IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
MAY 23 1969
James R. Cooney, Clerk, U. S. Court
By Virginia R. Lee DEPUTY

CLAUDE J. TOMPLAIT :

VS. : CIVIL NO. 5402

COMBUSTION ENGINEERING, INC., ET AL :

PRE-TRIAL STIPULATION AND ORDER

It is STIPULATED between the parties that the following matters are being agreed upon and there will be no necessity for the court to have trial on any of the following facts:

I.

The following jurisdictional questions were raised and disposed of as hereinafter indicated: NONE.

II.

The following disposition was made of pending motions or other similar matters preliminary to trial: NONE.

III.

In general THE PLAINTIFF CLAIMS: That for the past twenty-five (25) years, plaintiff has been an insulator and asbestos worker; that throughout these years in the course of his employment for various employers, he has been required to work with, to work around, and come in contact with, materials used in the insulating industry containing asbestos; that such materials were compounded, prepared, distributed and manufactured by the defendants; that such materials containing asbestos were highly poisonous, dangerous and harmful to human beings and that such materials were defective and not suitable for the

Civ.Order Book
Vol 28 Page 245

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purposes for which they were intended; that as a result of the plaintiff working with, working around, and coming in contact with such materials containing asbestos, he is and has been suffering from the disease asbestosis; that the defendants were guilty of negligence and carelessness in the following particulars, such negligence and carelessness directly and proximately causing the plaintiff's injuries and damages:

(a) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that the insulation they so prepared and manufactured were deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health, and that plaintiff would not know of such danger to his health, notwithstanding which defendants negligently failed to take any reasonable precautions or exercise reasonable care to warn plaintiff of the danger and harm to which he was exposed while handling hhe defendants' said insulation.

(b) That the defendants knew or in the exercise of ordinary care ought to have known that their said insulation was deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health, and that the plaintiff would not know of such dangerous character, notwithstanding which defendants failed and omitted to provide plaintiff with the knowledge as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances, if in truth there was any, to protect him from being poisoned and disabled as he was by exposure to such deleterious and harmful compound substances and other material contained in said defendants' insulation.

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations
ACL Doc 10657 · Page 2 of 21
Published by AsbestosClaims.Law
asbestosclaims.law/library/10657/2

(c) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that their insulation was deleterious, poisonous and highly harmful to plaintiff's body, lungs, respiratory system, skin and health, notwithstanding which defendants negligently and carelessly packaged said insulation so that in the ordinary handling for installation thereof, this plaintiff would come in contact with such deleterious, poisonous and highly harmful compound substances and other material contained in said defendants' insulation.

(d) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that the insulation they produced contained deleterious, poisonous and highly harmful substances to human body, lungs, respiratory system, skin and health, notwithstanding which defendants negligently failed to take any reasonable precautions or exercise reasonable care by placing any warnings on their containers of said insulation to warn the handlers thereof of the dangers to health in coming in contact with said insulation.

(e) That the defendants knew or in the exercise of ordinary or reasonable care ought to have known that its insulation contained deleterious, poisonous and highly harmful substances to the human body, lungs, respiratory system, skin and health, notwithstanding which defendants negligently supplied to plaintiff containers of said insulation which were broken open and could not be transported without coming in contact with plaintiff's skin and body.

(f) That the defendants knew or in the exercise of reasonable care ought to have known that their insulation contained deleterious and highly harmful substances to plaintiff's health, body, lungs, respiratory system, and skin, and defendants knew

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or in the exercise of ordinary or reasonable care should have known that plaintiff would not know the dangerous characteristics of their said insulation, notwithstanding which defendants negligently failed to take reasonable precautions or exercise reasonable care to warn the plaintiff of said danger and to instruct the plaintiff in the proper handling of their said insulation, or to take any reasonable precautions or exercise any reasonable care to protect plaintiff from harm and negligently failed to adopt and enforce a reasonable safe plan and method of handling and installing said insulation.

(g) That the defendants knew or in the exercise of reasonable care ought to have known that their insulation was defective and that such insulation was not suitable for the purposes for which it was intended.

(h) That the defendants should have tested their products, especially those containing asbestos, to ascertain the safe or dangerous nature of such products before offering them for sale, or in the alternative, should have removed such products from the market upon ascertaining that such products would cause asbestosis.

(i) That the defendants should have devised a method of application of their products, especially those containing asbestos, that would have kept those using such products from contracting asbestosis if the defendants would not remove such products from sale to the public.

