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

CLAUDE J. TOMPLAIT

vs.

COMBUSTION ENGINEERING, INC., ET AL

CIVIL ACTION NO. 5402

FILED
DEC 28 1967
James R. Cooney, Clerk, U. S. Court
By Margaret Driver DEPUTY

BRIEF FILED ON BEHALF OF ALL DEFENDANTS

This action was commenced on December 23, 1966. The Plaintiff sued each of the following companies:

Combustion Engineering, Inc.

R. & I. Refractor and Insulation Corporation

Johns-Manville Sales Corporation

Johns-Manville Products Corporation

Johns-Manville Fiberglass, Inc.

Owens Corning Fiberglass Corporation

Pittsburgh Corning Corporation

Gustin-Bacon Manufacturing Company

Pittsburgh Plate and Glass Company

Fibreboard Paper Products Corporation

Eagle-Picher Industries, Inc.

The cause of action asserted claims that the Plaintiff, as an insulator, was required to handle large quantities of insulation material, which was compounded, manufactured and prepared by the Defendants. He further alleges that during the period of time which he was employed as an insulator and due to the negligence and carelessness of the Defendants, he sustained severe, permanent and disabling injuries. He sues for general and special damages in the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00).

On the face of Plaintiff's Petition, it is alleged that his injuries were caused over a long period of time, and specifically in the Plaintiff's First Amended Complaint, his first allegation of negligence against any of these Defendants is that he was employed in the year 1959, the exact date being unknown, by B & B Engineering and Supply Company at the duPont Plant in

Orange, Texas (Par. 15 of Plaintiff's First Amended Complaint).

Paragraphs numbered 16 through 36, recite the various jobs that he worked on and the companies that employed him, the last date of employment being mentioned in Paragraph 36, wherein it is alleged as follows:

> "The Plaintiff says that during the year 1964, he was also employed by Johns-Manville Sales Corporation at the Gulf States Power Plant, Bridge City, Texas, and in the course of his employment, he was required to come in contact with calcium silicate, rock wool and 85% magnesium."

I.

PLAINTIFF'S CAUSE OF ACTION IS BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS OF THE STATE OF TEXAS, UNLESS THE SAME WAS TOLLED BY A WORKMEN'S COMPENSATION CLAIM

It is an elementary proposition of law, that any cause of action for a personal injury is barred after the expiration of two years from the date of the injury or death. Article 5526 § 6 provides as follows:

> "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following descriptions:
>
> * * * * *
>
> "6. Action for injury done to the person of another."

The statute of limitations would be tolled against all Defendants in this case only if the Plaintiff had made a claim for Workmen's Compensation by filing a claim, and until entry of the Final Judgment against the Workmen's Compensation insurer. Fidelity Union Casualty vs. Texas Power & Light Company, 25 S. W. (2d) 782 (Err. Refused).

On December 21, 1962, Claude J. Tomplait, as Plaintiff, filed suit in the 128th District Court of Orange County, Texas, against The Travelers Insurance Company, Texas Employers Insurance Association and Queen Insurance Company of America, as Defendants, claiming that while he was working for Armstrong Contracting & Supply Corporation, in July 1961, he contracted an occupational disease, namely, asbestosis ansilicosis. This case bears Docket Number 13,916. In the above-mentioned Petition, a photocopy of which is attached hereto and made a part hereof as "Exhibit A," the Plaintiff

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 2 of 32 asbestosclaims.law/library/10636/2

sets forth that a claim was made with the Industrial Accident Board of the State of Texas, and that after an award was made to him by the Board, he gave Notice of Appeal to the Industrial Accident Board, and filed the above-mentioned suit in the District Court of Orange County, Texas, to set aside the award of the Board. The Plaintiff prayed for compensation for 401 weeks, at $35.00 per week, plus interest and costs, and asked that he be awarded the above amount in a lump sum.

Subsequently, in the same case styled Claude J. Tomplait vs. Travelers Insurance Company, et al, the Plaintiff filed his First Amended Original Petition, alleging specifically that on or about July 26, 1961, while the Plaintiff was working in Orange County, Texas, for Armstrong Contracting & Supply Corporation, he contracted an occupational disease, which was the same as that alleged in the Original Petition. Plaintiff's First Amended Original Petition filed in the District Court of Orange County, Texas is attached hereto and made a part hereof as "Exhibit B."

Subsequently, and on September 16,1964, an Agreed Judgment was entered in cause numbered 13,916-A, wherein the said Claude J. Tomplait was awarded the sum of $6,000.00, said Agreed Judgment reciting that the above consideration was "in full compromise, settlement and satisfaction of all claims for Workmen's Compensation benefits that Plaintiff, Claude J. Tomplait, may have under the Workmen's Compensation Law of Texas for occupational disease and injurious exposure or exposures to the hazards of such disease at any time while in the employment of said Armstrong Contracting & Supply Corporation, Johns-Manville Corporation and/or Johns-Manville Sales Corporation." A copy of the above-mentioned Agreed Judgment is attached hereto and made a part hereof as "Exhibit C."

After the rendition of the Agreed Judgment on September 16, 1964, the Plaintiff, in the case at bar, Claude J. Tomplait, filed his Original Complaint in this Honorable Court on December 23, 1966, which was more than two years and two months after the rendition of the Agreed Judgment.

