IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

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

CLAUDE J. TOMPLAIT :

VS. : CIVIL NO. 5402

COMBUSTION ENGINEERING INC., ET AL :

PLAINTIFF'S BRIEF

TO THE HONORABLE JUDGE OF SAID COURT:

In the workmen's compensation proceeding filed in the State district court of Orange County, Texas, there were three insurance company defendants, and there was a severance and settlement as to two of the insurance companies on the 16th day of September, 1964; however the workmen's compensation proceeding was still in full force and effect against the third carrier, Queen Insurance Company. The settlement in Queen was not made until the 26th day of May, 1966. Very promptly and within two years from the final settlement of the Queen case, the present suit was filed in this Court on the 23rd day of December, 1966.

It is without question that under the Texas law, the injured worker cannot sue third parties without waiving his rights to collect workmen's compensation coverage. In this case, Tomplait could not have sued any of the manufacturers or companies who are defendants in this case in a third party action without waiving his right to collect his workmen's compensation insurance from Queen Insurance Company.

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Promptly, after all of the workmen's compensation proceedings were concluded, Tomplait did file this action.

The court might be interested to know that in the State workmen's compensation matter, each of the insurance carriers tried to assert that under the law of Texas, the other carrier or one of the other carriers covered the last employment of Tomplait. The Texas law is to the effect that the employer for whom the employee was working at the time of his last injurious exposure is the compensation carrier responsible. Tomplait kept working after he discovered he had asbestosis, and an ingenious theory was put forth that even after he discovered the asbestosis condition, subsequent employers were then responsible for the workmen's compensation due him and consequently they were therefore brought in as additional defendants in this state compensation action.

It therefore seems obvious that there could be no limitation of action against any of the defendants in this case based upon the period of limitation of two years following the settlement of the compensation case.

The question that appears to the writer is whether or not there is a limitation period applicable to the defendants and if there is, when does the limitation period begin and what is its term.

It is the plaintiff's contention in this case that over a period of many years, possibly twenty-five, he gradually contracted the disease of asbestosis. Asbestosis is and has been for these many years an occupational hazard of asbestos workers. It is the plaintiff's contention that the manufacturers of these

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asbestos and insulating products (which do not necessarily have to be asbestos) are made up of many small fibers which upon being inhaled penetrate the lungs like very small needles. Continued breathing of these fibers builds up in the lungs, and deterioration of the lungs developes to the extent that breathing becomes extremely difficult.

Plaintiff contends that no one in the world would have known better than the defendants the dangerous nature of the products they manufactured. These defendants ought to have made tests, they should have found out what the dangerous propensities of their products were, and should have advised those using the products (who could have reasonably been expected to use the products) of their dangerous nature. The defendants should also have advised the plaintiff and those situated as he was that certain precautionary measures should have been taken. It may have been that certain breathing apparatus, protective clothing, ointments, ventilation, etc. would have been required to lessen this dangerous hazard. We feel that there should be no statute of limitation applicable to such failure on the part of these defendants.

If the court would attempt to place the statute of limitation on this matter, then the plaintiff believes that this would simply be condoning improper action of manufacturers and distributors of dangerous products where the manufacturers or distributors knew that the injurious effects of their products would come about so slowly that in all likelihood any suit to collect damages would be barred by the statutes of limitation, whatever be the term.

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In other words, in argument, can a manufacturer be allowed to profit by producing dangerous materials causing the slow death of a person and then use as a defense to a suit that the action for damages should have been brought within a certain number of years? If this could possibly be correct then the claimant would very well be denied recovery in cases where he did not know of his injury or illness until after the expiration of the time for filing these suits.

In the Tomplait situation, he worked for many, many employers. We feel this analogous to the air contamination cases, several of which have been had recently in New York, wherein the major air contaminators are sued and it is not necessary that every company contaminating the air be included. If the three or four defendants in the air contamination case contribute substantially to the contamination of the air, this is sufficient. If these defendants in turn believe other companies are in truth the ones guilty of contaminating the air, they in turn must bring these other defendants in themselves and prove that these subsequent defendants contributed to the injury and not them, the original defendants.

The statute of limitations has emerged as a critical problem in the new wave of products liability litigation. Consumers are being exposed today to complex, synthetic substances in drugs, cosmetics, pesticides, cigarettes and industrial cases. These products are causing diseases and injuries which manifest themselves often long after the product has been used, including cancer, cataracts, and other eye damage, pneumoconioses, various degenerative diseases, and even genetic damage.

