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UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ILLINOIS } ss.
EASTERN DIVISION

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

FRANK BROWN
vs. No. 43633
JOHNS-MANVILLE CORPORATION,
a corporation.

ANSWER OF JOHNS-MANVILLE CORPORATION,
A CORPORATION

JOHNS-MANVILLE CORPORATION, a corporation, by Ruth & Lister, its attorneys, answering the complaint of the plaintiff in this action:

1. Denies that on the dates and occasions in plaintiff's complaint set forth, defendant did business in Waukegan, Lake County, Illinois, or owned or operated the factory, mill, or establishment alleged, or that plaintiff was employed by or worked for defendant.

2. Denies that any fumes, gases, or dusts arose from any work done or process operated by plaintiff, or that plaintiff was exposed to the inhalation of any fumes, gases, or dusts.

3. Denies that defendant knew, or should have known, that the inhalation of any dusts, fumes, or gases to which plaintiff is alleged to have been exposed was apt to

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or did produce illness or disease to the plaintiff of which the plaintiff now complains, or that any such illness or disease is, or was peculiar to the work or operations carried on or used in said business, or that any such work or operation subjected plaintiff to dangers of illness or disease incident to such work or process to which employees were, or are, not ordinarily exposed in other lines of employment.

4. Denies that the plaintiff was caused to or did, during the time in the plaintiff's complaint alleged, or any other time, necessarily, or otherwise, inhale large quantities of asbestos dust, fibre dust, sand dust, or cement dust, or any other dusts through his nose, mouth, or otherwise, or that any such dusts became lodged in plaintiff's throat or lungs, or caused any illness or disease in plaintiff, and further denies that plaintiff was in the exercise of due care and caution for his own personal health and safety.

5. Denies that plaintiff was exposed to various fumes, gases, or dusts of dangerous character, or that any such exposure could or would result in any illness or disease.

6. Denies that plaintiff has contracted pneumonoconiosis or tuberculosis, or that as a result of any occupational disease or other illness arising out of his work, plaintiff has lost weight, or has been incapacitated or weakened so that he cannot perform any work for which he is fitted or that plaintiff has suffered mental or physical

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pain or anguish, or will continue to suffer such, for any length of time, or that plaintiff has become liable for, or expended, any sums of money in and about endeavoring to be cured, or has been kept from his usual occupation, or lost pecuniary gains which he might have made had he been employed, by reason of any such occupational disease or illness arising out of his employment.

7. Denies that defendant wilfully failed to provide reasonable or approved devices, methods, or means for the prevention of occupational disease incident to such employment; denies that there were in and about said factory, no proper suction fans or other apparatus provided for collecting fumes, gases, or dusts in the room in said factory where plaintiff was employed, or that defendant failed to provide masks or respirators, or other apparatus to be used or worn by the plaintiff to protect him from inhaling any fumes, gases, or dusts in the air.

8. Denies that defendant negligently failed to remove, so far as practicable, by either ventilation or exhaust devices, any injurious fumes, gases, or dusts in the room in which plaintiff worked, contrary to statute.

9. Denies that it negligently caused or permitted [illegible] to be in the air as to make dust contrary to statute.

10. Denies that plaintiff sustained damage in the sum of Fifty Thousand ($50,000) Dollars, or any sum whatsoever.

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FIRST AFFIRMATIVE DEFENSE

11. That there is and was, during all of the time in plaintiff's complaint alleged, in full force and effect, a certain statutory provision, namely, "An Act to Promote Public Health by Protecting Certain Employees in this State from the Dangers of Occupational Diseases, and providing for the enforcement thereof." (Callaghan's Illinois Statutes Annotated, Chapter 48, paragraphs 185-200) in Section 2 of which certain classes of industries were listed, viz:

> (1) Employers engaged in carrying on any process of manufacture or labor in which sugar of lead, white lead, lead chromate, litharge, red lead, arsenate of lead or paris green are employed, used or handled,
>
> (2) Employers engaged in the manufacture of brass or the smelting of lead or zinc,
>
> (3) Employers engaged in any process of manufacture in which poisonous chemicals, minerals, or other substances are used or handled by the employees therein in harmful quantities or under harmful conditions,

and that in and by Section 15, subdivision B-4 of said Act it is provided that no common law or statutory right to recover damages for injury or death exists in favor of any employee by reason of an occupational disease arising out of or in the course of his employment in one or more of the occupations referred to in Section 2 of said Act.