It is the contention of all of the Defendants in this case that the cause of action of Claude J. Tomplait in the case at bar, is barred by the

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 3 of 32 asbestosclaims.law/library/10636/3

terms and provisions of Article 5526, § 6 of Vernon's Civil Statutes of the State of Texas, hereinabove quoted.

A nearly identical situation arose in the case of Judice vs. Somner Sollitt Company of Texas (C.C.A. Beaumont, 1961), 346 S.W.(2d)135 (Ref.N.R.E.). In that case, the Plaintiff had settled his claim for Workmen's Compensation with the Workmen's Compensation carrier, and thereafter sued Somner Sollitt Company of Texas, Somner Sollitt Company (an Illinois corporation), and Gulf Oil Corporation, for damages because of personal injuries he alleged that he sustained on or about January 19, 1957, while in the course of his employment as an employee of Maritime Guard, Inc., who was insured under the Workmen's Compensation Laws. In other words, the Plaintiff was suing the third parties involved, but he did not make the Somner Sollitt Company, an Illinois corporation, a party until March 19, 1959, which was not only more than two years after the Plaintiff claimed he had been injured, but more than two years after the Industrial Accident Board had approved a compromise settlement agreement between the Plaintiff and the Workmen's Compensation Insurance carrier.

Somner Sollitt Company, the Illinois corporation, by special Plea in Abatement, pleaded the two-year statute of limitations (Art.5526 V.A.C.S.), in bar of the plaintiff's alleged cause of action. As a part of the same pleading, it also pleaded the compromise settlement of plaintiff's claim for Workmen's Compensation and that the settlement was approved by the Industrial Accident Board on February 25, 1957.

The Trial Court, having concluded that the Plea was well founded, severed the suit against the Illinois corporation from the one against the other two defendants, sustained the Plea of Limitation and decreed that the plaintiff take nothing as against the Illinois corporation.

On appeal, the Court of Civil Appeals in Beaumont had the following to say, in sustaining the action of the Trial Court:

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 4 of 32 asbestosclaims.law/library/10636/4

"We hold the Trial Court to have been correct in sustaining appellee's limitation plea. The two-year statute of limitations (Art. 5526, supra) is expressly applicable to the classification of actions into which appellee's action falls - action 'for injury done to the person of another.' Limitation began to run the day after that on which the Industrial Board approved the compromise settlement agreement, by which appellant and Texas Employers Insurance Association compromised and settled appellant's claim for Workmen's Compensation. Brooks vs. Lucky, Tex. Civ. App., 308 S.W.(2d) 273. The record indisputably establishes that the Board approved the settlement agreement on February 25, 1957. Appellee, as previously stated, was not made a party to the suit until March 19, 1959. By that time, the limitation period had elapsed."

As has been heretofore pointed out, the Plaintiff in this case, in Paragraph numbered 36 of his First Amended Complaint, alleges that during the year 1964, he was employed by Johns-Manville Sales Corporation at the Gulf States Power Plant, Bridge City, Texas. On the face of Plaintiff's pleading, this is the last date that he alleges that he received a personal injury. It should be emphasized that the Agreed Judgment which was entered in the 128th Judicial Court of Orange County, Texas, on September 16, 1964, recites, on page 1 thereof, that the Plaintiff, Claude J. Tomplait, was making "a Claim for benefits under the Workmen's Compensation Law of Texas, because of occupational disease claimed to have been sustained by him at various times, while in the employment of Armstrong Contracting & Supply Corporation, and also while in the employment of the Johns-Manville Corporation and/or Johns-Manville Sales Corporation, prior to this (i.e., September 16, 1964) date.

Therefore, it is the contention of all of the Defendants that the alleged cause of action of the Plaintiff has been barred by Article 5526 V.A.C.S. Not only is his cause of action against Armstrong Contracting & Supply Corporation, Johns-Manville Corporation and Johns-Manville Sales Corporation barred, as a result of the Agreed Judgment which was entered on September 16, 1964, but likewise the alleged cause of action against all other Defendants who have been sued in the instant cause of action is barred, due to the fact that Plaintiff's pleadings allege personal injuries which occurred more than two years prior to the date that the instant suit was filed, to-wit, December 23, 1966.

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 5 of 32 asbestosclaims.law/library/10636/5

II.

THE PROVISIONS OF THE UNIFORM COMMERCIAL CODE OF THE STATE OF TEXAS ARE NOT APPLICABLE TO THE INSTANT CAUSE OF ACTION

As we understand it, it is the contention of Mr. Stephenson, Plaintiff's attorney, that the four-year statute of limitations provided for in the Uniform Commercial Code of the State of Texas, which did not become effective until midnight, June 30, 1966, is applicable to this cause of action.

The statute itself very plainly excludes the cause of action alleged in the instant lawsuit, at Section 2.725 (d), of the Uniform Commercial Code of the State of Texas, which provides as follows:

> "(d) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this act becomes effective." (Emphasis ours)

Obviously, on the face of Plaintiff's Original Complaint, as well as the amendment thereto, all causes of action relied upon by the Plaintiff, accrued prior to the effective date of the Uniform Commercial Code. Therefore, Plaintiff's contention that the four-year statute of limitations, which is mentioned in the Uniform Commercial Code, is applicable to these causes of action, is specious.

Respectfully submitted,

John Rienstra

John Rienstra, Attorney for
OWENS-CORNING FIBER GLASS CORP.

