IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
OCT 25 1971
JAMES R. COONEY CLERK
BY DEPUTY Margaret Turner

CLARENCE BOREL :

VS. : CIVIL ACTION NO. 6449

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL :

PLAINTIFF'S BRIEF IN REPLY TO DEFENDANTS' BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the plaintiff and replying to the brief submitted on behalf of the defendants, and particularly Fibreboard Corporation, and would say:

1.

The plaintiff takes issue with the fact stated by defendants that this case was submitted under Rule 49-A; however plaintiff says that it is immaterial whether it was or was not.

2.

The Court made clear and explicit instructions on the issue of assumed risk which is the principle complaint discussed in the defendants' brief.

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The Court in its charge as set out on Page 22 (Transcript of the Court's Charge), after discussing the fact that contributory negligence on the part of the deceased would bar recovery even though primary negligence was found against the defendants, went on to charge the jury:

> "Then you must return a verdict in this case against the plaintiff and in favor of the defendants unless, of course, that you should find for the plaintiff on the issue of a breach of implied warranty and strict liability. Also the defendants contend that the deceased, Mr. Borel, knew of the dangerous nature of the asbestos product manufactured by the defendants in connection with his insulation work and appreciated the danger and with such knowledge voluntarily assumed the risk by continuing his employment. Further, that this knowledge of the danger of the insulation was known to Mr. Borel's contractor or employer. Therefore, the Court would instruct you that if you find from a preponderance of the evidence that the deceased knew of the dangerous nature of the asbestos products with which he is working and appreciated the danger of working with such products or that he had knowledge through his contractor of the dangerous nature of the product and that he assumed the risk by continuing his work, then you would find against the plaintiff and in favor of the defendants."

It will, therefore, be seen that the Court clearly instructed the jury on the issue of assumed risk.

In addition, this Honorable Court continued to instruct on the question of implied warranty by saying on Page 23:

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"Now, turning our attentions to the matter of the defenses of the defendants in connection with the implied warranty or strict liability, you are charged that if there is any unreasonable risk or danger from using defendants' products containing asbestos, which risk or danger must be the risk or danger beyond that which would be contemplated by insulation contractor or insulator with the knowledge available to them as to characteristics of the product, such unreasonable risk or danger from using defendants' product must have been reasonably foreseen by the manufacturer. Therefore, if you find from a preponderance of the evidence that Mr. Borel came in contact with the defendants' product and developed asbestosis thereafter and at such time of contract, the product containing asbestos manufactured by the defendants and that the danger of the use of the said asbestos products by Mr. Borel could not have been reasonably foreseen by the manufacturer, then there could be no proximate cause and your verdict would be for the defendants. In other words, there would be no proximate cause of the breach of the warranty or strict liability that would justify your finding in favor of the plaintiff, but you would have to find for the defendants."

Still continuing with instructions on breach of warranty and strict liability, the Court went even further in giving the defensive theories and instructing the jury in connection with implied warranty, beginning on Page 24:

"Accordingly, you are instructed that in the event plaintiff has failed to prove by a preponderance of the evidence the existence of a defect in the product at which time the product was sold and that such defect was the proximate cause of death of Clarence Borel, then you cannot find for the plaintiff on the theory of breach of implied warranty or strict liability and you must return a verdict against the plaintiff and in favor of the defendants."

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The Court did not even stop at this, which plaintiffs say certainly cast the whole charge in a light favorable to the defendants, but even went further and summarized for the jury, beginning on Page 25, and said that if the jury found Mr. Borel guilty of acts or omissions of contributory negligence, then they should not find for the plaintiff on the theory of negligence and if the jury found for the plaintiff on the question of implied warranty or strict liability they would give attention to the question of damages; however, the Court further instructed, on Page 26:

> "On the other hand, if you found on the issue of assumed risk you would find for the defendants or if you found for the defendants on the other instructions which the Court has given you, you would find for the defendants."

Further, the Court after having charged the jury on liability, stated on Page 27:

> "Now, should the facts which you find be favorable for the plaintiff and against the defendants on the question of liability, then it would be your duty to determine the damages which you find from a preponderance of the evidence that the plaintiff is entitled to recover."

This indicates a clear instruction to the jury that they were not to answer the damage issue unless they found facts favorable for the plaintiff and against the defendants under the Court's charge. The jury fid answer the damage

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issue and consequently, it is clear that in doing so, they found in favor of the plaintiff and against the defendants on the breach of warranty issue, and under the Court's instructions as set out above, they must have considered the issue of assumption of risk in favor of the plaintiff.

3.

The only other point raised in the defendants' brief is the question of statutes of limitations. This can have no application in the case at hand, because the deceased did not know he had the occupational disease asbestosis until March 7, 1969; he entered into a compromise and settlement with his employer's workmen's compensation carrier which was approved by the Industrial Accident Board on July 31, 1969, and this suit was filed on October 20, 1969. There is no two-year period intervening anywhere, and giving the defendants' contention the view most favorable to them, there could be no limitation issue in this case.

WHEREFORE, plaintiff prays that the motions filed by defendants be in all things overruled.

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CERTIFICATE OF SERVICE BY MAIL

I, Ward Stephenson, hereby certify that a true and correct copy of the foregoing instrument was on this 21st day of October, 1971, mailed to the following named attorneys:

Mr. Ben L. Reynolds
Mr. Gordon R. Pate
Mr. George E. Duncan
Mr. Robert E. Barnes
Mr. George A. Weller
Mr. John Tucker
Mr. Charles S. Pipkin
Mr. W. N. Arnold, Jr.
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