Borel. Such request was refused and no such issue was submitted to the jury.

The rule as to burden of proof for motion for directed verdict and motion for judgment notwithstanding the verdict is well stated by the 5th Circuit in Boeing Company v. Shipman, 411 F. 2d 365, and repeated in Liberty Mutual Insurance Company v. Davis (5th Cir., 1969), 412 F. 2d 475. The court said that in considering such motions xxx "the Court should consider all of the evidence - not just the evidence which supports the non-movers case - xxx." xxx "A mere scintilla of evidence is insufficient to present a question for the jury." xxx "There must be a conflict in substantial evidence to present a jury question." Accordingly, our motion for judgment notwithstanding the verdict of the jury must be viewed from the standpoint of this rule.

MOTION FOR JUDGMENT ON THE VERDICT

The acts of contributory negligence found by the jury against the plaintiff's decedent in Interrogatory No. 3 present a complete defense to plaintiff's alleged cause of action or claim based upon strict liability. The acts of contributory


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negligence submitted to the jury in the Court's Charge were:

(a) Failure to use masks and respirators for protection from dust containing some asbestos;

(b) In failing to request his employer to furnish blowers to remove dust laden air;

(c) In working in asbestos dust laden air with full knowledge that he was inhaling such dust laden air;

(d) In continuing to work with insulation materials containing some asbestos after he knew, or in the exercise of ordinary care should have known, that it was affecting his health.

No objection was made by plaintiff to this charge.

Contributory negligence of the user is a defense to an action based upon breach of implied warranty or strict liability. McDevitt v. Standard Oil Company of Texas, 5th Cir., 1968, 391 F. 2d, 364, 367; Shamrock Fuel & Oil Sales Co., Inc. v. Tunks, Tex. 416, S.W. 2d 779 (1967). In McDevitt v. Standard Oil, supra, the Court said:

> "xxx The Texas Supreme Court recognized the conflict in the cases in this area, and quoted from Deans Prosser and Wade and 2 Restatement of the Law of Torts (2nd Ed.) 356, § 402A, Comment (n) to the effect that contributory negligence is no bar to a strict liability action when such contributory negligence consists of a failure to discover that a product is defective, but does constitute a defense when it consists of a voluntary and unreasonable proceeding to encounter a known danger.


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"Thus the essential holding in this case (Shamrock Fuel v. Tunks - a mandamus action) was stated by the Court as follows:

"'* * * these defenses, voluntary exposure and such others as may be recognized should be submitted specifically and not under the formula embraced by the contributory negligence issues (Nos. 36 and 37) employed in this case. Such form of submission embraces a failure to discover a defect or to guard against the possibility of its existence which under the greater weight of authority is not a defense to the action.'"

Again, the 5th Circuit says:

"It is evident from these two decisions that the Supreme Court of Texas did not decide that contributory negligence is never a defense to a strict liability action, but limited its holding to the principle that one who is contributorily negligent in failing to discover a defect in a product is not barred from recovery. The question of whether that species of contributory negligence variously referred to as 'misuse', 'improper use', 'voluntarily proceeding to encounter a known risk' or any other of the myriad synonyms used by various courts and writers constitutes defensive matter to such an action was expressly left open."

The 5th Circuit then quotes from the more recent case of Proctor & Gamble Manufacturing Co. v. Langley, Tex. Civ. App., 422 S.W. 2d 773 (reversed and rendered for defendant), where Chief Judge Dixon on rehearing said:

"We do not believe that the strict liability doctrine means that under circumstances such as we have here a consumer may knowingly violate the plain, unambiguous instructions and ignore the warnings, then hold the makers, distributors and sellers of a product liable in the face of the obvious misuse of the product.

"Appellees brought their suit on the theory of implied warranty. We agree that the product carried

an implied warranty of fitness, but such warranty existed only if the product was used in accordance with directions. The implied warranty did not apply when the product was misused, as it undisputably was in this case. (Emphasis added).

