IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED
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James R. Cooper, Clerk, U. S. Court
By Hazel E. Studdard DEPUTY

SAMUEL R. POTTER)
)
VS.) CIVIL ACTION NO. 6329
)
FIBREBOARD PAPER PRODUCTS)
CORPORATION, ET AL)

SECOND AMENDED ORIGINAL ANSWER OF THE DEFENDANT, UNARCO INDUSTRIES, INC., TO PLAINTIFF'S SECOND AMENDED ORIGINAL COMPLAINT AND FIRST AMENDED CROSS-ACTION OF UNARCO INDUSTRIES, INC.

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW UNARCO INDUSTRIES, INC., one of the Defendants herein, and files this its Second Amended Original Answer to Plaintiff's Second Amended Original Complaint and would respectfully show unto the Court and Jury the following:

I.

As to the allegations contained in Paragraph 1 of said Second Amended Original Complaint, this Defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or inaccuracy thereof, inasmuch as this Defendant does not have knowledge as to the citizenship of all of the parties hereto.

II.

This Defendant admits that Plaintiff seeks to recover a sum which is within the monetary jurisdiction of this Court and which exceeds the sum of Ten Thousand Dollars ($10,000.00), but denies that the Plaintiff is entitled to any recovery herein against this Defendant in any sum.

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III.

This Defendant does not have sufficient knowledge or information on which to base an admission or denial of the allegations contained in Paragraph 3 of Plaintiff's Second Amended Original Complaint.

IV.

In answer to the allegations contained in Paragraph 4 of the Complaint, this Defendant admits that during certain and limited periods of time mentioned herein, but not at all times referred to by Plaintiff, this Defendant has been engaged in the manufacture of materials used for insulation which were purchased by insulation contractors who employ experienced insulation workers in the application of the products, but denies that this Defendant's products are placed on the market to be purchased and used by the general public.

V.

With reference to the allegations contained in Paragraph 5 of the Complaint, this Defendant states that it does not have any knowledge or information as to the employment of the Plaintiff, the products allegedly handled by him or the jobs on which he was employed and, therefore, does not have sufficient knowledge or information upon which to base an admission or denial as to Plaintiff's employment or the details of such employment. Defendant does deny that it manufactured or sold any insulation material which was dangerous material.

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VI.

This Defendant denies the allegations contained in Paragraph 6 of the Plaintiff's Complaint.

VII.

This Defendant denies the allegations contained in Paragraph 7 and all sub-divisions thereunder, Sub-Paragraphs (a) through (e), inclusive.

VIII.

This Defendant denies the allegations contained in Paragraph 8 and all subdivisions thereunder, Sub-Paragraphs (a) through (d), inclusive.

VIII-A.

This Defendant denies the allegations contained in Paragraph 8-A of Plaintiff's Second Amended Complaint.

IX.

This Defendant denies the allegations contained in Paragraph 9 of Plaintiff's Amended Complaint. For further answer, this Defendant says that the doctrine of res ipsa loquitur has no application under the facts alleged by Plaintiff.

X.

In answer to Paragraph 10 of Plaintiff's Second Amended Complaint, this Defendant says it has no knowledge or information as to any injury or disease that Plaintiff may be suffering from and, therefore, can neither admit nor deny the injuries alleged by Plaintiff, but this Defendant does specifically deny that any such alleged injury was a direct and proximate cause of the negligence and carelessness of this Defendant or that this Defendant breached any warranty owed to the Plaintiff.

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XI.

This Defendant denies the allegations contained in Paragraph 11 of Plaintiff's Second Amended Original Complaint.

XII.

In answer to Paragraph 12 of Plaintiff's Amended Complaint, this Defendant says that it has no knowledge or information as to any medical treatment Plaintiff may have received and, therefore, cannot admit nor deny the allegations as to the truth or inaccuracy thereof, but does specifically deny that any such medical treatment was for injury or disease caused or brought about by any negligence or breach of warranty of this Defendant and further denies that Plaintiff is entitled to recover any such alleged medical expense against this Defendant.

XIII.

This Defendant denies the allegations contained in Paragraph 13 of the Plaintiff's Complaint and further denies that Plaintiff is entitled to any recovery sought against this Defendant.

XIV.

