IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
FEB 2 - 1972
JAMES R. COONEY, CLERK
BY DEPUTY

SAMUEL R. POTTER §

VS. § CIVIL ACTION NO. 6329

FIBREBOARD PAPER PRODUCTS §
CORPORATION, ET AL §

REPLY TO PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT BASED UPON COLLATERAL ESTOPPEL

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW the defendants ARMSTRONG CORK COMPANY, PHILIP CAREY CORPORATION, RUBEROID COMPANY, Division of GAF CORPORATION, FIBREBOARD PAPER PRODUCTS CORPORATION, and JOHNS-MANVILLE PRODUCTS CORPORATION, and file this their Reply and Brief in opposition to plaintiff's Motion for Partial Summary Judgment on the basis of collateral estoppel, and for such reply would show to the Court:

1.

Trial of Civil Action No. 6449, Clarence Borel vs. Fibreboard Paper Products Corporation, et al, in this Court was on the basis of a different state of facts than that which will be involved in the trial of this case. The alleged exposures to various products manufactured by defendants are different in time and place, different in degree, and accordingly will be dependent upon proof of an injurious exposure to each product.

Other factors, not intended to be exclusive, which stand out in opposition to plaintiff's motion are:

(1) The Judgment in Cause No. 6449, Clarence Borel vs. Fibreboard Paper Products Corporation, is not a final judgment.

(2) The plaintiff Borel was found guilty of contributory negligence which was a proximate cause of his death, which finding is a complete defense to any claim by the Borel plaintiffs based

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upon negligence. Defendants likewise contend this is a complete defense to plaintiff Borel's claim of breach of warranty. (The defendants Pittsburgh Corning and Armstrong Cork Company were not found guilty of negligence.)

(3) Any trial involving a breach of implied warranty would be an adversary proceeding as between the plaintiff Potter and the several defendants. The knowledge of plaintiff Potter will be dependent upon facts adduced upon the trial of this case, and before any issue of implied warranty to Potter could be raised, proof of time and place of exposure, proof of injurious exposure, and the nature of the implied warranty, the knowledge of Potter as to risk in working with products containing some asbestos is material on the issue of any potential liability based upon warranty.

The finding of the jury in the Borel case on breach of warranty and proximate cause is under attack on appeal, and could in no wise operate as an estoppel of these defendants to deny such warranty in the trial of the Potter case. Such a ruling would deprive each of these defendants of their constitutional right to trial by jury on the facts existing as between plaintiff and each of the several defendants.

The jury has found that Borel was guilty of contributory negligence which was a proximate cause of his death. Defendants contend that as a matter of law such finding is a complete defense to any liability to the Borel plaintiffs, and would be a defense to plaintiff's claim.

2.

The present plaintiff was in no wise a party to the Borel suit, and his claim is based upon alleged separate and distinct acts, at separate times and places.

Texas has consistently followed the rule that for a judgment to operate as an estoppel, there must be identity of issues

The Potter v. Fibreboard Case File (1969-1972), Reply to plaintiff's motion for partial summary judgment on collater… Published by AsbestosClaims.Law
ACL Doc 10469 · Page 2 of 7 asbestosclaims.law/library/10469/2

and identity of parties, of quality of parties, and of issues. 34 Tex. Jur. 2d, Sec. 521.

At 34 Tex. Jur. 2d, Sec. 521, the rule is stated:

> "The identities required for operation of a judgment as an estoppel are identity of parties, of quality in the parties, and of issues."

For purposes of argument, assume that the issues submitted will be the same, meaning that Mr. Potter will assert the same acts of negligence and breach of warranty, but based upon a different state of facts - which would make the issues not identical. Defendants contend there is no identity of parties, nor quality of parties, and the claims are based upon a different state of facts, nor is there a quality of parties, hence the doctrine is not applicable.

As suggested by Judge Goldberg in the case of Seguros Tepayac, S.A., Compania Mexicana v. Jernigan, 410 F.2d 718 (5th Cir., Ct. of App., 1969), the Federal Court is required to:

> ". . . take the 'Erie' route once again to visit our old friends in Texas Jurisprudence." p. 719

Referring to the Texas rule as to the necessity of identity of parties, Judge Goldberg says:

> " . . . Texas has not as yet affirmatively discarded the concepts of identity of parties or mutality of estoppel . . . " p. 727

3.

The latest expression of the Texas Supreme Court is the case of Benson v. Wanda Petroleum Company, 468 S.W. 2d 361 (Tex. Sup. Ct., 1971).

This case involved a collision between a Wanda Petroleum Company truck, and an automobile owned by Mr. and Mrs. Benson, which was driven by Porter. Separate suits for damages were filed in Eastland County against Wanda Petroleum by Mrs. Benson (whose husband was killed in this accident) and Mr. and Mrs. Porter.

