FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
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JAMES R. COONEY, CLERK
BY DEPUTY Virginia L. Lewis

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

SAMUEL R. POTTER	:	
VS.	:	CIVIL ACTION NO. 6329
FIBREBOARD PAPER PRODUCTS CORPORATION ET AL	:	
CLARENCE BOREL	:	
VS.	:	CIVIL ACTION NO. 6449
FIBREBOARD PAPER PRODUCTS CORPORATION ET AL	:	
J. J. CRAWFORD	:	
VS.	:	CIVIL ACTION NO. 6492
FIBREBOARD PAPER PRODUCTS CORPORATION ET AL	:	

MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGES OF SAID COURT:

The law of warranties and products liability, the doctrine of strict liability, and the rapidly expanding dynamic field of environmental health, each singly and altogether, mark these cases as classics in manufacturers' disregard of the lives and welfare of those using or coming in contact with their finished products.

This Honorable Court is aware, no doubt, of the contentions of the parties in these type of cases. To state our case briefly, therefore, we think would be adequate.

The plaintiffs, whether they are the heirs or legal beneficiaries of the deceased, or whether the plaintiff himself, was the worker involved, and are seeking damages from the

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manufacturers of asbestos insulating products. The liability is based upon negligence, breach of warranties, failure to warn of the inherently dangerous nature of the products manufactured by each of the defendants.

It is without question that none of the defendants:

(1) Tested their products prior to placing them. on the market so that they might each ascertain the dangerous nature and affect their products would have upon those exposed to them.

(2) Gave any warnings of the dangerous nature of their products.

(3) Warned that if inhaled their products might cause serious injury and harm.

(4) During any time material to the litigation made any studies of the affect of their products on the lungs or physical condition of persons coming in contact with their products through inhalation of the dust.

(5) Conducted studies designed to eliminate the inhalation of asbestos dust by those exposed to the products of these defendants.

(6) That no inspections were made of the area where workers using the products manufactured by the defendants and which contained asbestos concerning the asbestos dust count of their products,

and that all of the foregoing were and are violent breaches of duties and obligations under the law by the manufacturers to those using or coming in contact with the products of such manufacturers.

This Court has previously taken judicial knowledge of the fact that as early as 1913, and certainly for many years

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prior to 1940, not only England, but states of the United States had Workmen's Compensation Laws providing for the payment of benefits to one contracting the disease of asbestosis. Such laws do not differentiate between one working in a plant or one working in the construction industry, but regardless of this fact, these laws on the statute books should have been the most vigorous red flag of danger one could imagine advising these defendants of the affect their products might have on workers.

In the case of United States of America vs. Wilroy Reid, 251 F.2d 691, decided by the United States Court of Appeals, Fifth Circuit, January 21, 1958, the Court said:

> "To think that two diseases, each operating immediately on the lungs, generally as the result of slow and imperceptible actions, are so different as to require distinct rules of law would only add confusion to what now unavoidably borders on metaphysical dialectic. We agree with Judge Bruchhausen that while 'It is true that the whispered warnings of approaching tuberculosis are more audible than the silent disintegration resulting from silicosis. *** they, too, are the result of a condition over a period of time, rather than a point of time.' "
>
> "Moreover, the facts in this case support the implied findings of the Trial Court which, upon long accepted concepts of statutes of limitations (whether on the right or remedy), fortify the application of the Urie doctrine. These relate to the fundamental nature of a 'cause of action' or a 'claim' asserted as a legal obligation. Ordinarily there is a coincidence of negligent act and the fact of some damage. Where that occurs the cause of action comes into being and the applicable statute of limitations begins to run even though the ultimate damage is unknown or unpredictable. But it is not the wrongful, i.e., negligent act, which gives rise to the claim. For there must be damage caused by it. Until there is some damage, there is no claim and certainly a statute prescribing the time in which suit must be filed (whether as a condition of right or remedy) can never operate prior to the time a suit would be permitted."