"The above expression of Texas law is controlling in this case. The record before us reveals that James McDevitt was affirmatively provided with the manufacturer's instructions regarding the proper tire size for his vehicle and yet he purchased an improper size. In addition, the vehicle was driven with air pressure in the tires which at times was well above, and at other times well below, the recommended pressure as set out in published manuals. There was also evidence that the station wagon was driven at excessive speeds and over rough terrain. It is clear that such action under the rationale and teachings of the case of Proctor & Gamble Manufacturing Company v. Langley, supra, as well as the Restatement of Torts, 2d Ed. § 402A, Comment (n) is a defense in Texas to an action based on strict liability in tort. To hold otherwise would be to convert a strict liability cause of action into one of absolute liability. Such a holding would be at odds with the basic purpose of the doctrine. This basic purpose is to provide judicial protection for the otherwise defenseless consumer who usually will lack the ways and means to discover or prove the defect in a product which he purchases in reliance upon massive advertising campaigns and wide spread acceptance. It is not a part of this purpose to permit the imposition of absolute liability upon the manufacturer or distributor for no other reason than that the product was placed on the market. See Helene Curtis Industries, Inc. and Cosmair, Inc. v. Pruitt, supra."

In the recent case of Ruiz v. Minnesota Mining & Manufacturing Co., Cal. Ct. of App., Feb., 1971, C.C.H. Product Liability Service, Page 10,797, the Court held contributory negligence a defense to an action based on strict liability. The Court said:

"On the other hand, if the user discovers the defect and is aware of the danger and nevertheless unreasonably uses the product to his injury, his contributory negligence bars from recovery. (See Rest. 2d Torts (1965) § 402A, supra; Prosser, Strict Liability to the Consumer in California, 18 Hastings L.J. 9, 48-49; Barth v. B. F. Goodrich Tire Co. (CCH Products Liability Reports, Para. 6060), 265 Cal. App. 2d 228, 243 (71 Cal. Rptr. 306), hg. den.)"

The acts of contributory negligence submitted to the jury and found against the plaintiff's decedent are such as to bar recovery on the strict liability theory.

Where the danger or potential danger is obvious and known to the user, no warning is necessary and no liability attaches for an injury occurring from the reasonable hazards attached to the use of chattels or commodities. Larsen v. General Motors, 8th Cir. 1968, 391 F. 2d 495, 505.

THE DEFENSE OF "NO DUTY" BECAUSE THE POTENTIAL DANGER OF EXPOSURE TO ASBESTOS DUST WAS OPEN AND OBVIOUS AND WELL KNOWN TO THE PLAINTIFF

In the instant case, due to the knowledge and appreciation of the hazard by Borel of exposure to dust containing asbestos and the fact that such potential danger was well known to Borel, no duty existed on the part of the defendant manufacturer to warn him of the potential dangers. Myers v. Day & Zimmerman, Inc., 5th Cir., Ct. of Apps. Texas, 427 F. 2d 248 (1970). Also see Gulf Oil Corporation v. Bivins, 5th Cir., 276 F. 2d 753; J. & W. Corporation v. Ball, 414 S.W. 2d 143, 146, Tex. Sup. Ct. 1967.

Of necessity, in discussing the contention that the potential danger or hazard from asbestos dust was open and obvious and well known to plaintiff's decedent and, accordingly, no duty existed to warn, there must be a discussion of the affirmative defense of volenti or the fact that "he who consents cannot receive an injury."

In Myers v. Day & Zimmerman, Inc., supra, the Court at Page 252 said:

> "Texas requires the occupier of premises to keep them in reasonably safe condition for his invitees. He is obliged to inspect and discover hazardous conditions. With respect to those dangers of which he is aware, or should be aware because of his obligation to inspect, he has a duty 'to take such precautions as a reasonably prudent person would take to protect his invitees therefrom or to warn them thereof.' However, this duty does not extend to defects which constitute 'open and obvious' dangers - hence the 'no duty' principle.
>
> "The exception rests on the proposition that there could be no obligation to warn a person of something he already knows or of a danger so apparent that he will be charged with knowledge as a matter of law. In the 'no duty' situation, as in volenti, knowledge either actual or charged in law, is crucial. But there is one distinction between the doctrines which must be noted: the proof of 'no duty' is not a burden of the defense. Here the burden is on the plaintiff. In Halepeska v. Callihan Interests, Inc., the court stated:
>
> "'In a suit by an invitee against the occupier, the invitee must not only prove that he was injured as a proximate result of encountering a condition on the premises involving an unreasonable risk of harm, but he must also prove, as part of the plaintiff's case, that the occupier owed him a duty to take reasonable precautions to warn him or protect him from such danger, i.e., the plaintiff must negative 'no duty.'