John G. Tucker

John G. Tucker, Attorney for
GUSTIN-BACON MFG. CO.

George Weller

George Weller, Attorney for
FIBREBOARD PAPER PRODUCTS CORP.

Ben L. Reynolds

Ben L. Reynolds, Attorney for
EAGLE-PICHER INDUSTRIES, INC.

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 6 of 32 asbestosclaims.law/library/10636/6

George E. Duncan, Attorney for
PITTSBURGH PLATE & GLASS CO. and
PITTSBURGH ENGINEERING, INC.

Charles S. Pipkin, Attorney for
COMBUSTION ENGINEERING, INC. and
R. & I. REFRACTOR & INSULATION
CORP.

Gordon R. Pate, Attorney for
JOHNS-MANVILLE SALES CORPORATION
and
JOHNS-MANVILLE PRODUCTS
CORPORATION
and
JOHNS-MANVILLE FIBER GLASS, INC.

The foregoing Brief of all Defendants was served by mailing a copy thereof by certified mail, return receipt requested, on this 28th day of December, 1967, to Mr. Ward Stephenson, Stephenson Building, Orange, Texas, attorney for Plaintiff.

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 7 of 32 asbestosclaims.law/library/10636/7

EXHIBIT A
No. 13,916

IN THE 128TH DISTRICT COURT OF ORANGE COUNTY, TEXAS

CLAUDE J. TOMPLAIT	:	
	:	PLAINTIFF'S ORIGINAL
VS.	:	
	:	PETITION
THE TRAVELERS INSURANCE COMPANY, ET AL	:	

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CLAUDE J. TOMPLAIT, plaintiff, who resides in Orange County, Texas, complaining of THE TRAVELERS INSURANCE COMPANY, TEXAS EMPLOYERS INSURANCE ASSOCIATION and QUEEN INSURANCE COMPANY OF AMERICA, defendants, private corporations duly incorporated under and by virtue of the laws of the State of Texas, having license and permission to do business in said State, for the purpose of writing insurance; and for cause of action the plaintiff says the following:

1.

The plaintiff says that in the month of July, 1961 he was working in the County of Orange, State of Texas, for Armstrong Contracting and Supply Corporation in the capacity of insulator and in the furtherance of and while within the usual course of the business of his employer; that his said employer is engaged in the construction business; that the plaintiff was receiving an average weekly wage in the amount of $196.85 working eight hours per day and five days per week; that such average weekly wage in the amount of $196.85 entitled him to have his compensation calculated on the basic figure of $35.00 per week.

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 8 of 32 asbestosclaims.law/library/10636/8

2.

The plaintiff says that he was working in the above named county, and at the time of his injury his employer was engaged in a business within and subject to the Workmen's Compensation Act of the State of Texas, and was a subscriber, as that term is used in the Workmen's Compensation Act of the State of Texas, and carried a policy of insurance in compliance with said act with one of the defendants by the terms of which it agreed to pay to any person entitled thereto under the Workmen's Compensation Act of the State of Texas compensation for disability and death produced by an injury sustained in the course of such persons' employment with said employer, in accordance with the provisions of said act; that the said defendant thereby became bound and obligated to pay to the plaintiff the compensation for which he sues; that the said policy was issued to said employer and was at all times pertinent to this cause of action in full force and effect.

3.

The plaintiff says that prior to his injury and prior to the first distinct manifestation of disease during the month of July, 1961, he was a strong, healthy and able-bodied man, able to perform and did perform the duties of his employment in a satisfactory manner, but during said month aforesaid while engaged in the discharge of his duties and in the scope of his employment the following conditions became apparent: Personal injury and occupational disease, asbestosis and silicosis; that as a result of the occurence made the basis of this suit, plaintiff has suffered the following injuries:

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits
ACL Doc 10636 · Page 9 of 32
Published by AsbestosClaims.Law
asbestosclaims.law/library/10636/9

Severe and permanent injury to his body caused by dust, asbestos and other materials causing asbestosis and silicosis causing severe external and internal injuries including pulmonary fibrosis, restrictive ventilatory defect and arterio-desaturation. In the alternative, plaintiff says that if his injuries are not the sole cause of the disability and incapacity, then the same aggravated, prolonged or accelerated a prior condition.

4.

Plaintiff says that as a result of the injuries which he received he is now unable to work and has been unable to work or follow the pursuits of a working man so as to obtain and retain employment as such; and he therefore says that he is totally incapacitated at this time within the meaning of the Workmen's Compensation Law, and has been so incapacitated since the date of the receipt of said injuries and will continue to be totally incapacitated permanently; or in the alternative, the plaintiff says that he has received such lesser degree and percentage of disability as he may show himself entitled to receive upon trial hereof; and he says that his disability began on the date of the receipt of such injuries.

5.

Plaintiff says that he gave due and timely notice (within thirty days) to his employer and to the Industrial Accident Board after the receipt of the said injuries sustained by him, and did within due time (i.e., six months) after the receipt of such injuries make due claim for compensation to the Industrial Accident Board of the State of

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 10 of 32 asbestosclaims.law/library/10636/10

Texas; and in the alternative, plaintiff says that his employer had actual notice of said injuries within thirty days after the receipt thereof.

6.

