IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED

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James R. Cooney, Clerk, U. S. Court

By Virginia R. Sens DEPUTY

CLAUDE J. TOMPLAIT I

VS. I CIVIL ACTION NO. ~~5420~~ 5402

COMBUSTION ENGINEERING, INC., ET AL I

ADDITIONAL BRIEF ON THE QUESTION OF THE TWO YEAR STATUTE OF LIMITATIONS

In Frumer & Freedman, Vol. 3, Products Liability, Para. 40.01, the rule is stated:

"Products Liability - Warranty cases, unlike negligence cases, have involved questions both as to the applicable statute of limitations where personal injuries are sustained and as to the time when the action accrues.

(1) - Statute Applicable; personal injuries. We have pointed out that warranty is basically tort. xxx Where plaintiff has sustained personal injuries, however, many cases have held that a personal injury limitation period is applicable, whether or not warranty is tort or contract. These cases have stressed the fact that the gist of plaintiff's action is his personal injuries and that the statute did not only apply to actions in negligence."

Prior to adoption of the Uniform Commercial Code, Pennsylvania, followed the rule that the personal injury limitation period (two years) was applicable in a warranty-personal injury case, whether or not warranty is tort or contract.

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Para. 40.03, Frumer & Freedman, Vol. 3, Products Liability. The statute of limitation under the Uniform Commercial Code is not retroactive. Obst. vs. Newark Bracket & Ladder Company, 236 F. Supp. 581 (Ed. Pa. 1964).

In Frumer & Freedman, Products Liability, Vol. 3, Para. 39.01, the text states:

> "It is, of course, clear that a product can cause a disease which will not manifest itself immediately after exposure to the disease. It would seem that in such cases, plaintiff's cause of action should not accrue until his disease was diagnosed or until he should have discovered the nature of his disease. It has been so held in a number of fairly recent products liability cases." Sylvania Electric Products vs. Barker, 228 F.2d, 842, (1st Cir. Mass. 1955), cert. denied, 350 U.S. 988 (1956), applying Nebraska law, berylliosis contracted from blowing neon tubes containing beryllium dust. Ricciuti vs. Voltarc Tubes, Inc., 277 F.2d 809 (2d Cir. Conn. 1960), involving the contraction of berylliosis from beryllium dust in neon tubes.

The Court, in Ricciuti, held that the statute of limitations applicable to tort actions generally applied and the cause of action accrued when the disease was discovered.

Where plaintiff has sustained personal injuries, many cases have held that a personal injury period is applicable whether or not warranty is tort or contract. These cases

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have stressed the fact that the gist of plaintiff's action is his personal injuries and that the statute did not apply to actions in negligence.

In Rubino vs. Utah Canning Company, 123 Cal. Appeals 2d 18, 266 P.2d 163 (1954), a food-implied warranty case, the applicable statute provided that:

> "An action xxx for injury to or for the death of one caused by the wrongful act or neglect of another xxx" was to be brought within one year. The Court held that "xxx the legislative intent xxx was not to restrict xxx coverage to tort actions independent of any contractual relation, but to provide a limitation of one year where personal injury or death results, regardless of the tort, contract or breach of express or implied warranty aspect of the case."

In the case of Michalek vs. U. S. Gypsum Co. 2d Cir., 1935, 76 F.2d 115, the Court held that where a minor contracted silicosis and sued his employer over three years after employment terminated, the employer's alleged negligent action in failing to protect plaintiff from dust was barred by the statute of limitation which began to run when his employment was terminated, and not when the disease appeared, according to expert's opinion. The Court held that the plaintiff's cause of action was based on negligence and that the statute applicable to a negligence action was applicable.

Other cases which are applicable to this situation are cases involving the use of concrete. In Simmons vs. Rhodes

& Jamieson, Ltd. (1956) 46 Cal. 2d, 190, 293 P.2d 26, plaintiff suffered severe burns as a consequence of using ready-mixed cement purchased from defendant in constructing his own home. Plaintiff's contention that he was entitled to recover on the theory that the cement was not of merchantable quality, with the result that defendant had breached the implied warranty to which he was subject under a statute providing that, where goods are bought by description from a seller who deals in goods of that description, there is an implied warranty that the goods shall be of merchantable quality. The Court held that "merchantable quality" means that the substance sold is reasonably suitable for the ordinary uses it was manufactured to meet. The Court also rejected the contention that the cement had a concealed or hidden danger unknown to plaintiff and that defendant should have warned him that it would burn the skin. The injury, it was pointed out, occurred in the handling of a standard and common commodity, and quicklime, which has a caustic effect, and was the cause of the burns in the instant case, is a necessary ingredient of cement, and plaintiff was familiar with this fact.