This Defendant denies the allegations contained in Paragraph 14 of the Plaintiff's Complaint and denies that Plaintiff is entitled to any recovery sought herein against this Defendant, and further denies that any cause of action exists for gross negligence under the allegations in Plaintiff's Complaint.

XV.

This Defendant denies the allegations contained in Paragraph 15 of the Plaintiff's Complaint and denies that Plaintiff is

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entitled to any recovery sought herein against this Defendant.

This Defendant further denies the allegations contained in the last unnumbered paragraph of the Complaint and the prayer of such Complaint and would specifically deny that the Plaintiff is entitled to any recovery herein or to any relief sought by him in this action against this Defendant.

AFFIRMATIVE DEFENSES

XVI.

For further answer, and by way of affirmative defense, this Defendant would show that any cause of action, if any, which Plaintiff has or may ever have against this Defendant, which is not admitted but denied, accrued more than two years prior to the commencement of this suit against this Defendant and is barred by the Two-Year Statute of Limitations, Article 5526, Vernon's Texas Civil Statutes, and this Defendant pleads the same in bar to this action.

XVII.

For further answer, if such be necessary, this Defendant would show that any cause of action, if any, which Plaintiff has or may ever have against this Defendant, which is not admitted but expressly denied, accrued more than four years prior to the commencement of this suit against this Defendant and is barred by the Four-Year Statute of Limitations, Article 5529, Vernon's Texas Civil Statutes, and the Defendant pleads the same in bar to this action.

XVIII.

If Plaintiff did sustain any injury in the State of California as the result of the use of any product or products manufactured by this Defendant, which is denied, then any such

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action for personal injury occurring in the State of California accrued more than one (1) year prior to the filing of this suit on May 27, 1969, and such alleged cause of action is barred by the one (1) year Statute of Limitations of the State of California, Code of Civil Procedure, Section 340, Subdivision 3, which fixes the time within which an action for personal injury must be filed at one (1) year, and therefore any cause of action for personal injury occurring in the State of California is barred by the one (1) year Statute of Limitations of the State of California.

In this connection, this Defendant further pleads that the law of the State of California is that the one (1) 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. See Hanna, California Law of Employee Injuries and Workmen's Compensation, Second Edition, Volume 2, Chapter 23, Section 23.04 (5); State Comp Insurance Fund vs. Matulich, 55 California Appeals 2d, 528, 131 Pacific 2d 21.

XIX.

According to Louisiana Law Digest, Limitation of Actions, the law in Louisiana is:

> "Periods of prescription which operate to release debts are as follows:
>
> "One Year Period - The following actions are prescribed after one (1) year: xxx; all tort actions."

According to the interpretation of the Louisiana Law, the One (1) year Statute of Limitations applies to an action for personal injury and the pendency of a Workmen's Compensation claim does not suspend the running of the Statute of Limitations.

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XX.

If Plaintiff did sustain any injury in any state other than Texas, California or Louisiana, as a result of the use of any product manufactured by this Defendant, which is denied, then such occurred more than one (1) year or two (2) years or the period provided by the particular State where Plaintiff claims that the injury occurred, and this Defendant pleads each and all of the Statutes of Limitations as to said alleged cause of action under the law of the State where such alleged cause of action arose.

XXI.

For further answer, and by way of affirmative defense, this Defendant says that the products which this Defendant manufactured and sold were at all times reasonably fit and suitable for the purpose for which manufactured and sold and this Defendant denies that the same were in anywise defective.

XXII.

This Defendant denies that any product which it manufactured or sole in any manner caused or brought about any injury or illness, if any, to Plaintiff and further that the physical condition of which Plaintiff now complains was in nowise caused or brought about by the product manufactured and sold by this Defendant and that such condition of the Plaintiff is due solely to disease and other causes and is in nowise connected with this Defendant.

XXIII.

Answering still further, if such be necessary, and by way of further affirmative defense, this Defendant specially

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denies that Plaintiff sustained any injury or disease as a result of contact or use with or of any product manufactured by this Defendant and specially denies any fault or breach of warranty on the part of this Defendant and specially denies that this Defendant was guilty of any negligence proximately causing or contributing to cause Plaintiff's alleged injuries and damages, but to the contrary, this Defendant alleges that the Plaintiff himself was guilty of various acts, wrongs and omissions, each and all amounting to negligence, which, acting together or separately, were the sole proximate cause of his alleged injuries and damages, if any, or in the alternative, were a proximate cause thereof.