Plaintiff says that he gave notice of appeal to the Industrial Accident Board within twenty (20) days after the rendition of the award by the Board that he would not abide by the said final ruling and decision of said Board; that within twenty (20) days after having given such notice of appeal to the said Board, plaintiff instituted suit to set aside such award of the said Board, claiming compensation for the full amount claimed by him before the said Board, together with full payment of all expenses heretofore incurred, including but not limited to medical aid, hospital services, nursing and medicines, to-wit:

Dr. John C. Grace	$ 107.00
Dr. Tom R. Jones	90.00
Dr. Peron G. Jones	35.00
Memorial Baptist Hospital	132.50
Orange Memorial Hospital	12.00
Expenses relative to examination by Dr. William U. Leary, Houston, Texas	58.50
	$ 435.00

and full payment of all such expenses incurred in the future.

7.

Plaintiff says that for at least two hundred ten (210) days of the year immediately preceding his injuries, he had worked in the employment in which he was working at the time of his injuries, and during the days when so employed, he earned an average daily wage or salary of $34.12 per day; in the alternative, plaintiff says that if he be mistaken as to the foregoing allegation and that he did not

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 11 of 32 asbestosclaims.law/library/10636/11

work in such employment for at least two hundred ten (210) days of the year immediately preceding his accident and injuries, he shows that there were other employees of his class at the time of his injuries who had worked in such employment for at least two hundred ten (210) days of the year immediately preceding his accident and injuries, in the same or a similar employment in the same or a neighboring place, and that during the days when so employed, earned an average daily wage of $34.12 per day; and plaintiff further says that his average weekly wage shall consist of three hundred (300) times the average daily wage or salary which he has earned or which an employee of the same class has earned during the days which he or an employee of the same class actually worked in such year, divided by fifty-two (52); and plaintiff says that by such computation he earned an average weekly wage of $196.85 per week. Further in the alternative, plaintiff says that if by reason of the shortness of the time of the employment of other employees engaged in the same class of work during the year immediately preceding his injuries, and for other good and sufficient reasons, it is impracticable to compute his average weekly wage under the two methods above alleged, then he prays that his average weekly wage be computed by the court or jury in any manner that is fair and just to both parties, as of the date of his injuries, and in this connection says that $196.85 as an average weekly wage would be fair and just.

3.

The plaintiff says that he has employed the attorneys whose names are signed to this petition to represent him

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 12 of 32 asbestosclaims.law/library/10636/12

in this behalf and has contracted to pay said attorneys such fee as the court may allow, not to exceed thirty (30%) per cent of the recovery herein.

9.

Plaintiff says that he has no property, real or personal, from which he can support himself and that if compensation be awarded to him in weekly payments, after the attorneys' fees are paid out of each payment the balance will be wholly inadequate to support him. Further, he shows that he is a man of prudence and care in business matter and in the handling of money, and that, if compensation herein due him be paid him in a lump sum, he will be able to invest part of same in a business of some kind, out of which he can make a living. Plaintiff further says that if future payments of compensation are not awarded to him in a lump sum, then manifest hardship and injustice will result to him.

WHEREFORE, plaintiff prayesthat the defendant be cited to appear and answer herein, and that upon trial hereof, plaintiff have judgment against defendant setting aside the final decision and award of the Industrial Accident Board and for compensation for four hundred and one (401) weeks at the rate of $35.00 per week, for payment of all expenses heretofore incurred, including but not limited to medical aid, hospital services, nursing and medicines, and payment of all such expenses incurred in the future, that he have judgment against defendant for all past due installments of compensation together with four (4%) per cent interest, compounded annually, from the respective dates of maturity of each installment of compensation due him herein; and that the balance

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits
Published by AsbestosClaims.Law
ACL Doc 10636 · Page 13 of 32
asbestosclaims.law/library/10636/13

of compensation due him herein be awarded to him in a lump sum, allowing four (4%) per cent discount on such future installments; and plaintiff prays for such other and further relief, both general and special, at law and in equity, to which he may be entitled, and all costs of suit.

STEPHENSON, STEPHENSON
AND THOMPSON

By /s/ Ward Stephenson
Attorneys for Plaintiff
Stephenson Building
Orange, Texas

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits
ACL Doc 10636 · Page 14 of 32
Published by AsbestosClaims.Law
asbestosclaims.law/library/10636/14

Citation—District Court — Port Printers

THE STATE OF TEXAS

To: TEXAS EMPLOYERS INSURANCE ASSOCIATION
Upon whom service may be obtained by serving anyone subject to service at 2693 North Street, Beaumont, Texas.

Greeting:

You are commanded to appear by filing a written answer to the Plaintiff's petition at or before 10 o'clock A. M. of the Monday next after the expiration of 20 days from the service hereof, before the Honorable District Court of Orange County for the 128th Judicial District of Texas, at the Court House in Orange, Texas.

Said plaintiff's petition was filed on the 21st day of December, 1962

The file number of said suit being No. 13,916.

The style of the case is

CLAUDE J. TOMPLAIT is - - - - - - - - - - - - - - - Plaintiff,

versus

THE TRAVELRRS INSURANCE COMPANY, ET AL is - - - - Defendant.

A copy of plaintiff's petition accompanies this citation.

If this Citation is not served within 90 days after the date of its issuance, it shall be returned unserved.

Issued this the 21st day of December, A. D., 1962.

Given under my hand and seal of said Court, at office in Orange, Texas, this the 21st day of December, A. D., 1962.