We call the Court's attention to the case of Wright vs. Carter Products, 244 F.2d 53, decided by the United States

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Court of Appeals, Second Circuit, on May 1, 1957. In this case, Florence Wright sought damages for personal injuries suffered by her from the application of a deodorant and anti-perspirant manufactured by the defendant and distributed under the trade name of "Arrid." Roy, her husband, sought recovery for medical expenses and damages for loss of service. Mrs. Wright, a resident of Belmont, Massachusetts, had used Arrid for two or three times a week for approximately five years prior to June 1951 without suffering any ill effects. In June 1951 she bought a jar of Arrid at a nearby store, used it once, and immediately thereafter contracted a rash in both armpits. In this case, the Court said:

> "Thus the trial court concluded that the only issue of negligence presented was whether the mere use of aluminum sulfate in Arrid was sufficient to charge the manufacturer with liability to these plaintiffs when no warning was given by it of the possible harmful effect that Arrid might have to a very small proportion of the potential users of that deodorant."
>
> "The Court below apparently believed, since the evidence before it indicated that only a minuscule percentage of potential customers could be endangered by using Arrid, that the defendant was under no duty to warn of any harmful propensities the product might have despite the defendant's own knowledge thereof."
>
> "With such a conclusion we cannot agree, for we believe that duties to warn are not, in all cases, measured by solely quantitative standards. We believe that the trial court erred in defining the scope of this defendant-manufacturer's liability, and we remand the case for further findings in the light of our discussion herein."
>
> Further, the Court said,
>
> "Perhaps the best statement of the correct law we believe to govern the issue now before us appeared in an old, but enlightened, Michigan decision:
>
> > 'When the fact is once established and demonstrated by experience that a certain commodity apparently harmless, contains concealed dangers, and when distributed to the public through the channels of trade and used for the purposes for which it was made and sold

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> if sure to cause suffering to, and injure the health of, some innocent purchaser, even though the percentage of those injured be not large, a duty arises to and a responsibility rests upon the manufacturer and dealer with knowledge to the extent, at least, of warning the ignorant consumer ***'. Gerkin v. Brown & Sehler Co., 1913, 177 Mich. 45, 60, 143 N.W. 48, 53, 48 L.R.A., N.S., 224.' "

"It would seem that a manufacturer cannot be required to alter a formula that has proven safe for sale by the overwhelming majority of its users, but the standard of care owed by that manufacturer to its ultimate consumers may include a duty to warn those few persons who it knows cannot apply its product without serious injury. See Dickerson, Products Liability and the Food Consumer, ## 4.26-4.28 (1951); Dilliars & Hart, Product Liability; Directions for Use and Duty to Warn, 41 V.L.Rev. 145 (1955). Liability in negligence for the failure to discharge that duty by inserting appropriate words of caution is rightly borne as one of the costs of producing and selling a commodity for use by members of the public whose knowledge of potential danger to themselves may be greatly inferior to that possessed by the manufacturer. Cf. Rosenbusch v. Ambrosia Milk Corp., 1st Dept. 1917, 181 App.Div. 97, 168 N.Y.S. 505; Henry v. Crook, 3d Dept. 1922, 202 App. Div. 19, 195 N.Y.S. 642. Thus, in addition to the incidence of sensitivity to aluminum sulfate, the trial court should also consider the gravity of the possible injury from the use of Arrid and the difficulty, if any, of embodying an effective precaution in the labels or literature attached to the product. In ascertaining the standard of care owed by the defendant to the Ultimate consumers of Arrid, the trial court should also take into consideration the defendant's status as an expert in the formulation and use of chemicals for deodorant purposes. See Harper & James, The Law of Torts, ## 28.8, 28.9 (1956)."

"The defendant's status as an expert would thus seem doubly relevant: (1) as bearing on its duty to communicate its superior knowledge to those who, because of their own limited information, would otherwise be unable to protect themselves, and (2) as tending to show that the defendant knew, or should have known, of the possible harm that might befall some users of its product."

Again, on Page 63, the Court said,

"Lastly, the defendant asserts that the plaintiffs' claim, at least to the extent that it sounds in negligence, was barred by the three-year New York statute of limitations. The first serious outbreak

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of dermatitis suffered by Mrs. Wright occurred during the latter part of November, 1951, a little less than three years before suit was initiated. But the defendant has directed our attention to the testimony of one of the plaintiffs' own expert witnesses to the effect that 'it takes time for an allergic reaction to develop in certain individuals.' It is then argued that the plaintiffs' cause of action, if any, must have accrued as of the first application of Arrid by Mrs. Wright in 1946. Pushed to its logical extreme, this theory would indicate that whatever right to recovery Mrs. Wright may have possessed became stale after 1949, two years before she suffered any discernible injury."

Because of the nature of manufacturing of many different types of materials and substances, the United States Congress has enacted legislation dealing with hazardous substances. In Title 15, Section 1261, United States Code Annotated, hazardous substances are defined, required to be labeled, interstate shipment prohibited under certain circumstances. We will quote from portions of the Code to indicate Congressional intent and concern about this matter.