12. That if, as alleged in plaintiff's complaint, the various substances alleged to have been handled by plaintiff gave off various fumes, gases, and dusts in harmful quantities, and which were inhaled by plaintiff and caused

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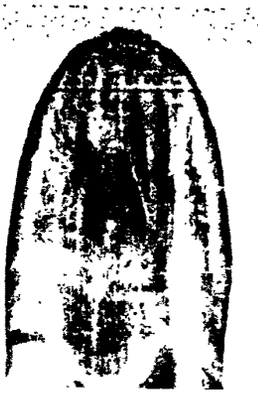
the illnesses and diseases claimed by plaintiff, then it appears that plaintiff sues for disability due to diseases incurred in a process of manufacture or labor in which poisonous chemicals, minerals, or other substances are used or handled by the employees therein in harmful quantities or under harmful conditions, and that no common law or statutory right of action accrues to the plaintiff by reason of the injuries in plaintiff's complaint alleged.

SECOND AFFIRMATIVE DEFENSE

13. That there is and was, during all of the time in plaintiff's complaint alleged, in full force and effect, a certain statutory provision, namely, "An Act to Promote Public Health by Protecting Certain Employees in this State from the Danger of Occupational Diseases, and providing for the enforcement thereof," (Callaghan's Illinois Statutes Annotated, Chapter 48, paragraphs 185-200) in Section 2 of which certain classes of industries were listed, viz:

> (1) Employers engaged in carrying on any process of manufacture or labor in which sugar of lead, white lead, lead chromate, litharge, red lead, arseniate of lead or paris green are employed, used or handled,
>
> (2) Employers engaged in the manufacture of brass or the smelting of lead or zinc,
>
> (3) Employers engaged in any process of manufacture in which poisonous chemicals, minerals, or other substances are used or handled by the employees therein in harmful quantities or under harmful conditions,

and that in and by Section 15, subdivision B-4 of said Act it is provided that no common law or statutory right to recover damages for injury or death exists in favor of any employee



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by reason of an occupational disease arising out of or in the course of his employment in one or more of the occupations referred to in Section 2 of said Act.

14. That in said factory, located at Waukegan, Illinois, wherein plaintiff is alleged to have been employed, there was used in the manufacturing processes carried on therein, certain substances named in said Section 2 of said Occupational Disease Act, viz: lead chromate and litharge, wherefore plaintiff's employer was engaged in processes of manufacture in which lead chromate and litharge were employed, used, and handled, and no common law or statutory right of action exists in favor of the plaintiff herein for the occupational diseases alleged to have been contracted by the plaintiff.

THIRD AFFIRMATIVE DEFENSE

15. That Section 1 of said "Act to Promote Public Health by Protecting Certain Employees in this State from the Dangers of Occupational Diseases, and providing for the enforcement thereof," (Par. 165, Chapter 48, Callaghan's Illinois Statutes Annotated) is in violation of the Fourteenth Amendment to the Constitution of the United States, and Section 2 of Article II and Article III of the Constitution of the State of Illinois, in that

(A) Said Section is so vague, indefinite, and uncertain that an employer may not reasonably know whether he is engaged in a work or process within its provisions, or what illnesses or diseases are peculiar to the work carried on and to which employees are not ordinarily exposed in other lines of employment; that no standard of approval is provided

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STATE OF ILLINOIS)
) ss
COUNTY OF COOK)

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

FRANK BROWN)
)
vs) NO. 13643
)
JOHNS-MANVILLE CORPORATION)
)
A CORPORATION)

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

Received a copy of the within brief this 2nd day of
October, 1934 at 11:15 O'Clock A. M.