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"Thus, in considering the propriety of a 'no duty' charge the focus of the inquiry will be different. It is not the defendant's burden to raise the question, but the plaintiff's burden to foreclose it." (Emphasis ours).

As noted in the above quotation, the proof of "no duty" is not a burden of the defense. Here the burden is on the plaintiff. See Halepeska v. Callihan Interests, Inc., 371 S.W. 2d 368, 378, Texas 1963.

The 5th Circuit in Myers v. Day & Zimmerman, at Page 250, states the rule with reference to the Texas volenti doctrine.

In the instant case, the burden was on the plaintiff to discharge the burden of proof as to "no duty," that is, that Borel did not know of the danger or that the danger was not so apparent that he would be charged with knowledge as a matter of law. Since the plaintiff did not obtain such a finding, the verdict of the jury does not establish a fact which is necessary for recovery.

Also, the defendants take the position that although the Court failed and refused to submit a special interrogatory to the jury on assumed risk or knowledge and appreciation of the danger of exposure to asbestos dust, nevertheless, we submit that the undisputed evidence contained in the admissions of Borel in his deposition establish the existence of no duty and the existence of knowledge and appreciation of the potential danger. Also, the


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testimony of Mr. McManus, President of Fuller-Austin Insulation Company, an employer of Borel, showed that this employer believed that asbestos dust was harmful and had been of this opinion for at least 15 years. Likewise, the testimony of William O. Daily, District Manager of A.C.& S., Inc., an insulating contractor who had employed Borel, showed that this employer had known of the danger of inhaling asbestos dust for 13 or 14 years. Under all the Texas authorities, which are recognized in Gulf Oil Corporation v. Bivins, 5th Cir., 276 F. 2d 753, and in subsequent Texas cases, the employee is charged with the notice of his employer.

There are two additional reasons why the plaintiff cannot recover damages for those exposures to asbestos products and asbestos dust after Borel had knowledge that he had suffered some injury as a result of contact with such products and that further contact would further injure him and affect his health, and these are stated as follows:

The rule is well recognized that a person cannot voluntarily encounter a danger, suffer injury from the voluntary encounter with danger and then recover damages because of his voluntary exposure to this danger. See Delhi-Taylor Oil Corporation v. Henry, Sup. Ct. Tex., 1967, 416 S.W. 2d 390; Western Auto Supply Company v. Campbell, Tex. Sup. Ct., 1963, 373 S.W. 2d 735; McKee v. Patterson, 153 Tex. 517, 217 S.W. 2d 391; Wesson


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v. Gillespie, Sup. Ct. Tex., 1964, 382 S.W. 2d 921 (the 8-Ball Lounge case); Safeway, Inc. v. Johnson, 5th Cir., 311 F. 2d 387. RABB v. COLEMAN, SUP. CT. TEX 1971, 469 SW 2d 384.

Likewise, a person must attempt to mitigate damages on any damages which are incurred and he cannot thereafter continue to subject himself to further exposures and except to recover damages resulting therefrom. 17 Tex. Jur. 2d Para. 32, Damages, Page 110, etc.

Borel testified:

"Q. Now, at this time, Mr. Borel, throughout your earlier life, let's say, going back four, five, ten years ago, were you or were you not a man in good health?

A. I think I was -- I thought I was in pretty good health. I had no pains outside of lung congestion continually all the time. And I just put it off. They called it pleurisy and so forth. I have had X-rays, went to the doctor to have X-rays just to check, and they would say it would be a little cloudy, 'Your lungs was cloudy,' and ask me what type of work I was doing. And I told them. And they would say well that's the reason for this cloudiness in your lungs." (Dep., p. 37, lines 6 through 17).

He then testified: After you've been on some jobs that's real dusty you feel bad all over and have pains all over your chest. I hawked around and coughed a lot and spit a lot of that stuff up and could hardly get started. He admitted this had been going on four or five years. He also admitted to having X-rays as long as ten years ago, that he had the pleurisy problem as long as ten years, that he had chest problems off and on during the last ten years, that he had X-rays to try to determine what the difficulty was.

When he bought his house about six years prior to his deposition, which was more than four years prior to the time any claim was filed for workmen's compensation, and wanted to take out a life insurance policy and they found out he was an insulator they advised him he would have to have a chest X-ray. This doctor told him that his X-rays were cloudy and the reason was his occupation as an insulator. He also had experienced shortness of breath when he walked fast or engaged in climbing, etc., and this was as long as six or eight years prior to the date of his deposition.