XXIV.

For further answer, pleading in the alternative, this Defendant would show that Plaintiff's alleged injuries and damages, if any, were caused solely, or in the alternative, were proximately caused by acts, wrongs, omissions and negligence of third parties or a third party, in nowise connected with this Defendant and for whom this Defendant is in nowise liable or responsible; or, in the alternative, the physical condition of which Plaintiff now complains was due solely to causes other than any negligence, fault or breach of warranty, none of which are admitted but denied, on the part of this Defendant.

XXV.

Answering still further, if such be necessary, and in the alternative, this Defendant would show that Plaintiff's

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injuries and damages, if any, were the result of an unavoidable accident as that term is defined in law.

XXVI.

For further answer, and pleading in the alternative, this Defendant would show that all situations and conditions of which Plaintiff complains, and the danger or dangers, if any, arising from the continued use of insulation material of which he complains, were open and obvious to him, and if any dangers existed as claimed by him, which are not admitted, then the same, if existing, were apparent and easily discernible, and the Plaintiff knew as much about the same as did this Defendant and the same were well known to the Plaintiff, or should have been known to him, and he appreciated any dangers arising therefrom and the conditions, if existing, were not such that this Defendant would be legally liable to the Plaintiff therefor.

XXVII.

For further affirmative answer herein, this Defendant would show that the Plaintiff with full knowledge of the fact that he was working in dust and creating dust from the insulation products knew that he would be subject to injury and that such working conditions and any risks attendant thereto were open and obvious to him and this Defendant here and now invokes the doctrine of volente non fit injuria as that term is known and defined in law, showing unto the Court that the Plaintiff knew and appreciated any dangers or risks attendant thereto and nevertheless voluntarily exposed himself to any such alleged risks.

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XXVIII.

Answering still further, if such be necessary, this Defendant would show that Plaintiff voluntarily assumed the risk of performing the work in which he was engaged on the occasions in question, and he had actual notice and knowledge of all conditions and situations surrounding the work which he was performing and of any dangers, if any existed, arising therefrom, fully appreciated the same, but nevertheless Plaintiff voluntarily proceeded and continued over a period of years to work with and around insulating materials, and voluntarily exposed himself to all such conditions, dangers or hazards incident to such work, and for these additional grounds this Defendant invokes the doctrine of volente non fit injuria as that term is known and defined in law.

XXIX.

Answering still further, 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 alleged occurrences or happenings in question were brought about or caused by transitory conditions arising in the course of the work the Plaintiff was doing, and ordinarily incident thereto, the Plaintiff using his and his employers' own manner, method and means of doing the work and this Defendant owed no duty with respect thereto.

XXX.

For further answer herein, in the alternative, this Defendant would show that its products were reasonably fit and safe for the purpose for which they were made, manufactured and

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sold, and that if Plaintiff was in fact injured as he alleges and claims as a result of the use of any of the products of this Defendant, then such injury was the result of the negligence of Plaintiff's employers or contractors and not this Defendant in failing to adopt and enforce safe working practices and methods; or alternatively, Plaintiff failed to use and utilize any safety devices, such as gloves, protective clothing, masks and respirators for breathing and thus is not entitled to recover against this Defendant.

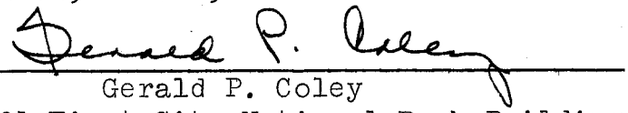
XXXI.

For further grounds of relief, this Defendant says that if any judgment is entered herein jointly and severally against this Defendant and the other Defendants herein, then in such event this Defendant is entitled to contribution over and against such other Defendants in accordance with the provisions of Article 2212 of Vernon's Civil Statutes of Texas.

WHEREFORE, this Defendant having fully answered herein prays judgment of the Court that Plaintiff take nothing against this Defendant by his suit and that this Defendant go hence without day for its cost, or in the alternative, this Defendant have judgment for contribution as set forth above.

Respectfully submitted,

VINSON, ELKINS, SEARLS & SMITH

By 

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