EXECUTE WHEN COPY IS DELIVERED:

This, a true copy of the original Citation, was delivered to Defendant:

_____

on the _____ day of _____ 19____

_____
Sheriff-Constable

_____ County, Texas

By _____ Deputy.

ETHEL BURTON, Clerk
District Court, Orange County, Texas

By _____ Deputy

SHERIFF'S RETURN

Came to hand on the_____day of_____, 19____, at_____o'clock_____M., and executed in_____County, Texas, by delivering to each of the within named defendants, in person, a true copy of this Citation together with the accompanying copy of the plaintiff's petition, at the following times and places, to-wit:

NAME	DATE			TIME			Place, and Course and Distance From Court House	Mileage
	Month	Day	Year	Hour	Min.	M.		

And not executed as to defendant__, _____

the diligence used in finding said defendant___, being:_____

and the cause of failure to execute this process is:_____

and the information received as to the whereabouts of the said defendant___, being: _____

I actually and necessarily traveled_____miles in the service of this Citation, in addition to any other mileage I may have traveled in the service of other process in the same case during the same trip.

FEES—Serving_____cop_____, $_____

Mileage_____miles, _____

Total, - - - - - - - - - - $_____

_____ } Sheriff / Constable

_____County, Texas

By_____Deputy

File No. 13,916

DISTRICT COURT
Orange County, Texas
128th Judicial District of Texas

CITATION

CLAUDE J. TOMPLAIT

vs.

THE TRAVELERS INSURANCE CO. ET AL

Issued December 21, 19 62

Ethel Burton, Clerk

By _____ Deputy

Filed _____ Day of _____, 19____

Ethel Burton, Clerk

By _____ Deputy

Port Printers

Delivered this 26 day of December 1962

at 9:35 o'clock A M

R. E. CULBERTSON, Acting Sheriff
JEFFERSON COUNTY, TEXAS

BY _____
DEPUTY SHERIFF

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EXHIBIT B
No. 13,916

IN THE 128TH DISTRICT COURT OF ORANGE COUNTY, TEXAS

CLAUDE J. TOMPLAIT	:	
	:	PLAINTIFF'S FIRST
VS.	:	AMENDED ORIGINAL
	:	PETITION
THE TRAVELERS INSURANCE	:	
COMPANY, ET AL	:	

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW CLAUDE J. TOMPLAIT, plaintiff, who resides in Orange County, Texas, leave of the court having been first had and obtained, and files this his first amended original petition in lieu of his original petition heretofore filed herein, complaining of THE TRAVELERS INSURANCE COMPANY, TEXAS EMPLOYERS INSURANCE ASSOCIATION and QUEEN INSURANCE COMPANY OF AMERICA, defendants, private corporations duly incorporated under and by virtue of the laws of the State of Texas, having license and permission to do business in said state, for the purpose of writing insurance; and for cause of action the plaintiff says the following:

1.

That on or about the 26th day of July, 1961, the plaintiff was working in the County of Orange, State of Texas, for Armstrong Contracting and Supply Corporation in the capacity of insulator and in the furtherance of and while within the usual course of the business of his employer; that his said employer is engaged in the construction business; that the plaintiff was receiving an average weekly wage in the amount of $196.85 working eight hours per day and five days per week; that such average weekly wage in the amount

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits
Published by AsbestosClaims.Law
ACL Doc 10636 · Page 17 of 32
asbestosclaims.law/library/10636/17

of $196.85 entitled him to have his compensation calculated on the basic figure of $35.00 per week.

2.

The plaintiff says that he was working in the above named county, and at the time of his injury his employer was engaged in a business within and subject to the Workmen's Compensation Act of the State of Texas, and was a subscriber as that term is used in the Workmen's Compensation Act of the State of Texas, and carried a policy of insurance in compliance with said act with one of the defendants by the terms of which it agreed to pay to any person entitled thereto under the Workmen's Compensation Act of the State of Texas compensation for disability and death produced by an injury sustained in the course of such persons' employment with said employer, in accordance with the provisions of said act; that the said defendant thereby became bound and obligated to pay to the plaintiff the compensation for which he sues; that the said policy was issued to said employer and was at all times pertinent to this cause of action in full force and effect.

3.

The plaintiff says that prior to the first distinct manifestation of disease during the month of July, 1961, he was a strong, healthy and able-bodied man, able to perform and did perform the duties of his employment in a satisfactory manner, but during said month aforesaid while engaged in the discharge of his duties and in the scope of his employment the following conditions became apparent: Occupational disease, asbestosis and silicosis; that as a result of the occurrence

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 18 of 32 asbestosclaims.law/library/10636/18

made the basis of this suit, plaintiff has suffered the following injuries: Severe and permanent injury to his body caused by dust, asbestos and other materials causing asbestosis and silicosis causing severe external and internal injuries including pulmonary fibrosis, restrictive ventilatory defect and arterio-desaturation.

4.

Plaintiff says that in the absence of conclusive evidence that the plaintiff suffered disability from contracting silicosis or asbestosis due to the nature of his employment, then plaintiff says that during the ten (10) years immediately preceding the date of incapacity the plaintiff has been exposed to the inhalation of silica dust or asbestos dust over a period of not less than five (5) years, at least two (2) years of which were in this state under a contract of employment existing in this state.

5.