(j) That the products of the defendants, especially asbestos, were warranted, either expressly or impliedly, to be merchantable, when in truth they were not, and therefore, the defendants breached to the plaintiff, as well as to others, the warranty of merchantability.

(k) That the doctrine of res ipsa loquitur applies in this case.

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IV.

In general, defendant FIBERBOARD PAPER PRODUCTS CORPORATION claims:

(1) The plaintiff filed his original complaint on or about December 23, 1966, alleging an action for damages allegedly resulting to plaintiff from the use of certain products manufactured and sold by numerous defendants, of which this defendant is alleged to have been one. Plaintiff alleges in his original complaint that he does not know which of the defendants are responsible, neither did he inform this defendant of the name of the insulation or insulation material which plaintiff contends he came in contact with and which he alleges and contends caused injury to his body. Further, the allegations do not inform this defendant of either the year, the place, the date or dates of alleged contact, the date or dates of alleged injury, the name of the product, or any other information whereby the exact nature of the claim could be ascertained. The plaintiff testified in his oral deposition that he did not know the name of the product or the date or dates upon which he sustained any alleged injury, but his injury resulted as a result of his occupation and constant contact with various types of insulation products.

(2) This defendant denies that the plaintiff sustained any injury as a result of contact or use of any product manufactured by this defendant.

(3) This defendant denies that it sold any products to the employers listed in Paragraphs 15 through 36 of the plaintiff's first amended complaint.

(4) If plaintiff did sustain any injury as the result of the use of any product manufactured by this defendant, which is

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations Published by AsbestosClaims.Law
ACL Doc 10657 · Page 5 of 21 asbestosclaims.law/library/10657/5

denied, then such cause of action accrued more than two (2) years prior to the filing of this suit on December 23, 1966, and such cause of action for personal injury is barred by the two (2) year statute of limitation of the State ofTexas.

(5) This defendant further contends that if plaintiff did sustain any injury as a result of the use of any product manufactured by this defendant, that plaintiff was guilty of various acts and omissions constituting negligence, one or more of which was a proximate cause of his alleged injury, and therefore, he is barred from recovery by various acts of contributory negligence.

(6) This defendant is asserting the defense that the plaintiff, with full knowledge of the fact that he was creating dust from insulation products, worked in said dust knowing that he would breathe the dust, and plaintiff knew that he would be subject to injury, and he is therefore barred under the theory that any risk was open and obvious to him, and he is likewise barred under the doctrine of volenti non fit injuria.

(7) This defendant further contends there existed no duty on the part of this defendant to warn the plaintiff of any potential danger in the handling of insulation materials and products, and denies that it owed any duty to plaintiff to adopt and enforce a reasonably safe plan and method of handling and installing insulation and insulation materials.

(8) This defendant further contends that plaintiff was fully advised of his condition in July, 1961, and he claimed on said date that he was disabled as a result of asbestosis, and nevertheless, he continued to work with such product after said date and voluntarily subjected himself to injury with full and complete knowledge of the consequences.

(9) Each and all of the other contentions of this defendant are set forth in its original answer on file herein.

(10) In the event there is any recovery in favor of the plaintiff against more than one defendant, and if there is any recovery against this defendant, then this defendant contends that it will be entitled to contribution.

V.

In general, Defendant GUSTIN-BACON MANUFACTURING COMPANY claims:

(1) Defendant denies that plaintiff ever worked with any product made, manufactured or sold by this defendant.

(2) Defendant denies that any product made, manufactured or sold by this defendant contained any injurious, harmful or dangerous substances.

(3) Defendant denies that plaintiff sustained any injury as a result of contact or use of any product made, manufactured or sold by this defendant.

(4) Defendant says that if plaintiff is suffering from the disease of asbestosis as alleged (which defendant denies) that no product manufactured or sold by this defendant contained any of the substances which could or did cause such disease.

(5) Plaintiff's cause of action, if any, is barred by the two-year statute of limitations.

(6) Plaintiff was guilty of contributory negligence.

(7) Plaintiff voluntarily assumed the risk and his claim is barred by the doctrine of volenti non fit injuria.

(8) There was no duty on the part of this defendant to warn plaintiff.