In Katz vs. Arundel-Brooks Concrete Corp., (1959) 220 Md. 200, 151 A.2d 731, 78 A.L.R.2d 692, an action for third degree burns sustained as a consequence of working with wet cement, mixed and sold by defendant, was filed on the theory that defendant failed to give warning of the dangerous or potentially dangerous properties of the concrete. The Court said that concrete is not a new product, having been used for many years, and it is one which is perfectly safe to use if

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normal precautions are taken against prolonged application to sensitive portions of the skin. Of special importance in considering the extent of the duty to warn, the Court stated, is the fact that ready-mixed concrete is customarily sold to builders who are thoroughly familiar with its properties, and not to a casual user without experience, with the result that warnings in most cases "would only dilate upon the obvious." The Court's conclusion was that it would be as unreasonable to require every supplier of concrete to warn of its caustic properties as to require an electric company to warn of the danger of touching uninsulated wires. The Court also indicated there could be no recovery on the theory of breach of warranty of fitness in view of the fact that there was no showing that the concrete delivered was defective, that it contained anything unusual, or that it was not safe to use in the usual and customary manner. The Court commented that plaintiff got precisely what he ordered, namely, wet concrete mixed according to specifications. Also a judgment denying recovery for chemical burns sustained by buyer from contact with concrete or cement was affirmed in Imperial vs. Central Concrete, Inc., (1955) 1 App. Div. 2d 671, 141 N.Y.S.2d 307, affirmed without opinion, 2 N.Y. 2d 939, 162 N.Y.S.2d 35, 142 N.E.2d 209.

In Baker vs. Stewart Sand & Material Co. (Missouri Appeals) 353 S.W. 2d 108, in an action for burns sustained in use of ready-mixed concrete manufactured by defendant, the evidence that plaintiff knew the concrete contained lime and that lime is caustic barred recovery for alleged negligent failure to warn of dangers involved in using concrete.

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the workmen's compensation cases more than two (2) years prior to the date that he filed the instant suit, with the exception of an alleged injury he sustained while in the employment of Aber Company. Of course, he was not working with any products of any company other than Aber Company, and certainly not with products of Fibreboard Paper Products Corporation, while employed by the Aber Company. More than two years expired between the date of the final judgment and the filing of this suit. It is respectfully submitted that the Court should sustain this defendant's motion for summary judgment.

Respectfully submitted;

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A copy of this brief was served on all counsel of record by mailing a copy to their respective post office addresses on the 10th day of May, 1968.

_____
OF COUNSEL

In the recent case of Breaux vs. Aetna Cas. & Surety Co., 272 Fed. Supp. 668 (District Court, La., Aug. 18, 1967, as amended Sept. 29, 1967) it was held that a malpractice action against a physician is one in tort and is subject to the tort statute of limitation. The Court further held that it now seems well established that actions arising out of implied warranty that a product intended for intimate personal use is fit for human consumption are to be treated as tort actions. If cases involving alleged impurity or unwholesomeness of products are treated as tort actions, it logically follows that the claim against the manufacturer for its alleged failure to warn was also a tort action. In the Breaux case, the Court held that the statute began to run when the patient knew or reasonably should have known that the drug and/or the physician's negligence caused the alleged injury.

CONCLUSION

It is clear in our case that the claim of Tomplait is barred by the two year statute of limitations. This is clear for the reason that plaintiff was asserting in the workmen's compensation cases that his disability was due to asbestosis, which was the result of his employment. Plaintiff also admitted that his own doctors had diagnosed his disease and difficulty prior to the time that his workmen's compensation case was filed and prior to the time a final judgment was entered in this case and advised him to discontinue this type of employment. The plaintiff's alleged cause of action is barred under the undisputed facts for the reason that a final judgment was entered in

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CIVIL ACTION NO. 5420

CLAUDE J. TOMPLAIT

VS.

COMBUSTION ENGINEERING, INC., ET AL

ADDITIONAL BRIEF ON THE QUESTION OF THE TWO YEAR STATUTE OF LIMITATIONS (DUPLICATE)

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