FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JAN 23 1970
JAMES R. COONEY, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

SAMUEL R. POTTER

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

CIVIL ACTION NO. 6329

REPLY OF THE DEFENDANTS, FIBREBOARD CORPORATION, ET AL, TO MOTION OF PLAINTIFF TO TAKE ANSWERS TO CERTAIN WRITTEN INTERROGATORIES AS CONFESSED

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW the defendants, Fibreboard Corporation and Pittsburgh-Corning Corporation, for and on behalf of themselves and the remaining defendants in this case, and file this, their reply to the plaintiff's motion to take answers to certain written interrogatories as confessed, and as grounds for said reply would show the Court:

1.

Rule 33, Federal Rules of Civil Procedure, expressly provides that a defendant may object to certain interrogatories within the time provided by the rule or within the time as extended. The rule provides: "Answers to interrogatories to which objection is made shall be deferred until the objections are determined." No determination has been made by the Court on the defendants' objections to the interrogatories. Defendants, Fibreboard Corporation and Pittsburgh-Corning Corporation, as well as other defendants, have filed objections, some of which are similar in nature, and we submit herewith an order to the Court sustaining these objections. Rule 37 (a) of the Federal Rules of Civil Procedure provides that the proper procedure, where an

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interrogatory has not been answered, and if answer is required, is for the plaintiff to file a motion to require an answer thereto. No application has been filed by the plaintiff to require the defendants, or either of them, to file an answer to any specific interrogatory.

2.

Defendants submit that Interrogatory No. 2 is subject to the objection that it was argumentative. The question assumes that each and all of the products manufactured by the defendants are dangerous in nature. Each of the defendants have objected to the interrogatory on the basis that it is argumentative. They have denied that the products manufactured by them are of a dangerous nature and have stated that their products are suitable and reasonably fit for the purpose for which the products were intended. This will certainly be one of the strongly contested issues in this case, and for the Court to make a ruling that the defendants' answers are evasive and unresponsive would be an attempt to decide the ultimate factual and legal issue in this case.

Interrogatories going to the ultimate issues of the case have been pronounced objectionable. Porter vs. Montaldo's, 71 Fed. Supp. 372; Tudor vs. Leslie, 4 Federal Rules Service 33.324, Case 1, 1 Federal Rules Decision, F.R.D. 448; Cyclopedia Federal Procedure, 3rd Edition, Vol. 7, Page 453. Many cases can be cited for the proposition that the interrogated party is not required to give opinions, contentions as to matters of law or conclusions,or to make research and compilation of information not readily known to him. Thus, it has been held that interrogatories may not call for conclusions of law and that discovery

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should not be extended to any elaboration of explanation and comparison. See Federal Practice and Procedure, Rules Edition, Barron and Holtzoff, Vol. 2A, Para. 768, Page 308, and the cases cited under Note 84. Interrogatories have been held improper as calling for opinions, contentions or conclusions which include the qualifications of a party and the nature and cause of the unsafe condition of machinery, etc. Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Vol. 2A, Page 311. Interrogatories which require determination by a party of a question of law are often held improper, as to whether the party is required to decide what evidence will be relevant, or state his conception of the law as applied to the particular facts, or indicate on what legal principles he will rely. Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, Page 313, and the cases cited in the text.

The plaintiff misconceives his remedy in requesting this Court to deem the answers to such interrogatory to be taken as confessed. (Rule 37, supra). It would be an abuse of the discovery procedures for this Court to allow such matters to be taken as confessed since the only manner in which this may be accomplished is under Rule 36, Federal Rules of Civil Procedure, wherein a party has served a written request for the admission of a relevant matter of fact and the other party has wholly failed and refused to answer same.

3.

With reference to plaintiff's motion concerning Interrogatory No. 7, defendants submit that their objection that this interrogatory is argumentative, ambiguous, unintelligible and irrelevant to the issues in the case, is a good objection. The

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defendants qualified the objection by stating that if it be assumed that the word "use" is utilized in its normal usage, defendants answer the interrogatory "no." The interrogatory in the first place calls for an opinion and conclusion and it is contrary to all of the contentions of the defendants in this case. The plaintiff in this case does not even contend that he has dermatitis, and I think it is established without question that the use of products containing asbestos does not cause dermatitis.

4.

With reference to plaintiff's motion concerning Interrogatory No. 9 and the defendants' answer, the objection made by the defendants is valid in that the interrogatory is vague, ambiguous and unintelligible. The defendant, Fibreboard Corporation, answered the interrogatory with an unqualified no. The remaining defendants stated that if the question assumes that plaintiff means that the studies inquired about are concerned with the product after it left the defendant's manufacturing plant, the answer was an unqualified no. There is no basis in the rules which would permit the Court to decree that a yes answer was given when an unqualified no was given to the interrogatory. Additionally, the plaintiff again misconstrues his remedy, in that if the objections are overruled, then the defendants should have an opportunity to answer the interrogatory, as is provided in Rule 33.

5.

With reference to the motion concerning Interrogatories Nos. 11 and 12, the objection that the question was argumentative, ambiguous, irrelevant and immaterial is valid. The plaintiff's

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attorney recites a finding by a physician in London and asks if the defendants agree with his finding. Interrogatory No. 12 refers to a report of a Dr. W. E. Cook, in 1924, to the effect that he found clear evidence of asbestosis and that this discovery was published in a British medical journal. The objection that this question was argumentative, ambiguous, irrelevant and immaterial is a good objection. Generally, interrogatories have been deemed improper, so that they need not be answered, where they call for opinions; conclusions, including conclusions of law; contentions; comparisons, or explanations. The object of interrogatories is the ascertainment of facts and not opinions, conclusions or contentions, or the like; and interrogatories should be limited accordingly. Cyclopedia of Federal Procedure, 3rd Edition, Vol. 7, Para. 25.447, Page 450. Many cases can be cited for the proposition that the interrogated party is not required to give opinions, contentions as to matters of law or conclusions, or to make research and compilation of information not readily known to him. See Federal Practice and Procedure, Rules Edition, Barron and Holtzoff, Para. 768, Page 308; Liquidometer Corporation vs. Capital Air Lines, Inc., 2 F.R.S. (2d) 33.319, Case 1, 24 Federal Rules Decision 319, District Court Delaware, 1959. Another test is whether the answer to this question would serve any substantial purpose. Taylor vs. Sound S.S. Lines, 100 Fed. Supp., 388, 389.