Plaintiff says that as a result of the injuries which he received he is now unable to work and has been unable to work or follow the pursuits of a working man so as to obtain and retain employment as such; and he therefore says that he is totally incapacitated at this time within the meaning of the Workmen's Compensation Law and has been so incapacitated since the date of the receipt of said injuries and will continue to be totally incapacitated permanently; or in the alternative, the plaintiff says that he has received such lesser degree and percentage of disability as he may show himself entitled to receive upon trial hereof; and he says that his disability began on the date of the receipt of such injuries.

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 19 of 32 asbestosclaims.law/library/10636/19

6.

Plaintiff says that he gave due and timely notice (within thirty days) to his employer and to the Industrial Accident Board after the receipt of the said injuries sustained by him, and did within due time (i.e., six months) after the receipt of such injuries make due claim for compensation to the Industrial Accident Board of the State of Texas; and in the alternative, plaintiff says that his employer had actual notice of said injuries within thirty days after the receipt thereof; or in the alternative, plaintiff says that any failure (which is specifically denied) to give notice of injury and/or file claim for compensation within the statutory periods is excused for good cause which continued up to the time of filing.

7.

Plaintiff says that he gave notice of appeal to the Industrial Accident Board within twenty (20) days after the rendition of the award by the Board that he would not abide by the said final ruling and decision of said Board; that within twenty (20) days after having given such notice of appeal to the said Board, plaintiff instituted suit to set aside sich award of the said Board, claiming compensation for the full amount claimed by him before the said Board, together with full payment of all expenses heretofore incurred within ninety-one (91) days according to the provision of Section 26(d) of Article 8306, V.A.T.S., including but not limited to medical aid, hospital services, nursing and medicines, to-wit:

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 20 of 32 asbestosclaims.law/library/10636/20

Medical Expense	Amount	Date
Dr. John C. Greco	$ 67.00	July 26 - Oct. 24, 1961
Dr. Tom R. Jones	90.00	Aug. 1 - 28, 1961
Dr. Peron O. Jones	35.00	Aug. 10, 1961
Memorial Baptist Hospital	132.50	Aug. 8-10, 1961
Orange Memorial Hospital	12.00	July 26, 1961
	$ 336.50	

8.

Plaintiff says that for at least two hundred ten (210) days of the year immediately preceding his injuries, he had worked in the employment in which he was working at the time of his injuries, and during the days when so employed, he earned an average daily wage or salary of $34.12 per day; in the alternative, plaintiff says that if he be mistaken as to the foregoing allegation and that he did not work in such employment for at least two hundred ten (210) days of the year immediately preceding his accident and injuries, he shows that there were other employees of his class at the time of his injuries who had worked in such employment for at least two hundred ten (210) days of the year immediately preceding his accident and injuries, in the same or a similar employment in the same or a neighboring place, and that during the days when so employed, earned an average daily wage of $34.12 per day; and plaintiff further says that his average weekly wage shall consist of three hundred (300) times the average daily wage or salary which he has earned or which an employee of the same class has earned during the days which he or an employee of the same class actually worked in such year, divided by fifty-two (52); and plaintiff says that by such computation he earned an average weekly wage of $196.65 per week. Further in the alternative, plaintiff says that if by reason of the shortness of the time of

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 21 of 32 asbestosclaims.law/library/10636/21

the employment of other employees engaged in the same class of work during the year immediately preceding his injuries, and for other good and sufficient reasons, it is impracticable to compute his average weekly wage under the two methods above alleged, then he prays that his average weekly wage be computed by the court or jury in any manner that is fair and just to both parties, as of the date of his injuries, and in this connection says that $196.85 as an average weekly wage would be fair and just.

9.

The plaintiff says that he has employed the attorneys whose names are signed to this petition to represent him in this behalf and has contracted to pay said attorneys such fee as the court may allow, not to exceed thirty (30%) per cent of the recovery herein.

10.

Plaintiff says that he has no property, real or personal, from which he can support himself and that if compensation be awarded to him in weekly payments, after the attorneys' fees are paid out of each payment the balance will be wholly inadequate to support him. Further, he shows that he is a man of prudence and care in business matters and in the handling of money, and that, if compensation herein due him be paid him in a lump sum, he will be able to invest part of same in a business of some kind, out of which he can make a living. Plaintiff further says that if future payments of compensation are not awarded to him in a lump sum, then manifest hardship and injustice will result to him.

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 22 of 32 asbestosclaims.law/library/10636/22

WHEREFORE, plaintiff prays that the defendant be cited to appear and answer herein, and that upon trial hereof, plaintiff have judgment against defendant setting aside the final decision and award of the Industrial Accident Board and for compensation for four hundred and one (401) weeks at the rate of $35.00 per week, for payment of all expenses heretofore incurred, including but not limited to medical aid, hospital services, nursing and medicines, and that he have judgment against defendant for all past due installments of compensation together with four (4%) per cent interest, compounded annually, from the respective dates of maturity of each installment of compensation due him herein; and that the balance of compensation due him herein be awarded to him in a lump sum, allowing four (4%) per cent discount on such future installments; and plaintiff prays for such other and further relief, both general and special, at law and in equity, to which he may be entitled, and all costs of suit.