(9) The products manufactured by this defendant were reasonably safe and fit for the purpose for which made, manufactured and sold, and defendant was under no duty to see that plaintiff or

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations Published by AsbestosClaims.Law
ACL Doc 10657 · Page 7 of 21 asbestosclaims.law/library/10657/7

plaintiff's employers adopted and enforced a safe plan and method of handling, working with or installing such material.

(10) In the event plaintiff recovers any judgment, then defendant is entitled to judgment against the co-defendants for contribution.

VI.

In general, Defendant OWENS-CORNING FIBERGLAS CORPORATION claims:

(1) Defendant denies that plaintiff ever worked with any product made, manufactured or sold by this defendant.

(2) Defendant denies that any product made, manufactured or sold by this defendant contained any injurious, harmful or dangerous substances.

(3) Defendant denies that plaintiff sustained any injury as a result of contact or use of any product made, manufactured or sold by this defendant.

(4) Defendant says that if plaintiff is suffering from the disease of asbestosis as alleged (which defendant denies) that no product manufactured or sold by this defendant contained any of the substances which could or did cause such disease.

(5) Plaintiff's cause of action, if any, is barred by the two-year statute of limitations.

(6) Plaintiff was guilty of contributory negligence.

(7) Plaintiff voluntarily assumed the risk and his claim is barred by the doctrine of volenti non fit injuria.

(8) There was no duty on the part of this defendant to warn plaintiff.

(9) The products manufactured by this defendant were reasonably safe and fit for the purposes for which made, manufactured and sold, and defendant was under no duty to see that plaintiff or

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plaintiff's employers adopted and enforced a safe plan and method of handling, working with or installing such material.

(10) In the event plaintiff recovers any judgment, then defendant is entitled to judgment against the co-defendants for contribution.

(11) That plaintiff's condition is due solely to acts, omissions and negligence of various employers of plaintiff for whom he worked when being exposed to products of which he complains.

VII.

In general, Defendant EAGLE-PICHER INDUSTRIES, INC. claims:

(1) Plaintiff has not alleged in his amended complaint that he came into contact with any product manufactured by this defendant or a date or time of exposure to any product manufactured by this defendant and therefore no cause of action is asserted against this defendant.

(2) This defendant denies that the plaintiff sustained any injury as a result of contact or use of any product manufactured by it.

(3) If plaintiff did sustain any injury as a result of the use of any product manufactured by this defendant, which is denied, then such cause of action accrued more than two years prior to the filing of this suit on December 23, 1966, and such cause of action for personal injury is barred by the two year statute of limitation for the State of Texas.

(4) If plaintiff did sustain any injury as a result of the use of any product manufactured by this defendant, plaintiff was guilty of various acts and omissions constituting negligence, one or more of which was the proximate cause of his alleged injury, and therefore, he is barred from recovery

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations Published by AsbestosClaims.Law
ACL Doc 10657 · Page 9 of 21 asbestosclaims.law/library/10657/9

by various acts of contributory negligence.

(5) If plaintiff did sustain any injury as a result of the use of any product manufactured by this defendant, plaintiff used the product with full knowledge of the fact that he was creating dust from insulation products and he worked in the dust knowing that he would breathe the dust and he is therefore, barred from any recovery under the theory that any risk was open and obvious to him and he is likewise barred under the doctrine of volenti non fit injuria.

(6) If plaintiff sustained any injury as a result of the use of any product manufactured by this defendant, there existed no duty on the part of this defendant to warn the plaintiff of any potential danger in the handling of insulation materials and products and this defendant denies that it owed any duty to plaintiff to give any warning with respect to any product.

(7) This defendant would show the plaintiff was fully advised of his condition in July, 1961 at which time he claimed that he was disabled as a result of asbestosis, and nevertheless, he continued to work with insulation material after this date and therefore voluntarily subjected himself to injury with full and complete knowledge of the consequences.

(8) This defendant would show that its products were reasonably fit and safe for the purpose for which they were made, manufactured and sold, and that if plaintiff were injured as the result of the use of any of its products that such injury was the result of the negligence of plaintiff's employers and contractors and not this defendant in failing to adopt and enforce safe working practices and methods.

(9) All of the contentions of this defendant as set forth in its Original Answer on file are adopted.

(10) Defendant further contends that any condition from which the plaintiff is now suffering, if any, is the result, in whole or in part, of prior or subsequent injuries, diseases, bodily conditions

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations Published by AsbestosClaims.Law
ACL Doc 10657 · Page 10 of 21 asbestosclaims.law/library/10657/10

and infirmities for which this defendant is in nowise liable or responsible.