At all times he knew that he was breathing dust containing some asbestos and that breathing this dust was not good for him. He tried the use of a respirator on DuPont jobs as early as 1945 (approximately) and testified:

"Q. Why did you do that? Why did you use a respirator?

A. Why, I just figured this dust is bad for me, but I didn't know how bad it was.

Q. Now, how long -- have you known that as long as ten years?

A. Yes, I known it was dangerous -- any kinda dust was dangerous the way I considered it, I, just myself.

Q. Yes, sir.

A. I considered any kind of dust was hazardous to you."

He further testified: "Q. So you have had some chest problems during the last ten years? A. Oh, yeah, off and on."



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In April of 1964, which was the date he bought his home, he had an X-ray made by a doctor in Port Neches. With reference to this he testified: "Q. All right. Now, I believe you said that one doctor told you that your X-rays were cloudy and the reason for that was your occupation? A. Yes."

Borel also testified that he knew that the breathing of asbestos dust could not be good for your health and he has known that the breathing of this dust was bad for him for at least 15 or 20 years. He also admitted that he knew the breathing of dust was dangerous and bad for your health but he didn't know just how dangerous it was.

Likewise, he admitted that Dr. Kenneth R. Watkins had advised him his X-rays were cloudy and that this was caused by dust.

The doctor in Port Neches advised him: "He told me to avoid dust as much as I possibly could." This was the same doctor who told him that his X-rays showed that his lungs were cloudy and this was due to his trade or work.

He likewise testified that he knew he was working with asbestos; that every time you saw a piece of insulation you are going to get a lot of dust; that you would breathe it; that he knew he was breathing it.


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Referring to the time when he worked at Texaco, which was six years prior to working in the shipyards, he testified:

"Q. Did you know at that time that breathing dust wasn't good for you?

A. Well, I figured it wasn't good for me, but there wasn't nothing I could do. I didn't know how in the world to apply it without breathing some of it, because you just can't do it." (Dep., Page 43, Lines 4 through 14).

After testifying that he wore a respirator at the DuPont Plant in 1946, he was asked:

"Q. Why did you do that? Why did you use a respirator?

A. Why, I just figured this dust is bad for me, but I didn't know how bad it was."

xxx

"Q. What's your understanding of the purpose of a respirator?

A. That's to keep dust out of your nostrils and your lungs.

Q. Now, how long -- have you known that as long as ten years?

A. Yes, I known it was dangerous -- any kinda dust was dangerous the way I considered it, I, just myself. I considered any kind of dust was hazardous to you."

xxx

"Q. I believe that when Mr. Stephenson was examining you, you stated that you knew that the breathing of asbestos dust could not be good for your health, is that correct?

A. That's right. It's impossible.

Q. All right. Haven't you known this for at least 15 or 20 years, that you were breathing this dust and that it was bad for you?


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A. Yes, I knew the dust was bad, but we used to talk it among the insulators: how bad was this dust? Could it give you TB? Could it give you this, etc.?

Q. All right. Then you did know that it had some degree of danger but you didn't know how dangerous it was?

A. I didn't know it was dangerous like this bad. I really didn't."

Borel further testified that the dust had always been a safety item and they had talked about it at Union meetings. In fact, they had been talking about it since 1937. "I have been aware of it, it doesn't seem very healthy I know."

The foregoing testimony of Borel shows without question that Borel knew he was breathing dust which contained some asbestos; that he knew that the asbestos dust was harmful to his health but he did not know how harmful it was; that he knew it was hazardous but he did not know how hazardous. We submit that the foregoing testimony of Borel shows that he knew and appreciated the fact that working with asbestos dust was dangerous and injurious to health, although it can be conceded that he did not know and medical science did not know that such exposures might cause the condition of mesothelioma. At least, beginning with the year 1947, when the Texas Workmen's Compensation Act included asbestosis as an occupational disease, Borel was charged as a matter of law with knowledge of the disease known as asbestosis. Of course, he knew at all times that he was working with asbestos and he knew


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that asbestos dust would cause harm to his health. Even though the plaintiff did not discharge her burden, we think the foregoing testimony establishes the defense of "no duty" to warn that asbestos dust can be harmful to your health, and it further establishes that Borel knew and realized that exposure to asbestos dust was hazardous and harmful to his health. There is no escape from the testimony that he had consulted a doctor for chest problems for at least ten years prior to the date of his deposition; there is no dispute about the fact that in May, 1964, he had X-rays taken and the doctor advised him that he had spots on his lung and this was caused by his occupation. The doctor told him to avoid breathing the dust and to avoid dust exposures as much as possible. Clearly, this is notice of the danger; this is knowledge and appreciation of the hazards of working with asbestos dust.