STEPHENSON, STEPHENSON
AND THOMPSON

By_____
Attorneys for Plaintiff
Stephenson Building
Orange, Texas

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 23 of 32 asbestosclaims.law/library/10636/23

NO. A-13,916-A

CLAUDE J. TOMPLAIT	§	IN THE DISTRICT COURT OF
VS.	§	ORANGE COUNTY, TEXAS
THE TRAVELERS INSURANCE COMPANY AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION	§	128TH JUDICIAL DISTRICT

AGREED JUDGMENT

BE IT REMEMBERED, that on this, the 16th day of September, 1964, the above entitled and numbered cause wherein Claude J. Tomplait is plaintiff and The Travelers Insurance Company and Texas Employers' Insurance Association are defendants came on to be heard at an agreed setting, this cause having heretofore been severed from Cause No. A-13,916, now pending in this Court, and all parties having appeared in person and through their attorneys and announced ready for trial, and a jury having been by all parties expressly waived, the matters of fact, as well as of law, were thereupon submitted to the Court; and the Court, having heard the pleadings and evidence, finds that this suit involves a claim for benefits under the Workmen's Compensation Law of Texas because of occupational disease claimed to have been sustained by said plaintiff at various times while in the employment of Armstrong Contracting & Supply Corporation and also while in the employment of Johns-Manville Corporation and/or Johns-Manville Sales Corporation prior to this date, the defendant, The Travelers Insurance Company, being the insurance carrier under said law for said Armstrong Contracting & Supply Corporation at such times, and the said defendant, Texas Employers' Insurance Association, being the insurance carrier for said Johns-Manville Corporation and/or Johns-Manville Sales Corporation at such times, it being claimed by

"EXHIBIT C"

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plaintiff that he was injuriously exposed to the hazards of said occupational disease while in the employment of said employers.

The Court finds that plaintiff submitted a claim to the Industrial Accident Board of the State of Texas for such occupational disease, the same being No. W-67299 on the docket of said Board, that the final award of said Industrial Accident Board on said claim was made on the 18th day of December, 1962, that notice of appeal was timely filed by plaintiff and that this suit was duly and timely filed, thereby giving this Court jurisdiction herein;

It is therefore ORDERED by this Court that said award of said Industrial Accident Board, insofar as it applies to any claims against the defendants herein, be and the same is hereby set aside, vacated and held for naught.

Thereafter, it was made known to the Court that, subject to the approval of the Court, the parties had reached a compromise settlement of this suit and of all matters in controversy between them, under the terms of which it was agreed that plaintiff, Claude J. Tomplait, should recover judgment herein against the defendant, The Travelers Insurance Company, for the sum of FIVE THOUSAND ($5000.00) DOLLARS and should recover judgment herein against the defendant, Texas Employers' Insurance Association, for the further sum of ONE THOUSAND ($1000.00) DOLLARS in full compromise, settlement and satisfaction of all claims for workmen's compensation benefits that plaintiff, Claude J. Tomplait, may have under the Workmen's Compensation Law of Texas for occupational disease and any injurious exposure or exposures to the hazards of such disease at any time while in the employment of said Armstrong Contracting & Supply Corporation, Johns-Manville Corporation and/or Johns-Manville

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 25 of 32 asbestosclaims.law/library/10636/25

Sales Corporation; and the Court having found from the evidence that the liability of the defendants, The Travelers Insurance Company and Texas Employers' Insurance Association, each and both, and the extent of the disease and any injurious exposure or exposures to the hazards of said disease at any time while in the course and scope of plaintiff's employment for said employers are uncertain, indefinite and incapable of being satisfactorily established, and that said proposed compromise settlement of such claims under the Texas Workmen's Compensation Act is reasonable, fair and just, and that the same should in all things be approved and confirmed;

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court that the proposed compromise by and between the plaintiff and the defendants, The Travelers Insurance Company and Texas Employers' Insurance Association, whereby the plaintiff is settling all claims for workmen's compensation benefits that he might have under the Texas Workmen's Compensation Act for occupational disease and any injurious exposures to the hazards of said disease at any time while in the course and scope of his employment for the Armstrong Contracting & Supply Company, Johns-Manville Corporation and/or Johns-Manville Sales Corporation, be and the same is hereby in all things approved and confirmed; and when the defendants, The Travelers Insurance Company and Texas Employers' Insurance Association, comply with this judgment by payment of the amounts herein provided, the plaintiff shall thereafter have no claim of any type whatsoever under the Texas Workmen's Compensation Act for an occupational disease and any injurious exposures to the hazards of said disease as against said defendants or either of them.

And it further appearing to the Court that the said Claude J. Tomplait has been represented by the law firm of Stephenson,

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 26 of 32 asbestosclaims.law/library/10636/26

Stephenson & Thompson, of Orange, Texas, before the Industrial Accident Board of the State of Texas and in this Court under a contract to pay said attorneys thirty (30%) per cent of any amount recovered, and said contract having been presented to the Court, and the Court having heard evidence thereon and having determined that a fee of thirty (30%) per cent out of the recoveries herein would be fair and reasonable and that the services of such attorneys were necessary and the Court having further taken into consideration the benefits accruing to Claude J. Tomplait as a result of said services, and having further found that benefits have accrued thereby and said fee of thirty (30%) per cent of this judgment was just and reasonable based upon said services performed and benefits accruing;

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court that said contract for attorneys' fees be, and the same is, hereby approved and confirmed.