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There are three or four main theories in use today in the United States to determine when a cause of action accrues or when the statute of limitations begins to run. We list these rules, from the most restrictive to the most liberal:

(1) From the act of the defendant; the first contact. A number of courts have held that the cause of action accrues when the defendant commits his wrong. This is also stated as the time when the product first comes into contact with the plaintiff, or from the time of the negligence of the defendant, or, in the case of warranty, from the time of the sale of the product.

(2) From the last contact. Another group of states have adopted as the time period when the cause of action accrues the last contact by the plaintiff with the substance. This result is generally accomplished on the theory that the defendant's negligence was a continuing one, lasting until the last exposure. Courts have used this rule in products and in non-products tort cases.

(3) From the time of discovery or notice. A number of states have adopted a test turning upon the time the plaintiff had notice of his disease or injury. This test is variously stated, as: the time when the plaintiff discovered his injuries when it was diagnosed by a doctor, when the disease manifested itself, or when the plaintiff reasonably should have discovered his condition. Cases have involved the laws of Pennsylvania, Indiana, Nebraska, and Connecticut. The leading case, although not involving products liability, is the Supreme Court decision in Urie vs. Thompson, 377 U.S. 163 (1949), where a worker developed silicosis after a number of years of employment. The holding, that the cause of action did not accrue until the discovery

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of the disease, has been very influential in products cases. "Tolling" the usual statutory period until the plaintiff has discovered his illness is also the result of express statutory language in some states.

(4) From the time of discovery of causal relation. It would be possible for a court to extend the time for the accrual of a cause of action beyond the period when injury was discovered to the time when the reason for the injury was discovered -- the causal relationship between the product and the illness. This would be logical enough, since very often a person knows that he is injured but does not know the cause. For example, in the MER/29 drug cases, some users knew they had cataracts but assumed they were due to age. Sometime thereafter they discovered that they had been taking MER/29 and read in the paper that it was suspected of causing cataracts. It was really only at that point that they had adequate information to form a decision to bring suit, and it was generally at that point that they consulted an attorney for the first time.

Quoting from the Urie vs. Thompson case, cited above, The Supreme Court said:

> "According to petitioner's allegations, he had been employed as a fireman on steam locomotives of the interstate Missouri Pacific for roughly thirty years. In 1940 he had been forced to cease work by a pulmonary disease diagnosed as silicosis. This permanently disabling affliction had been caused by continuous inhalation of silica dust blown or sucked into the cabs of the locomotives on which he had worked. The injurious concentration of silica dust in the air breathed by petitioner arose from the railroad's use of its locomotives' sanding boxes of sand materials containing 80 to 90 per cent of silica or silicon dioxide and the emission by the locomotives' faultily adjusted 'sanders' of such sand materials in excessive amounts beyond those needed to provide traction for locomotive wheels. Respondent Thompson, trustee of the railroad since 1933, 'knew or by the exercise of due care should have known,' of the danger of silicosis arising from the conditions of petitioner's employment."

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Quoting further, the Court said,

"Furthermore, the court held that the Federal Employers' Liability Act's three-year statute of limitations, 45 USCA #56, 10A FCA Title 45, #56, did not bar petitioner's claim since his 'cause of action accrued in May, 1940, when he became incapacitated."

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 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 Va.L.Rev. 145 (1955). Liability in negligence for the failure to discharge that duty be 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."

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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 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 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."

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 this case clearly come within the labeling and hazardous substances statutes. Mr. Tomplait certainly has a toxic condition, the materials certainly were irritants and they certainly were strong sensitizers, and they were mixtures or substances which caused substantial personal injury and illness, as a result of the customary handling and use of these materials.

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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.

WHEREFORE, the plaintiff prays that this Honorable Court overrule any defensive plea of limitation of action and sustain the plaintiff's right to proceed herein against all of the defendants.

Respectfully submitted,

STEPHENSON, THOMPSON & MORRIS

By Ward Stephenson
Attorneys for Plaintiff
Stephenson Building
Orange, Texas 77630

NO. 5402

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LAW OFFICES
STEPHENSON, THOMPSON & MORRIS
STEPHENSON BUILDING
ORANGE, TEXAS

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