IN THE UNITED STATES DISTRICT COURT

FOR THE

EASTERN DIVISION OF TEXAS - BEAUMONT DIVISION

SAMUEL R. POTTER, §
§
Plaintiff, §
§
V. § CIVIL ACTION NO. 6329
§
FIBREBOARD PAPER PRODUCTS §
CORPORATION, ET AL, §
§
Defendants.

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUN 24 1970
JAMES R. GOONEY, CLERK
BY DEPUTY Margaret Driver

FIRST AMENDED ANSWER OF DEFENDANT ARMSTRONG CORK COMPANY TO PLAINTIFF'S SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Armstrong Cork Company and for answer to plaintiff's second amended original complaint served herein on it on February 24, 1970, says:

FIRST DEFENSE

Your defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of plaintiff's second amended original complaint. If the domicile and place of incorporation of the various defendants are correctly alleged, then your defendant admits that the Court has jurisdiction based upon diversity of citizenship of the parties hereto.

2. It is admitted by your defendant that the claim asserted by the plaintiff herein exceeds the jurisdictional amount of this Honorable Court.

3. Your defendant has no knowledge or information concerning the residence of the plaintiff, and therefore neither admits nor denies the same.

4. Your defendant admits that it has engaged in the manufacture of some materials used for pipe insulation which contain some asbestos. Your defendant, however,

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denies that the insulation products manufactured by it are placed on the market to be purchased and used by the general public. On the contrary, your defendant sells its product to insulation contractors who purportedly employ experienced insulation workers in the application of the product.

5. With respect to the allegations of paragraph 5 your defendant says that it is without knowledge or information as to the employment by plaintiff as an insulator between the years 1940 to 1967. It denies all of the remaining allegations of said paragraph 5.

6. Your defendant denies the allegations in paragraph 6 of the complaint.

7. With respect to the allegations of paragraph 7 your defendant denies that any injury or damage complained of by the plaintiff was directly or proximately caused by any negligence or carelessness of this defendant. It likewise denies the allegations of sub-paragraph a, b, c, d and 3 of paragraph 7.

8. Your defendant denies the allegations of paragraph 8 as well as sub-paragraphs a, b, c, and d thereof.

8a. Your defendant denies each and all of the allegations contained in paragraph 8-a, and it denies that the theory of strict liability is applicable to the facts alleged in plaintiff's second amended original complaint.

9. Your defendant denies the allegations of paragraph 9. Your defendant further says that the doctrine of res ipsa loquitur has no application to the case at bar under the facts alleged by the plaintiff.

10. With respect to the allegations of paragraph 10 of the complaint your defendant denies that the plaintiff sustained any injury as a result of any act of

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omission on the part of your defendant, and denies that the plaintiff was injured as a result of any breach of warranty of your defendant and denies the breach of any implied warranty or duty to the plaintiff. Your defendant has no knowledge or information as to the cause or causes of plaintiff's alleged disability, if any, and this defendant specifically denies that any such injury was the result of any breach of duty owing by your defendant to the plaintiff, or was proximately caused by any act or omission on your defendant's part.

11. Your defendant denies the allegations of paragraph 11 of the complaint.

12. Your defendant denies the allegations of paragraph 12 of the complaint.

13. Your defendant denies the allegations of paragraph 13 of the complaint.

14. Your defendant denies the allegations of paragraph 14 of the complaint. Your defendant further denies that any cause of action exists for gross negligence under the allegations as set forth in plaintiff's second amended complaint.

15. Your defendant denies the allegations of paragraph 15 of the complaint.

FIRST AFFIRMATIVE DEFENSE

Your defendant specially denies that the plaintiff herein sustained any injury as a result of contact with or by virtue of the use of any product manufactured by your defendant.

SECOND AFFIRMATIVE DEFENSE

Your defendant alleges and would show unto the Court that all of the products which your defendant manufactured and sold were at all times reasonably fit and

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and suitable for the purposes for which they were manufactured and sold, and your defendant expressly denies that the same were in anywise defective for the use for which they were manufactured.