It is further ORDERED, ADJUDGED AND DECREED by the Court that Claude J. Tomplait do have and recover of and from The Travelers Insurance Company the sum of FIVE THOUSAND ($5000.00) DOLLARS and that said amount be paid in a lump sum at this time.

It is further ORDERED, ADJUDGED AND DECREED by the Court that plaintiff, Claude J. Tomplait, do have and recover of and from the defendant, Texas Employers' Insurance Association, the sum of ONE THOUSAND ($1000.00) DOLLARS, payable in a lump sum.

It is further ORDERED, ADJUDGED AND DECREED by the Court that said sums herein decreed to plaintiff, Claude J. Tomplait, be apportioned, seventy (70%) per cent to the said Claude J. Tomplait and thirty (30%) per cent to his attorneys, Stephenson, Stephenson & Thompson.

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 27 of 32 **asbestosclaims.law/library/10636/27**

It is further ORDERED, ADJUDGED AND DECREED that the defendants each pay one-half (1/2) of the legally taxable court costs incurred herein up to and including this date, and that said defendants shall not be responsible for any court costs incurred after that date by any party.

It further appearing to the Court, and the Court having found that prior to the signing and entry of this judgment, the full amount herein adjudged against said defendants has been in all things fully paid as provided herein, and that said judgment except as to costs of court has been in all things satisfied;

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court that no execution shall issue as to The Travelers Insurance Company or Texas Employers' Insurance Association and that this judgment shall stand fully and finally paid, satisfied, extinguished and released, except as to costs of court incurred in this severed case.

It is further ORDERED, ADJUDGED AND DECREED that nothing herein shall be construed to be any waiver on the part of the plaintiff of any rights, claims, or causes of action that he has or may assert against the defendant Queens Insurance Company.

RENDERED, ENTERED AND SIGNED, this 16th day of September, 1964.

James N. Nelson
JUDGE PRESIDING

APPROVED:

STEPHENSON, STEPHENSON AND THOMPSON

By _____
ATTORNEYS FOR PLAINTIFF,
CLAUDE J. TOMPLAIT

STRONG, PIPKIN, STRONG AND NELSON

By _____
ATTORNEYS FOR DEFENDANT,
THE TRAVELERS INSURANCE COMPANY

MARCUS AND WELLER

By _____
ATTORNEYS FOR DEFENDANT, TEXAS
EMPLOYERS' INSURANCE ASSOCIATION

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits Published by AsbestosClaims.Law
ACL Doc 10636 · Page 28 of 32 asbestosclaims.law/library/10636/28

We and each of us having requested the Court to render and enter the foregoing judgment, do now each hereby acknowledge full payment of the sum of FIVE THOUSAND ($5000.00) DOLLARS recovered by us from defendant, The Travelers Insurance Company, under the terms of the foregoing judgment, and likewise do hereby acknowledge full payment of the sum of ONE THOUSAND ($1000.00) DOLLARS recovered by us from defendant, Texas Employers' Insurance Association, under the terms of the foregoing judgment, and do each hereby declare said judgment to be in all things fully paid, satisfied and released; and in consideration of the compromise of said suit and the entry of said judgment by agreement and the payment of same, as hereby acknowledged, we and each of us do hereby fully and finally release and discharge the said defendant, The Travelers Insurance Company, and the said defendant, Texas Employers' Insurance Association, each and both, from all claims of any kind or character now accrued or that might accrue in the future by the reason of the occupational disease made the basis of this suit, and do each hereby declare and acknowledge that all claims and benefits accruing or to accrue in the future by reason thereof, including any and all claims for medical expense or related benefits, are in all things fully and finally compromised, settled, paid and satisfied.

Signed this 16th day of September, 1964.

CLAUDE J. TOMPLAIT, PLAINTIFF

STEPHENSON, STEPHENSON & THOMPSON

BY _____
ATTORNEYS FOR PLAINTIFF

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NO. 13,916-A

CLAUDE J. TOMPLAIT

VS.

THE TRAVELERS INSURANCE COMPANY AND TEXAS EMPLOYERS' INSURANCE ASSOCIATION

AGREED JUDGMENT

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The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits
ACL Doc 10636 · Page 30 of 32

THE STATE OF TEXAS §

COUNTY OF ORANGE §

I, ETHEL BURTON, Clerk of the District Court in and for said County and State, do hereby certify that the above and foregoing is a true and correct copy of the AGREED JUDGMENT rendered in Cause No. A-13,916-A, entitled CLAUDE J. TOMPLAIT vs THE TRAVELERS INSURANCE CO., ET AL as the same is recorded in Vol. R-1, page 133, CIVIL MINUTES, Orange County, Texas.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 19th day of April, A. D. 1967.

CLERK, DISTRICT COURT, ORANGE COUNTY, TEXAS

CIVIL ACTION NO. 5402

CLAUDE J. TOMPLAIT

vs.

COMBUSTION ENGINEERING, INC., ET AL

BRIEF FILED ON BEHALF OF

ALL DEFENDANTS

LAW OFFICES OF

WELLS, DUNCAN AND BEARD

BEAUMONT SAVINGS BUILDING

BEAUMONT, TEXAS

The Tomplait v. Combustion Engineering Case File (1962-1969), Brief against plaintiff, with exhibits

ACL Doc 10636 · Page 32 of 32

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asbestosclaims.law/library/10636/32