Heth & Lister

ATTORNEYS FOR DEFENDANT

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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 reconcilation. Plaintiff claims that the two cases are reconcilible 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

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 could even 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. Wedron Silica Co., in the 6-2nd Ill. which stated that silicosis develops over a long period of time and creeps upon its victim unawares. 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 Bouvier's 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,

Joe Dorsey

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UNITED STATES OF AMERICA
STATE OF I L L I N O I S } ss.

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

FRANK BROWN

vs. No. 43633.

JOHNS-MANVILLE CORPORATION,
a corporation.

MEMORANDUM OF POINTS AND AUTHORITIES ON DEFENDANT'S MOTION TO DISMISS

Plaintiff sues for the alleged contraction of the occupational diseases known as pneumoconiosis and tuberculosis, as a result of inhaling dangerous and deleterious dusts.

In a very recent decision, Burns v. The Industrial Commission, 356 Ill. 602, the Supreme Court of Illinois reinterprets Section 2 of the Illinois Occupational Diseases Act, and creates a third class of employments which are subject to the provisions of Section 2 of said Occupational Diseases Act: namely those "engaged in any process of manufacture or labor in which poisonous chemicals, minerals, or other substances are used or handled by the employees therein in harmful quantities or under harmful conditions." The test of liability in this newly designated third class would seem to be whether the disability arises from the use of

1.

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"poisonous chemicals, minerals, or other substances."

Bouvier's Law Dictionary defines poison to be "any substance, which, when taken into the living organism, is capable of causing impairment or cessation of function."

Stedman's Medical Dictionary defines poison to be "any substance which, when taken into the body, is injurious to health and dangerous to life."

The substances alleged to have been handled by plaintiff, and to which he was exposed, and designated by him in his said complaint to be "dangerous" and "deleterious to the health of human beings" certainly bring themselves within the classification of "capable of causing impairment or cessation of function," particularly in the light of the illnesses and diseases which the plaintiff says they caused.

Paragraph (b) of Section 15 of the Occupational Diseases Act (paragraph 199 of Chapter 48 of Callaghan's Illinois Statutes, Annotated) provides:

> This subdivision (b) of this section shall apply automatically and without election to all employees and employers engaged in the occupations referred to in section 2 of this Act. No common law or statutory right to recover damages for injury or death sustained by any employee by reason of an occupational disease arising out of and in the course of his employment in one or more of the occupations referred to in section 2 of this Act, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this subdivision (b) of this section, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury. The compensation herein provided, together with the provisions of this subdivision (b) of this section, shall be the full, complete and only measure of responsibility of any employer engaged in any of the occupations referred to in section 2 of this Act.

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Defendant therefore urges that it appears from said complaint that plaintiff sues for disability due to alleged occupational disease incurred in "process of manufacture or labor in which poisonous chemicals, minerals, or other substances are used or handled by the employees thereof in harmful quantities or under harmful conditions," as provided in Section 2 of the Occupational Diseases Act of the State of Illinois; and that under the provisions of Section 15 of said Act, no common law or statutory right of action accrues to the plaintiff by reason of the injuries in plaintiff's complaint alleged.

Defendant therefore respectfully submits that said complaint should be dismissed.

Attorneys for Defendant.

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STATE OF ILLINOIS)
) ss
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY

FRANK BROWN)
)
vs) NO. 34C 6265
)
JOHNS MANVILLE CORPORATION,)
A CORPORATION)

COMPLAINT AT LAW

COUNT I

The plaintiff, FRANK BROWN, by his attorney, SOL ROSENBERG, complains of the defendant, JOHNS MANVILLE CORPORATION, a corporation, and says:

1. That on or about the 30th day of June, A. D. 1932, the defendant, JOHNS MANVILLE CORPORATION, a corporation, was a duly organized and authorized corporation, doing business in the State of Illinois, County of Lake, and City of Waukegan, at which time and place, it owned, operated, and maintained a factory, mill, or establishment for the purpose of manufacturing asbestos in its various forms.