THIRD AFFIRMATIVE DEFENSE

Your defendant would show to the Court that if the plaintiff sustained any injury as a result of the use of any product manufactured by your defendant, which is not admitted, but expressly denied, then that such injury was sustained as a result of the occupation of the plaintiff, in that the plaintiff herein had been engaged as an insulator or worker in the field of insulation for a vast number of years, and at all times during such period of employment, the plaintiff himself knew that he was working in dust-laden air which contained asbestos dust, as well as other dust particles, part of which were created by his own work, or the work of his co-employees, and also by virtue of the failure of his employer at the time, or the owner of the premises on which he was working, to provide facilities for the elimination of dust-laden air, and therefore any such injury as he may have sustained was from an occupational disease resulting from his long continued occupation as an insulator, and not as a result of any isolated incident or contact with any product manufactured by your defendant. And in this connection your defendant further alleges that it is not liable at law, nor is it responsible for any occupational disease which was suffered or sustained by the plaintiff in the course of his employment with various contractors over a number of years.

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FOURTH AFFIRMATIVE DEFENSE

Your defendant further says that any product or products which it manufactured and sold for insulation purposes in no manner caused or brought about any injury or illness to the plaintiff, and your defendant says that the physical conditions of which your plaintiff now complains were in nowise caused or brought about by any product manufactured or sold by your defendant, but on the contrary such condition was due solely to disease and other causes or to the acts and omissions of third persons as well as the acts of the plaintiff himself.

FIFTH AFFIRMATIVE DEFENSE

Your defendant avers and alleges that the plaintiff himself was guilty of various acts, wrongs, and omissions, each and all of which amounted to negligence in the performance of his work and occupation, which acts together or separately were a proximate cause of his alleged injury, in that the plaintiff failed to use and utilize any safety device such as masks or respirators for breathing; that he failed to request the use of such masks and respirators; that he failed to request his employer to furnish blowers and other equipment to remove the dust-laden air; that he worked in dust-laden air with full knowledge that he was inhaling such dust-laden air; that he continued to work with insulating materials containing some asbestos after he knew, or in the exercise of ordinary care should have known, that it was affecting his health.

SIXTH AFFIRMATIVE DEFENSE

Your defendant says that if the plaintiff sustained any injury as the use of any material or product manufactured by your defendant, which is denied, the danger, if any, arising from the continued use of such

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material was open and obvious and was well known to the plaintiff, or should have been known to him, but nevertheless he continued to work as an insulator and continued to subject himself to air which was laden with dust from insulation material.

In the alternative, if any danger existed which was not open and obvious or apparent to the plaintiff at all times, then he knew at all times of the dangers involved with insulation materials containing some asbestos and in working in dust-laden air where insulation materials were in use.

And notwithstanding this fact he continued to use and work with such materials and under such conditions with such knowledge, and therefore your defendant owed him no duty to warn of any potential dangers that might be involved and plaintiff therefore is barred from any recovery under the theory of volenta non fit injuria.

SEVENTH AFFIRMATIVE DEFENSE

Your defendant further alleges that if the defendant did sustain any injury as the result of the use of any product manufactured by your defendant, which is not admitted but expressly denied, that then and in that event such act occurred more than two years prior to the filing of this suit against your defendant on February 18, 1970, and such cause of action was and is barred by the two-year statute of limitations of the State of Texas, to wit, Article 5526, Revised Civil Statutes of Texas, and this defendant pleads the same in bar to this action.

Further, your defendant says that if the plaintiff sustained any injury as the result of the use of any product manufactured by your defendant in any other states of the Union, then your defendant says that

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each and all of the statutes of limitation as to said alleged cause of action, were under the laws of the State of Texas, or under the laws of any state where such alleged cause of action arose, constitutes a bar to plaintiff's cause of action herein.

