IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
DEC 4 1970
JAMES R. COONEY, CLERK
BY DEPUTY Myra Barton

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

REPLIES TO THE MOTION FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, each and all of the Defendants and file this, their reply to Plaintiffs' Motion for Partial Summary Judgment in each of the above cases, and as grounds therefor would show the Court:

1.

The Defendants, and each of them, deny that their respective product or products were of an inherently dangerous nature, but to the contrary, state that they were reasonably safe for the purpose for which they were manufactured and distributed. Defendants, and each of them, contend that until 1964 or early 1965, there was no reasonable knowledge that the exposure to dust containing some asbestos in the construction industry would produce or cause any occupational disease known as asbestosis. This was based upon the fact that the average dust count in the construction industry was within the limits of five million particles of asbestos dust to

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one cubic foot of air, which was the reasonably safe limit established by the American Society of Governmental Industrial Hysienists.

2.

Defendants further state that they did not have, and do not have, such relationship and control over the construction workers, their employers and their working conditions or the method of application of the product as would create any duty on the Defendants, or each of them to provide a reasonably safe place for the construction workers to work, but to the contrary, this was the duty of the employer or insulation contractor, and this will be raised by testimony upon the trial of this case, and has been raised by answers to Interrogatories and Depositions now on file, to which reference is here made.

3.

Each of the Plaintiffs had full and complete knowledge that they were working with products containing asbestos and that the products created dust when they were cut and applied during the course of construction, and each of the Plaintiffs knew and realized that the dust created from the products containing asbestos created a problem insofar as the breathing and ingestion of the dust into their system and they knew that it could and would cause some harm and it was not healthy to subject themselves to excessive amounts of dust. The Plaintiffs, and each of them, admit that they knew that respirators and masks were furnished for their use, but they each failed and refused to use and utilize these safety devices which they knew were provided for the purpose of reducing the hazard of inhaling excessive amounts of dust containing asbestos.

4.

In reply to the Plaintiffs' allegations that no conducted studies or inspections were made by any of the Defendants herein in the area where insulation workers were applying the products manufactured, these Defendants would show that they had no knowledge of all of the many job locations where their products might be used, had no access to the areas where such products were being used,

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and had no right to prescribe or govern the working conditions under which the workers were performing their work for their own employer or independent contractor. Defendants would further show that, generally, they had no knowledge of the specific times and places when such products were being used, and, additionally, it is shown in the depositions of the Plaintiffs that these products were usually used on the premises of third persons in nowise connected with these Defendants.

5.

The Asbestos Workers Union, of which each of the Plaintiffs or decedent were members, the employer-insulation contractors of each of the Plaintiffs, and the Plaintiffs themselves, are each charged with judicial knowledge of the laws of the state to the effect that the disease of asbestosis was an occupational disease, and this is a specific occupational disease in Texas under the Workmen's Compensation Act; likewise, the depositions on file show that the trade journals, union publications, and employers and the men themselves, knew of the disease of asbestosis and possible dangers of exposure and inhalation of dust containing asbestos. The deposition of Joseph Shrode reflects that the unions, of which each of the respective Plaintiffs or decedent were members, had knowledge of the problem of exposure to dust containing asbestos and they negotiated with their contractors' association for the reduction of dust exposure and other safety measures.

6.

Early knowledge regarding any potential danger from exposure to asbestos dust was based on exposure in manufacturing plants and textile factories using asbestos cloth and pure asbestos and these studies did not in anywise pertain to construction workers engaged in the construction trade where the worker was using products containing 10% to 12% asbestos and exposure was minimal and within the dust limits recommended by the American Association of Governmental Hygienists.

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7.

Plaintiffs cite the Federal Statute governing the labeling of hazardous substances (Title 15, Section 1261, United States Code Annotated). It is obvious that this statute has no application to the cases at hand, since by its terms, it is limited to substances packaged in containers "intended or packaged in a form suitable for use in the household or by children." (Section 1261 (p.)). In passing, it might also be mentioned that this statute, although clearly not applicable here, was not enacted until long after the dates upon which Plaintiffs rely.

8.

It is undisputed that the products manufactured by the Defendants containing asbestos are not inherently dangerous and that the products are fit for the purpose for which they are manufactured. Any hazard created from the use of products containing asbestos is created in the method of application and the improper cutting, scribing and mixing of the product under conditions and work practices which are in the control of the employer and the insulation worker; thus, if exposures to an excessive amount of dust are created, they are created as the result of the working conditions and the environment and the method used by the workmen under the control of their employers, the failure of the workmen to use masks, etc., which are not the responsibility of the manufacture and over which conditions the manufacturers have no control or right of control.

WHEREFORE, PREMISES CONSIDERED, these Defendants suggest that the Plaintiffs' Motion is not well taken and should be overruled.

Respectfully submitted,

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I certify that a copy of the foregoing Replies to the Motion for Partial Summary Judgment was mailed to Mr. Ward Stephenson, STEPHENSON & THOMPSON, Stephenson Building, Orange, Texas, attorney for Plaintiffs, on the 3rd day of December 1970.

Lindell Pate

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CIVIL ACTION NO. 6329

SAMUEL R. POTTER

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION, ET AL

REPLY TO MOTION FOR PARTIAL

SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT

COURT FOR THE EASTERN DISTRICT

OF TEXAS - BEAUMONT, DIVISION

GORDON R. PATE
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