## THE PLAINTIFF'S CLAIM IS BARRED BY THE TEXAS TWO (2) YEAR STATUTE OF LIMITATION

We have filed an extensive brief on the statute of limitation of the State of Texas, as well as the statute of the State of California and the State of Louisiana. California and Louisiana both have a one (1) year statute of limitation and the filing of a workmen's compensation claim does not toll or suspend the running of the statute.

In Texas, when we consider all of Borel's testimony, and particularly the admissions about the May, 1964, X-ray examination


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and the doctor's advice to him, we know that he knew and realized that he had sustained some injury as a result of exposures to asbestos dust.

The rule in Texas in either negligence or breach of warranty cases resulting in personal injury is that the cause of action accrues from the time of the negligent act or omission. See cases heretofore cited in Page 3 of the limitation brief.

In Robertson v. Texas & New Orleans Railroad Company, 122 S.W. 2d 1098, err. ref., where a person sustains an injury, though slight, the statute of limitations attaches at once and the running of the statute is not postponed by the fact that substantial damages did not occur until a later date. Cases from other jurisdictions support the rule that plaintiff's cause of action accrues from the date of occurrence, negligence or wrong, even though the disease results long after exposure.

Other jurisdictions expressly hold that in any event the statute of limitation for an exposure which would cause or contribute to cause damage or injury to the body would in any event begin at the termination of employment or the termination date of the exposure. In Borel's case, the statute of limitation would begin as to a particular exposure when he left a particular job on which a particular defendant's product was used. To hold otherwise would result in a rule of law which would make one manufacturer


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liable or responsible for the harmful exposure or damage sustained from exposure to the product of another.

In any event, the statute of limitations would run from May, 1964, when he was told that he had spots on his lungs and this was caused or produced by exposures to asbestos dust in the course of his employment. All claims from exposures prior to this date would have been barred by the Texas two (2) year statute of limitation in May of 1966. Obviously, since he knew that exposures to asbestos dust were harmful to his health, he could not recover for any exposures from and after said date. It must also be remembered that in December, 1964, warnings were placed on the products of one defendant and warnings were likewise placed on the product of this defendant in January, 1966. No warning was necessary since the plaintiff's decedent already knew that exposures to asbestos dust were harmful, but in any event, there could be no recovery for exposures from and after the date of the warning.

Under any theory of limitation or stale demand resulting from injury, the plaintiff's cause of action in this case is barred by limitation. The claim of Borel for workmen's compensation was filed June 4, 1969, and the compromise of this claim was approved by the Industrial Accident Board on July 31, 1969. Any and all claims for damages were barred prior to June 1, 1966, under the


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Texas two (2) year statute of limitation, and the mere fact that plaintiff may have had a claim for workmen's compensation for an occupational disease some three years later did not operate to extend the limitation period. Article 8307, Para. 6(a), Revised Civil Statutes of Texas, does not operate to toll the statute of limitation while a suit against the wrong employer runs its course. Likewise, the pendency of a compensation action which was barred by limitation does not toll the statute of limitation to a common law action. Garza v. Sumrall, Ct. Civ. App. Texas, 267 S.W. 2d 912, writ of error refused.

In conclusion, we submit that the two (2) year statute of limitation in any event begins to run or the cause of action accrues at the time of each exposure and alleged injury. The second alternative would be that the statute of limitation begins to run and the cause of action accrues when his employment for a particular employer during which he was exposed to a particular product, has expired, and last, but not least, the statute of limitation as to all defendants would run in any event from the date the doctor advised him that his lungs were cloudy and that this had resulted from his employment and that he should avoid exposing himself to dust in the course of his employment.

In conclusion, we submit that there are many reasons why the Court should grant the defendants a judgment in this case and


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should grant the judgment notwithstanding any verdict of the jury. In deference to the Court, we have pointed up these matters in order that they might receive the careful consideration of the Court. Defendants respectfully pray that a judgment be entered that the plaintiff take nothing.

Respectfully submitted;

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