Section 1261:

"(f) The term 'hazardous substance' means: (1) (a) Any substance or mixture of substance which (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv), is a strong sensitizer, (v) is flammable, or (vi) generates pressure through decomposition, heat, or other means, if such substance or mixture or substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children."

"(g) The term 'toxic' shall apply to any substance (other than a radioactive substance) which has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface."

"(j) The term 'irritant' means any substance not corrosive within the meaning of subparagraph (i) of this section which on immediate, prolonged, or

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repeated contact with normal living tissue will induce a local inflammatory reaction."

"(n) The term 'label' means a display of written printed, or graphic matter upon the immediate container of any substance; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears (1) on the outside container or wrapper, if any there be, unless it is easily legible through the outside container or wrapper and (2) on all accompanying literature where there are directions for use, written or otherwise."

"(p) The term 'misbranded package' or 'misbranded package of a hazardous substance' means a hazardous substance in a container intended or suitable for household use which, except as otherwise provided by or pursuant to section 1262 of this title, fails to bear a label --

(1) which states conspicuously (A) the name and place of business of the manufacturer, packer, distributor or seller; (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard, unless the Secretary by regulation permits or requires the use of a recognized generic name; (C) the signal word "DANGER" on substances which are extremely flammable, corrosive, or highly toxic; (D) the signal word "WARNING" OR "CAUTION" on all other hazardous substances; (E) an affirmative statement of the principal hazard or hazards, such as 'Flammable', 'Vapor Harmful', 'Causes Burns', 'Absorbed Through Skin', or similar wording descriptive of the hazard; (F) precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Secretary pursuant to section 1262 of this title; (G) instruction, when necessary or appropriate, for first-aid treatment; (H) the word 'poison' for any hazardous substance which is defined as 'highly toxic' by subsection (h) of this section; (I) instructions for handling and storage of packages which require special care in handling or storage; and (J) the statement 'Keep out of the reach of children', or its practical equivalent, and

(2) on which any statements required under subparagraph (1) of this paragraph are located prominently and are in the English language in conspicuous and legible type in contrast by typography, layout, or color with other printed matter on the label."

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Section 1262:

"The following acts and the causing thereof are prohibited:

"(a) The introduction or delivery for introduction into interstate commerce of any misbranded package of a hazardous substance."

"(c) The receipt in interstate commerce of any misbranded package of a hazardous substance and the delivery or proffered delivery thereof for pay or otherwise."

"(g) The manufacture of a misbranded package of a hazardous substance within the District of Columbia or within any territory not organized with a legislative body."

We believe it can be clearly seen from the above quoted portions of the Federal Statute not only are steps necessary to protect the public in this regard but that laws have been enacted towards accomplishing this end.

There can be no question but that the defendant manufacturers and distributors in these cases clearly come within the labeling and hazardous substances statutes. The plaintiffs certainly have toxic conditions, the materials certainly were irritants and they certainly were strong sensitizers, and they are mixtures or substances which caused substantial personal injury and illness, as a result of the customary handling and use of these materials. The packages of materials were not branded or, as the statute states, "misbranded" packages. There were not warnings shown on any of these insulating materials; there were no instructions for the handling, and no instructions for the use. In addition, these packages were introduced or delivered into interstate commerce in violation of the Federal law, and were also manufactured in violation of the Federal law absent the proper markings, labeling and branding of the packages.

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This contrived neglect is in the historic traditions of the industry which awaits the research results of others and then gains further delays by confusing and lobbying against the findings.

The defendants have pled contributory negligence on the parts of the plaintiffs; however, plaintiffs say that the following cases clearly hold that contributory negligence is not a defense in these actions: McKisson vs. Sales Affiliates, Inc., 416 S.W. 2d 787 (Tex. 1967); Shamrock Fuel & Oil Sales Co. vs. Tunks, 416 S.W. 2d 779 (Tex. 1967).

WHEREFORE, plaintiffs pray that this Court grant this motion for partial summary judgment upon the liability of the defendants herein; and that the cases proceed to trial on the issues of damages.

Respectfully submitted,

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POTTER
BOREL
CRAWFORD

CERTIFICATE OF SERVICE BY MAIL

I, Ward Stephenson, hereby certify that a true and correct copy of the foregoing instrument was on this the 18th day of November, 1970, mailed to the following named attorneys:

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