The Potter v. Fibreboard Case File (1969-1972), Reply to plaintiff's motion for partial summary judgment on collater… Published by AsbestosClaims.Law
ACL Doc 10469 · Page 3 of 7 asbestosclaims.law/library/10469/3

The suits were consolidated and when called for trial Mrs. Benson took a voluntary non-suit. The Porter case against Wanda was tried and Wanda's driver was found not negligent, and that Porter was guilty of negligence, proximately causing the collision. This resulted in a take nothing judgment in favor of Wanda. Mrs. Benson then filed suit against Wanda in Harris County, and the trial court rendered summary judgment for Wanda on the theory that the judgment in the Porter case was binding on Mrs. Benson. The theory was that the Bensons and the Porters were engaged in a joint enterprise and as a matter of law there was privity which made the findings in the Porter case res judicata or the theory of estoppel by judgment applied.

This holding was affirmed by the Court of Civil Appeals. The Supreme Court held this was error and stated:

> "It has been emphasized that privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same state of facts." p. 363
>
> xxx
>
> "The suit at bar is a separate and distinct action for redress for personal injuries. Mrs. Benson was not a party to the former action instituted by the Porters following her non-suit and they did not represent her in her claims against Wanda, respondent here. It was not shown that Mrs. Benson participated in, or exercised any control over, the trial in the Porter suit, or that she had any right to do so. She was not shown to have any beneficial interest in the recovery of damages for personal injuries on behalf of the Porters. In our view, the requirements of due process compel the conclusion that a privity relationship which will support application of the rules of res judicata does not exist under these circumstances. Accordingly, we hold that the fact findings and judgment in the Porter suit do not bar Mrs. Benson, and that she is entitled to her day in court in prosecuting this action in her own right." p. 364

It can be seen that the case at bar is analogous; that there is no identity of interest, as is required by Texas Court.

The Potter v. Fibreboard Case File (1969-1972), Reply to plaintiff's motion for partial summary judgment on collater… Published by AsbestosClaims.Law
ACL Doc 10469 · Page 4 of 7 asbestosclaims.law/library/10469/4

Plaintiff is therefore not entitled to invoke this doctrine.

If plaintiff's contention is correct, then why should not the jury findings in the prior case of "contributory negligence" be binding on Potter? Had the jury findings been adverse as to Borel, would such findings be binding here on Potter? The answer is obviously, "No". Such findings are not binding on Potter.

Another obvious finding in Borel is no negligence on the part of Armstrong Cork Company and Pittsburgh Corning. Is this finding binding on Potter based upon a separate state of facts? Obviously not.

4.

Counsel for plaintiff has cited Seguros Tepeyac, S.A., Compania Mexicana v. Jernigan, 410 F.2d 718 (1969) 5th Cir. case applying Texas law. To understand this case and the relation of the parties one must refer to Seguros Tepeyac, S.A., Compania Mexicana vs. Bostrom, 347 F.2d 168 (5th Cir., Ct. of App., 1965).

Borel had no relation to Potter, and there is no suggestion of "identity of parties" or identity of occurrences which form the basis of Potter's claim. The rule in Texas is not changed by the Seguros case. Since there is no identity of parties or no quality of relationship - and the basis of alleged liability is from different exposure or exposures (and several defendants contend no exposures to defendant's product and certainly no injurious exposure), this rule does not apply.

The Seguros case does not attempt to change the law in Texas but recognizes the present status of it.

Defendants are still hopeful that the Court will submit all of the fact issues by interrogatories to the jury in this case, some of which the Court elected not to submit in Borel.

The Potter v. Fibreboard Case File (1969-1972), Reply to plaintiff's motion for partial summary judgment on collater... Published by AsbestosClaims.Law
ACL Doc 10469 · Page 5 of 7 asbestosclaims.law/library/10469/5

Defendants have heretofore suggested that the trial of any "asbestosis" case should be postponed pending the appellate ruling in the Borel case; however, plaintiff's counsel has insisted upon this trial without the Borel judgment becoming final. It is submitted that no issue of estoppel is presented, but if it is, then such cannot be asserted upon the basis of a verdict and judgment which is not a final binding judgment.

Defendants respectfully submit that the motion for partial summary judgment should be denied.

Respectfully submitted,

JOHN G. TUCKER

GEO. A. WELLER

OF COUNSEL FOR ALL DEFENDANTS

I certify that a copy of the foregoing instrument was mailed by First Class United States Mail to Mr. Ward Stephenson, 712 Division Street, Orange, Texas, 77630, Attorney for Plaintiff, on the 1st day of February, 1972.

OF COUNSEL

The Potter v. Fibreboard Case File (1969-1972), Reply to plaintiff's motion for partial summary judgment on collater… Published by AsbestosClaims.Law
ACL Doc 10469 · Page 6 of 7 asbestosclaims.law/library/10469/6

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