2. That the said defendant, in its factory, owned and operated a certain department known as the construction gang in which sand was shoveled into pits and cement was dumped out of trucks; that the said defendant also owned and operated another department known as the receiving gang, in which asbestos, fibre, and cement were shoveled into trucks; that during the course of work in both the aforesaid department sets, a great deal of sand dust, cement dust, asbestos dust, and fibre dust were caused to and did impregnate the air in such great quantities as to

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be greatly deleterious to the health of human beings.

3. That on the aforesaid day and at the time and place aforesaid, he was in the employ of the said defendant and worked in the construction gang, shoveling sand into piles and dumping cement out of trucks; that he also worked in the receiving gang, shoveling asbestos, fibre, and cement into trucks; that during the course of his employment by said defendant, he was exposed and subjected to a great deal of the aforesaid dusts circulating in and about the said departments.

4. That in the carrying on of the said business by the defendant as the same was being conducted and for many years prior thereto had been carried on, the defendant knew and by the exercise of due care and caution should have known that the same was apt to and did produce the illness and disease in the plaintiff, of which the plaintiff now complains, which illness and disease is peculiar to such work and process of carrying on said business, to which employees were and are not ordinarily exposed in other lines of employment.

5. That the plaintiff was caused to and did, during the period aforesaid, necessarily breathe in large quantities of asbestos dust, fibre dust, sand dust, and cement dust through his nose and mouth and said dusts became lodged in his throat and lungs, causing the illnesses hereinafter complained of, while the plaintiff was in the exercise of due care and caution for his own personal health and safety.

6. That the plaintiff was in entire ignorance of the dangerous character of the various dusts to which he was exposed, and to the specific nature of the disease or diseases that would or could result from the inhalation of

the aforesaid dusts, and was never, at any time, informed by any agent of the defendant of the fact that such danger did or could possibly exist.

7. That at and during the aforesaid time and place, the defendant did one or other of the following acts, thereby causing the plaintiff to contract and succumb to the occupational diseases known as pneumoconiosis and tuberculosis, as a result whereof, he has lost considerable weight; he has been incapacitated and weakened so that he has been prevented from attending to his usual occupation and business, and he has suffered great mental and physical pain and anguish and will continue so to suffer for the rest of his life; he has become liable for and expended large sums of money in and about endeavoring to be cured of his illnesses as aforesaid; he has been prevented and hindered from attending to his usual occupation and business whereby he has lost divers great gains and profits and will continue to lose divers great gains and profits.

(a) wilfully failed to provide reasonable and approved devices, methods, or means for the prevention of said diseases, contrary to the provisions of Section I of and Act entitled, "An Act to Promote the Public Health by Protecting Certain Employees in this State from the Dangers of Occupational Diseases", and providing for the enforcement thereof, in this that there were, in and about the said premises, no proper suction fans or other apparatus provided for collecting the injurious dusts in the air in and about the said premises where plaintiff worked; that the defendant failed to provide masks or respirators or other apparatus to be used or worn by said plaintiff which would effectively prevent his from inhaling the said dusts caused to impregnate and float in the air in and about the said premises as pro-

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vided by the said statute, and which would effectively prevent him from contracting the diseases herein complained of.

(b) negligently failed to remove as far as practicable, by either ventilating or exhaust devices, the aforesaid injurious dusts from the premises in which the plaintiff worked, contrary to Section 12 of an Act concerning the health and safety of employees in factories, mercantile establishments, mills, and workshops in the State of Illinois.

(c) negligently caused and permitted the premises to be swept so as to raise asbestos dust, fibre dust, sand dust, and cement dust, contrary to Section 15 of an Act concerning the health and safety of employees in factories, mercantile establishments, mills, and workshops.

Plaintiff asks judgment for Fifty Thousand Dollars ($50,000).

Sol Andrews
ATTORNEY FOR PLAINTIFF

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Be it remembered that heretofore, to-wit, on the 18th

day of June A. D. 1934, a certain

Complaint was filed in the office of the Clerk of said

Court, in words and figures following, to-wit:

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