EIGHTH AFFIRMATIVE DEFENSE

Your defendant says that if the defendant sustained any injury as a result of the use of a product manufactured by your defendant which is denied, then such occurred four years prior to the filing of this suit against your defendant on February 18, 1970, and such cause of action is barred by the four-year statute of the State of Texas, to wit, Article 5529, Revised Civil Statutes of Texas, and this defendant pleads the same in bar to this action.

NINTH AFFIRMATIVE DEFENSE

Your defendant says that if the plaintiff sustained any injury while working in the State of California as a result of the use of any product or products manufactured by your defendant, which is expressly denied, then any such action for personal injury occurring in the State of California accrued more than one year prior to the filing of this suit against your defendant on February 18, 1970, and such alleged cause of action is barred by the one-year statute of limitations of the State of California, Code of Civil Procedure §340, Sub-Division 3, which fixes the time within which an action for personal injury must be filed at one year, and therefore, any cause of action for personal injury occurring in the State of California is barred by the one-year statute of limitations of the State of California.

And, in this connection, your defendant would further show that the law of the State of California is that

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the one-year statute of limitations on a cause of action for personal injury against a third party is not tolled while an injured employee pursues his workmen's compensation remedy. State Comp Insurance Fund v. Matulich, 55 California Appeals 2d, 528, 131 P.2d 21.

TENTH AFFIRMATIVE DEFENSE

Your defendant further says that if the plaintiff sustained any injury in the State of Louisiana as a result of the use of any product or products manufactured by your defendant, which is expressly denied, that any such cause of action for personal injuries occurring in the State of Louisiana is barred by the one-year statute of limitations of the State of Louisiana. That the laws of the State of Louisiana expressly provide:

> "One year period - The following actions are prescribed after one year: all tort actions."

And further answering your defendant says that any cause of action which he ever had or might have for any injury suffered more than one year prior to the filing of the instant suit, to wit, on February 18, 1970; that under the applicable laws of the State of Louisiana the pendency of any workmen's compensation claim does not suspend the running of the statute of limitations.

ELEVENTH AFFIRMATIVE DEFENSE

In the event plaintiff sustained any injury in any state other than Texas, Claifornia or Louisiana, as a result of the use of any product manufactured by your defendant, which is not admitted, but expressly denied, then such occurred more than one or two years or the period provided by the particular state where plaintiff claims that the injury occurred, and your defendant pleads each and all statutes of limitations as to said alleged cause of action under the law of the state where such alleged action arose.

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TWELFTH AFFIRMATIVE DEFENSE

Your defendant says that the plaintiff herein was an experienced insulating worker, and at all times knew that he was working with asbestos and products containing asbestos, as well as other products which might be harmful to him; if the plaintiff herein did not know such products were harmful, then his employers at all times knew that they were working with insulating materials which contained asbestos, and said employers had actual knowledge of the fact that particles of said products could enter the air when said product was cut or applied, and plaintiff's employers likewise had knowledge that if blowers or fans were not used in the area, that their employees would be subject to the dust hazard and inhalation of said dust. That is is common knowledge that if an individual works in an area where the air is laden with dust, that the individual will breathe this dust into his nose and body system unless the employee uses some type of mask, respirator or other protective device, or unless the employer provides some means whereby the dust is removed from the air as a safety measure.

THIRTEENTH AFFIRMATIVE DEFENSE

Your defendant denies that it made any warranty of any kind or character, and denies the existence of any warranty; it further denies any fault or breach of warranty, but says that the insulation products manufactured by it were at all times reasonably fit and suitable for the purpose of insulation, which was the purpose for which they were manufactured and sold, and plaintiff's injury, if any, did not result from any defect in said product. Any and all dust conditions which may have resulted from the use of the products were created during the application thereof, at which time the product or products were cut or changed from

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the original form in which they were manufactured by your defendant, and the conditions under which the plaintiff worked were at all times prescribed by his employer or the owner of the premises where the plaintiff was employed. Your defendant had no responsibility for the conditions that existed at the place where the work of the plaintiff was being performed.