(11) Defendant further contends that plaintiff's damages, if any, is the result of an unavoidable accident.

(12) In the event there is any recovery in favor of Plaintiff against more than one defendant, and if there is any recovery against this defendant, then this defendant contends that it will be entitled to indemnity or contribution.

VIII.

In General, Defendant PITTSBURGH CORNING CORPORATION and Defendant PITTSBURGH PLATE GLASS COMPANY claim:

(1) Defendants deny that plaintiff ever worked with any product made, manufactured or sold by these defendants.

(2) Defendants deny that any product made, manufactured or sold by these defendants contained any injurious, harmful or dangerous substances.

(3) Defendants deny that plaintiff sustained any injury as a result of contact or use of any product made, manufactured or sold by these defendants.

(4) Defendants say that if plaintiff is suffering from the disease of asbestosis as alleged (which defendants deny) that no product manufactured or sold by these defendants contained any of the substances which could or did cause such disease.

(5) The conditions of which plaintiff complains were open and obvious to him, he having been warned by a physician in 1961 that his continuing to work under such conditions would be injurious to his health, but plaintiff nevertheless continued to work under such alleged conditions and thereafter voluntarily assumed the risk of continuing to work under the conditions alleged.

(6) Plaintiff's cause of action, if any, is barred by the two year statute of limitations.

(7) Plaintiff was guilty of contributory negligence.

(8) Plaintiff voluntarily assumed the risk and his claim is barred by the doctrine of volenti non fit injuria.

(9) There was no duty on the part of these defendants to warn plaintiff.

(10) The products manufactured by these defendants were

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations Published by AsbestosClaims.Law
ACL Doc 10657 · Page 11 of 21 asbestosclaims.law/library/10657/11

reasonably safe and fit for the purpose for which made, manufactured and sold, and defendants were under no duty to see that plaintiff or plaintiff's employers adopted and enforced a safe plan and method of handling, working with or installing such material.

(11) In the event plaintiff recovers any judgment, then defendants are entitled to judgment against the co-defendants for contribution.

IX.

In General, Defendants COMBUSTION ENGINEERING, INC. and R & I REFRACTORY AND INSULATION CORPORATION claim:

(1) In general, these defendants deny liability and contest the issue of damages, and deny the allegations of the plaintiff's complaint with respect thereto, and the acts, omissions and negligences and breaches of warranty as set out therein.

(2) The defendants contend that Combustion Engineering, Inc., never at any time material to this suit made, manufactured or sold any insulation products.

(3) Defendants deny that plaintiff ever worked with any product made, manufactured or sold by these defendants.

(4) Defendants deny that any product made, manufactured or sold by these defendants contained any injurious, harmful or dangerous substances.

(5) Defendants deny that plaintiff sustained any injury as a result of contact with or use of any products made, manufactured or sold by these defendants.

(6) Defendants say that if plaintiff is suffering from the disease of asbestosis as alleged (which defendants deny) that no product manufactured or sold by these defendants contained

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations
ACL Doc 10657 · Page 12 of 21
Published by AsbestosClaims.Law
asbestosclaims.law/library/10657/12

any of the substances which could or did cause such disease.

(7) Defendants contend that the conditions of which plaintiff complains were open and obvious to him, he having been warned by a physician in 1961 that his continuing to work under such conditions would be injurious to his health, but plaintiff nevertheless continued to work under such alleged conditions and thereafter voluntarily assumed the risk of continuing to work under the conditions alleged.

(8) Plaintiff's cause of action, if any, is barred by the Texas two-year statute of limitations.

(9) Plaintiff's cause of action, if any, is barred by the Texas four-year statute of limitations.

(10) Defendants further contend that the plaintiff himself was guilty of contributory negligence which was the sole cause of his alleged injuries and damages, if any, or in the alternative, were a proximate cause thereof, among which were the following:

(a) In failing to use and utilize any safety devices, such as gloves, protective clothing, masks and respirators for breathing.

(b) In continuing to work with insulation material after he knew, or in the exercise of ordinary care should have known that it was affecting his health.

(c) In continuing to work with insulation material after he had been advised by a physician not to do so.

(d) In failing to seek other employment where he would not come in contact with insulation materials.

