STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRANK BROWN	)	
	)	
vs.	)	NO. 43633
	)	
JOHNS MANVILLE COMPANY	)	
	)	
a corporation	)	

BRIEF IN ANSWER TO DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S ACTION

I.

CONSTRUCTION OF SECTION 2 OF THE OCCUPATIONAL DISEASE ACT PRIOR TO THE DECISION IN BURNS vs INDUSTRIAL COMMISSION 356, Ill. 602

Kelley v. St. Louis Smelting Co., 397 Ill. 367, speaks for itself and it is quite in accord with the 1st National Bank v. Wedron Silica Co., in the 350 Ill. page 560. Arnell v. Superior Mirror Co., 210 Ill. App. 486 seems to be contra to the Burns decision, and apparently, even though not mentioned in the Burns decision has extended by the latter which is repeated in 356, Ill. 602. While it is true that the subject matter of the Arnell case would fall apparently withing the scope of the Burns case, the rule of law laid down in the Arnell Case has not been overruled so much as it has been extended.

First National Bank v. Wedron Silica Co., 351 Ill. page 560 was decided while the Burns case was pending on appeal before the Supreme Court of Illinois, and in that case the Supreme Court expressly read Section 2 of the Occupational Disease Act, so that three classes of cases were created in exactly the same way, that they described the same in the Burns case; yet the Supreme Court of Illinois went on in the 1st National Bank

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case and expressly stated that silicosis came under Section 1 of the Occupational Disease Act.

The Burns case was not a silicosis case, but one where the proof tended to bring out a nitric Acid and mercuric poisoning. If the Burns decision had intended had intended to overrule the Wedron case, it would seem logical that the Court could at least have mentioned the latter in it's opinion in the Burns case. It would also seem logical that before the Wedron case was decided, the Court having also had the Burns case before it for consideration, would have laid down a different ruld than it had. Certainly the most logical interpretation of these two cases is one of reconciliation. Plaintiff claims that the two cases are reconcilable in that the Wedron case had to do with silicosis and the Burns case with an Acid poisoning. With respects to defendant's argument that arsenic poisoning brings the plaintiff's declaration under Section 2, we can dismiss that with a gesture, by calling the Court's attention to the fact that arsenic poisoning was not alleged in the declaration; and that that may be a matter of defense to be brought out in evidence, rather than a question of law.

In the Burns decision the court attempted to establish the meaning of approximately thirty-one words of Section 2 of the Act by supplying the word "or" at such a place so as to create a third classification of cases, to wit: poisonous chemicals, minerals or other substances. We have at this point two interpretations to choose from. One, that the word poisonous refers only to the word, chemicals; that minerals or other substances are not modified by the word, poisonous. Or second, that the word poisonous modifies all three words, to wit; chemical, mineral and other substances. Now to follow the logical argument that the intention of the Court in the Burns decision was to give

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direct to the law as written in the statute, it would hardly be consistent to make the third classification in Section 2 so broad (by interpretating the word, poisonous to modify only the word, chemical) that it would make inoperative the whole of Section 1 and all of Section 15 a, without declaring both Section 1 and all of Section 15a either unconstitutional or unintelligible. We should then be faced with a proposition that one-third or less of some Section is to be saved from being meaningless at the expense of the whole of Section 15a. We can hardly impute such nonsense to our Supreme Court. We are then forced to the conclusion that the word, poisonous, was meant to modify all of the substances mentioned in third classification of Section 2, or whether it is a non-extra hazardous disease within the purview of Section 1 and 15a, and that, in the plaintiff's opinion is a question of fact. As a matter of construction of the English language, it would be redundant to insert the word poisonous before each of the words which it modifies, and for that reason the statute to be construed properly must refer the word poisonous chemicals, minerals, other substances. It would seem from reading the Act that exposure to the more toxic substances referred to in Section 2 was recognized by the legislature in framing the Occupational Disease Act as requiring immediate attention. We need only to refer to the law of the Supreme Court in the Case of Madison v. Ozark Silica Co., in the 6-2nd Ill. which stated that silicosis develops over a long period of time and creeps upon its victim unaware. In counsel's brief are arguments that are really questions of facts and not questions of law. What medical authorities agree upon or disagree upon, cannot be argued as matters of law. Counsel cites authority to the effect that silicosis being harmful, then necessarily must be poisonous. Whether or not silica inhaled into the lungs in particles of various sizes is poisonous

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is yet only a theory unsubstantiated by any proof; all medical authorities are agreed that silica taken into the alimentary canal is probably harmless and certainly not poisonous,,whereas the mechanical irritation of silica or any dust is a proven fact. In support of the poison theory, defendant quotes various law Dictionary to the effect that any substance taken into the living organisms is capable of causing impairment or cessation of function, is a poison. If we were to give as broad a meaning to the term poison as the word implies, we should be faced with the proposition that drowning is a poison since it is common knowledge that water when taken in to the (living Organisms) lungs causes a cessation of function resulting in death. Or, perhaps did the expression "when taken into the living organisms" refer to introduction of substances into the alimentary canal. The very word poison comes from the latin word, meaning "to drink" or "potion" and to the ordinary layman means something taken into the system through the alimentary canal or injected into the blood system. Since pneumoconiosis or silicosis is not contracted through injections or through the alimentary canal, we are forced to the conclusion that it is not a poison and does not cause a poisoning of the human body and with apologies to the Court, plaintiff again submits, is this not a question of fact rather than a question of law. We must, in view of the persistency of the defendant's counsel to confound the word "injurious" with the word "poisonous", call once more to the attention of the Court that injurious is not a synonym for poisonous.

In view of the foregoing, plaintiff submits that the defendant's motion to dismiss should be denied and that the defendant be required to plead further.

Respectively submitted,

Abe Brodkin

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