FOURTEENTH AFFIRMATIVE DEFENSE

Your defendant specially denies that the plaintiff sustained any injury or disease as a result of contact with or the use of any product manufactured by this defendant, and specially denies that there was any breach of warranty express or implied on the part of your defendant, and further specially denies that your defendant was guilty of any negligence proximately causing or contributing to case plaintiff's alleged injuries and damages, but on the contrary says that the plaintiff himself was guilty of various acts of wrongs and omissions, each and all of which amount to negligence, which actions, together or separately, were the sole proximate cause of his alleged injuries and damages, if any, or in the alternative, were the proximate cause thereof.

FIFTEENTH AFFIRMATIVE DEFENSE

Your defendant says, in the alternative, that if the plaintiff sustained any injuries, that same were solely, or in the further alternative, were proximately caused by the acts either of commission or omission of third persons, for whose acts your defendant is in no way liable or responsible. In the alternative if plaintiff sustained any injury from the use of any product, or from any breach of warranty, none of which are admitted but denied, then such was the fault or breach of warranty of third parties, for whom this defendant is not liable or responsible.

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SIXTEENTH AFFIRMATIVE DEFENSE

Further answering herein, and in the alternative, this defendant would show that there is and was no legal liability on the part of this defendant because of the fact that the allged happenings in question were brought about or caused by transitory conditions arising in the course of the work which the plaintiff was doing, and ordinarily incident thereto; and plaintiff and his employers used their own manner, method and means of performing such work, and this defendant owed no duty with respect to such work, nor was there any relationship as between plaintiff and this defendant which created any duty on the part of this defendant as to the manner or method in which the work was done or the conditions under which the plaintiff performed his work.

SEVENTEENTH AFFIRMATIVE DEFENSE

Further answering herein, and in the alternative, this defendant says that the plaintiff's claims to injury and damage, if any, were the result of an unavoidable accident.

PLEA OF CONTRIBUTION

As a further grounds of relief, and pleading in the alternative, this defendant says that if any judgment is entered herein jointly and severally against it andother defendants, that in such event this defendant is entitled to contribution against such other defendants in accordance with the provisions of the laws of the State of Texas, to wit, Article 2212 of the Revised Civil Statutes of Texas.

WHEREFORE, PREMISES CONSIDERED, your defendant prays that on a hearing hereof plaintiff take nothing, and that your defendant go hence and recover its costs; or in the alternative that your defendant have its judgment

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for contribution against the other defendants in connection with any judgment that might be rendered in favor of the plaintiff herein.

FULBRIGHT, CROOKER, FREEMAN,
BATES & JAWORSKI

By _____
W. N. Arnold, Jr.

Bank of the Southwest Building
Houston, Texas 77002 224-7070

Attorneys for Defendant
Armstrong Cork Company

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing answer of defendant, Armstrong Cork Company, to plaintiff's second amended original complaint was delivered to Mr. Ward Stephenson, Stephenson & Thompson, Stephenson Building, Orange, Texas, attorney for plaintiff, and to Mr. George E. Duncan, Mr. Dale Dowell, Mr. Gordon R. Pate, Mr. Ben Reynolds, Mr. James W. Mehaffy, Sr., Mr. Charles S. Pipkin, Mr. John G. Tucker, Mr. Gerald P. Coley and Mr. Robert E. Barnes, Jr., by mailing a copy of said answer by certified mail addressed to their respective addresses of record in this case on the 23rd day of June, 1970. A copy was also mailed to Mr. Frank Bean.

_____
W. N. Arnold, Jr.

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BEAUMONT DIVISION

SAMUEL R. POTTER

V.

FIBREBOARD PAPER PRODUCTS
CORPORATION, ET AL

FIRST AMENDED ANSWER OF DEFENDANT
ARMSTRONG CORK COMPANY TO
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FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI
ATTORNEYS AT LAW

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