(11) In the alternative, defendants contend that the plaintiff's injuries and damages, if any, were caused solely by acts, wrongs, omissions and negligences of third parties, to-wit, his various

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations Published by AsbestosClaims.Law
ACL Doc 10657 · Page 13 of 21 asbestosclaims.law/library/10657/13

employers, in failing to furnish him with protective clothing and safety devices, masks and respirators for breathing.

(12) Defendants further contend, in the alternative, that the plaintiff's injuries and damages, if any, were the result of an unavoidable accident.

(13) Defendants further contend that the plaintiff voluntarily assumed the risk and his claim is barred by the doctrine of volenti non fit injuria.

(14) Defendants further contend that they owed no duty to the plaintiff to warn him.

(15) The products manufactured by these defendants were reasonably safe and fit for the purposes for which made, manufactured and sold, and defendants were under no duty to see that plaintiff or plaintiff's employers adopted and enforced a safe plan and method of handling, working with or installing such materials.

(16) Defendants further contend that any condition from which the plaintiff is now suffering, if any, is the result, in whole or in part, of prior or subsequent injuries, diseases, bodily conditions and infirmities for which these defendants are in nowise liable or responsible.

(17) In the event plaintiff recovers any judgment, then defendants contend they are entitled to judgment against the co-defendants for contribution.

X.

In general, Defendants JOHNS-MANVILLE PRODUCTS CORPORATION and JOHNS-MANVILLE FIBER GLASS,INC. claim:

(1) Defendants deny that plaintiff ever worked with any product made, manufactured or sold by these defendants.

(2) Defendants deny that any product made, manufactured or sold by these defendants contained any injurious, harmful or dangerous substances.

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations Published by AsbestosClaims.Law
ACL Doc 10657 · Page 14 of 21 **asbestosclaims.law/library/10657/14**

(3) Defendants deny that plaintiff sustained any injury as a result of contact or use of any product made manufactured or sold by these defendants.

(4) Defendant Johns-Manville Products Corporation says that if plaintiff is suffering from the disease of asbestosis as alleged (which defendant denies) that no product manufactured or sold by this defendant either caused or was a contributing cause to the plaintiff's contracting said disease. Defendant Johns-Manville Fiber Glass, Inc. says that if plaintiff is suffering from the disease of asbestosis as alleged (which defendant denies) that no product manufactured or sold by this defendant contained any of the substances which could or did cause such disease.

(5) Plaintiff's cause of action, if any, is barred by the two year statute of limitations.

(6) Plaintiff was guilty of contributory negligence.

(7) Plaintiff voluntarily assumed the risk and his claim is barred by the doctrine of volenti non fit injuria.

(8) There was no duty on the part of these defendants to warn plaintiff.

(9) The products manufactured by these defendants were reasonably safe and fit for the purpose for which made, manufactured and sold, and defendants were under no duty to see that plaintiff or plaintiff's employers adopted and enforced a safe plan and method of handling, working with or installing such material.

(10) In the event plaintiff recovers any judgment, then defendants are entitled to judgment against tha co-defendants for contribution.

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XI.

THE CONTESTED ISSUES OF FACT, IF RAISED BY THE EVIDENCE, OR THE FACT IS NOT ESTABLISHED AS A MATTER OF LAW ARE:

(1) Did the plaintiff work with any product manufactured by each of the defendants containing asbestos fibers?

(2) When did plaintiff work with each of the defendants' products containing asbestos fibers?

(3) Where did plaintiff work with each of the defendants' products?

(4) Did plaintiff sustain any injury from the use of such products?

(5) Is the plaintiff's claim barred by the two year statute and the four year statute of limitation?

(6) Were any of the products containing asbestos fibers manufactured by any one of the defendants in a defective condition when they left the hands of the manufacturers?

(7) Are the defendants guilty of any negligence?

(8) Is the plaintiff guilty of contributory negligence?

(9) Were defendants' products reasonably safe and fit for the purpose for which they were made, manufactured and sold?

(10) Was defendants' negligence the proximate cause of plaintiff's injuries?

(11) Plaintiff contends that there was an expressed warranty of the merchantability of defendants' products and that it was breached. Defendants deny that there was any expressed warranty and deny a breach of any expressed warranty.

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations Published by AsbestosClaims.Law
ACL Doc 10657 · Page 16 of 21 asbestosclaims.law/library/10657/16

(12) Plaintiff contends that there was an implied warranty of the merchantability of defendants' products and that it was breached. Defendants deny that there was any implied warranty and deny the breach of any implied warranty.