6.

With reference to plaintiff's motion as to Interrogatory No. 13, inquiring as to whether the defendant recognizes that in 1931 the English Parliment passed legislation making asbestosis

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a compensable disease, etc., we submit that the objection that this interrogatory is argumentative, ambiguous, irrelevant and immaterial is a valid objection. Further, this interrogatory inquires as to the existence of a law and the interpretation thereof. It applies to the asbestos textile factories and not to the conditions which are alleged to exist insofar as the plaintiff, a field insulation applicator, is concerned.

Rule 33 should not be construed to require counsel for defendant to do legal research for plaintiff's counsel. Kluchenac vs. Osward and Hess, 20 F.R.D. 87, and Federal Practice and Procedure, Rules Edition, Barron and Holtzoff, Para. 768, Page 308.

7.

Reference is made to Interrogatories Nos. 16, 17 and 19 and the objections thereto. Defendants object to Interrogatory No. 16 on the grounds that it is irrelevant and immaterial, in that plaintiff does not claim that he has lung cancer. No. 17 is objected to for the same reason and that plaintiff does not contend he has the disease of mesothelioma, and in Interrogatory No. 19 the objections are the same, in that plaintiff does not contend that he has the disease of cor pulmonale.

The objection should be sustained. The question calls for medical opinion which is highly controversial, and further, the plaintiff has not complied with Rules 33 and 37. If the defendants' objections are overruled, then the defendants should have the opportunity to answer said interrogatories, and in this connection, the answer would be "no" to Interrogatories Nos. 16, 17 and 19.

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8.

With reference to Interrogatory No. 26, defendants submit that the interrogatory is ambiguous in that the "problem" is not defined, and further, the question is argumentative, irrelevant and immaterial. Defendants do not recognize that the same problem which confronts an asbestos worker working in the application of products containing asbestos is the same as the exposure of other construction workers. The plaintiff's motion does not comply with Rule 33 or Rule 37 and the Court would be disregarding the rules if each and all of the defendants would be decreed as having given a "yes" answer to such interrogatories. Further, it calls for an opinion and conclusion, which is not required under Rule 33. Usually, interrogatories under Rule 33 are to be limited to matters of fact within the personal knowledge of the party interrogated. An interrogated party is not required to give opinions, contentions as to matters of law, conclusions, or to make research.

9.

The same argument is made as to Interrogatory No. 28 and the attempt of the plaintiff to ask the Court to decree a "yes" answer to the interrogatory. The defendant, Fibreboard, objected to this interrogatory on the basis that it assumed a fact which was not in evidence and the "problem of asbestos dust" is ambiguous and not defined, and it is argumentative, irrelevant and immaterial. This objection is good. The interrogatory and the motion seeks to decree a "yes" answer to an interrogatory to which an objection was directed, and if these defendants were required to make an answer to this rather vague and indefinite interrogatory, the answer would be "no."

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10.

With reference to Interrogatory No. 33 and the motion to call the answers evasive and unresponsive, these defendants submit that the defendants' answers to this interrogatory is a valid and responsive answer. Just because the plaintiff did not get an answer which he wanted, he seeks to place a strict interpretation on his interrogatory and the defendants' answers thereto. The plaintiff's motion as to Interrogatory No. 33 should be overruled. Reference is also made to the plaintiff's motion for discovery on the matter of a respirator which has been fully answered, in that the defendants do not make respirators or have possession of such, except where they go out and buy them on the open market.

11.

With reference to Interrogatories Nos. 47 through 84, the defendants properly objected to these questions as calling for conclusions and opinions on questions of law. Interrogatories calling for opinions and conclusions of law are objectionable. See Federal Practice and Procedure, Rules Edition, Barron and Holtzoff, Vol. 2A, Para. 768, Page 309; and Kluchenac vs. Osward and Hess, 20 F.R.D. 87.

12.

In conclusion, the defendants recognize that the Court has a broad discretion in considering objections to interrogatories and in determining whether they must be answered. We submit that the plaintiff in this case has not followed the correct procedure prescribed under Rules 33 and 37. The defendants' objections to certain interrogatories have not been overruled. When they are overruled, the defendants, under the rule, have an opportunity

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to file their answers thereto. Medical opinion in this case will be diverse and the opinions will be directly adverse, one to the other, both as to the plaintiff's alleged condition and its cause or causes and as to the effect of asbestos dust, etc. Just because some person may have researched the matter or have written a paper on a particular subject does not make it fact, and these defendants should not be required to express an opinion and conclusion based upon some research paper or report, the validity of which depends not only on the depth of the researcher but on the qualifications of the researcher. We respectfully submit that the plaintiff's motion should in all things be overruled.

Respectfully submitted;

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I certify that a copy of the foregoing reply of the defendants, Fibreboard Corporation, et al, to motion of plaintiff to take answers to certain written interrogatories as confessed was served on Mr. Ward Stephenson, Stephenson Building, Orange, Texas, by mailing a copy to said address on the 22nd day of January, 1970.

_____
OF COUNSEL

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