(13) Was the failure of plaintiff to follow and heed the advice of Dr. Jones, given in 1961, to quit working with insulating materials the sole cause of his condition and injury? If not, was it a contributing cause, and if so, to what extent?

(14) Was plaintiff's injuries or condition caused solely by acts of omissions of one or more of his employers in failing to provide plaintiff with adequate ventilation, protective clothing, masks, safety devices and respirators, if any such were necessary?

(15) Did plaintiff voluntarily assume the risk, and is his claim barred by the doctrine of volenti non fit injuria?

(16) Unavoidable accident.

(17) The amount of damages.

XII.

THE CONTESTED ISSUES OF LAW ARE:

(1) Is the plaintiff's claim barred by the two year statute of limitation and the four year statute of limitation?

(2) Did the defendants owe to the plaintiff the duty to warn plaintiff?

(3) Did plaintiff voluntarily assume the risk, and is his claim barred by the doctrine of volenti non fit injuria?

(4) Can plaintiff recover on the theory of either express or implied warranty?

(5) Defendants contend that as a matter of law each of their products were reasonably safe and fit for the purpose for which the same were made, manufactured and sold, to-wit, insulating purposes.

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XIII.

POINTS OF LAW:

Plaintiff contends, but defendants do not agree, that it is an established medical fact that the disease asbestosis is acquired by the inhalation of asbestos dust and fibers; that it has been established by deposition and will be established further by oral testimony that this is a disease common to insulators and asbestos workers, and it therefore becomes the burden of the defendants to establish any excuse or defense refuting the causal connection between the disease and the use of such products; that once it becomes established by proof that the plaintiff has asbestosis and has acquired same from working around asbestos products and that certain of the defendants manufacture and distribute asbestos products, the legal liability for the damages to the plaintiff should be apportioned between those defendants responsible; and that if the defendants in truth believe that any other concern or manufacturer did manufacture and sell asbestos insulating products, then the obligation and burden rests upon such defendants to bring in by way of counterclaim or cross-action such additional defendants as they believe might have contributed to the cause of this disease by manufacturing and selling asbestos products which were used by or around the plaintiff. In this connection, plaintiff says that the defendants are in the best position to know of all companies or manufacturers selling such products and if the damages are to be apportioned among the defendants, then the obligation rests upon such defendants to bring into this suit by cross-action or counterclaim such other defendants as they may believe responsible, in whole or in part, for the injuries and damages suffered by the plaintiff. That the nature of this cause of action is similar to the air contamination cases, wherein the concerns

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations Published by AsbestosClaims.Law
ACL Doc 10657 · Page 18 of 21 asbestosclaims.law/library/10657/18

charged with contaminating the air have the burden establishing that they are not the sole or only contaminator.

XIV.

That the following complaints in interventions have been filed herein:

(a) Complaint in intervention of TEXAS EMPLOYERS' INSURANCE ASSOCIATION, seeking to recover against the defendants and plaintiff (except Johns-Manville Sales Corporation, Johns-Manville Products Corporation, and Johns-Manville Fiber Glass, Inc.) the sum of One Thousand ($1,000.00) Dollars, reasonable attorneys' fees and costs of court.

(b) Complaint in intervention of THE TRAVELERS INSURANCE COMPANY, seeking to recover against the defendants and plaintiff the sum of Five Thousand ($5,000.00) Dollars, reasonable attorneys' fees, and costs of court.

(c) Complaint in intervention of QUEEN INSURANCE COMPANY OF AMERICA, seeking to recover against the defendants and plaintiff the sum of One Thousand Five Hundred ($1,500.00) Dollars, reasonable attorneys' fees, and costs of court.

In the event plaintiff recovers any judgment, the intervenors above named will be entitled to recover said amounts out of the plaintiff's recovery.

XV.

IT IS AGREED:

(1) That all actuarial and life expectancy tables and charts may be introduced without testimony.

(2) That plaintiff's claim is based only with reference to such products of the defendants as contain asbestos fibers.

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations Published by AsbestosClaims.Law
ACL Doc 10657 · Page 19 of 21 asbestosclaims.law/library/10657/19

XVI.

The probable length of the trial of this case is four (4) days.

APPROVED:

STEPHENSON, THOMPSON AND MORRIS

BY: _____
Attorneys for Plaintiff

_____
GORDON PATE

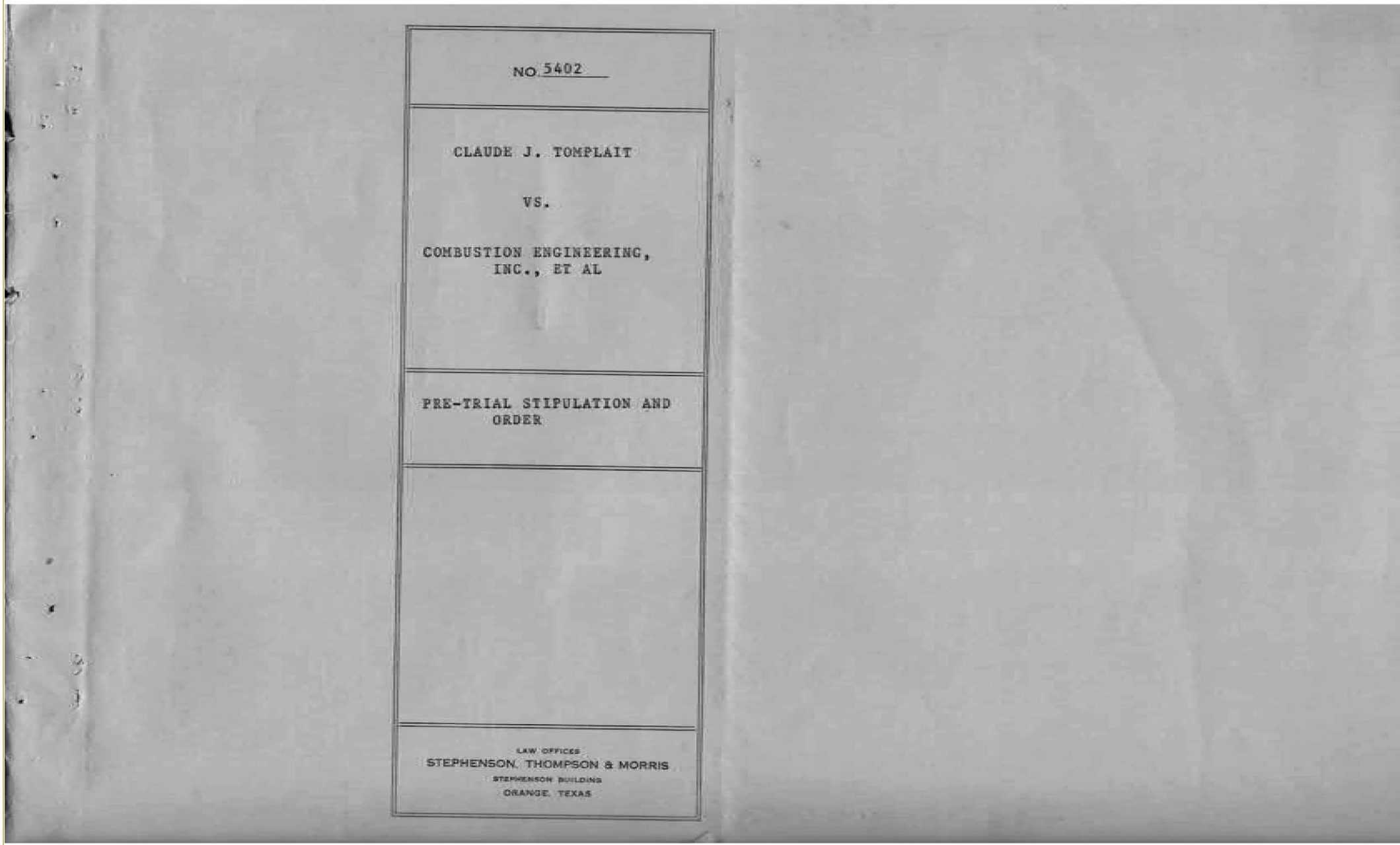
_____
JOHN RIENSTRA

[redacted]

APPROVED, SIGNED and ENTERED this 23rd day of May, 1968.

_____
Chief Judge, United States District Court

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NO. 5402

CLAUDE J. TOMPLAIT

VS.

COMBUSTION ENGINEERING, INC., ET AL

PRE-TRIAL STIPULATION AND ORDER

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

The Tomplait v. Combustion Engineering Case File (1962-1969), Pretrial stipulations
ACL Doc 10657 · Page 21 of 21
Published by AsbestosClaims.Law
asbestosclaims.law/library/10657/21