IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
MAY 27 1968
James R. Cooney, Clerk, U. S. Court
By Margaret Turner DEPUTY

CLAUDE J. TOMPLAIT

VS.

COMBUSTION ENGINEERING, INC., ET AL

CIVIL ACTION NO. 5402

FIRST AMENDED ANSWER OF DEFENDANT, FIBREBOARD PAPER PRODUCTS CORPORATION, TO PLAINTIFF'S SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Fibreboard Paper Products Corporation, and files this, its first amended answer to plaintiff's second amended complaint, and for such answer this defendant would show:

1.

In reply to Paragraphs 1 through 12 inclusive, this defendant admits that it is a foreign corporation organized under the laws of a foreign state, with a permit to do business in the State of Texas; this defendant does not know the residence of the remaining defendants, but assuming that each of the corporate defendants are non-residents of Texas, then this Court has jurisdiction of the alleged claim.

2.

In answer to Paragraph No. 13, it is admitted that Fibreboard Paper Products Corporation has been and is now engaged in the manufacture of materials used for insulation, but it denies that it was engaged in the manufacture of such materials during all times mentioned in plaintiff's petition and for a long time prior thereto.

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It is denied that the insulation materials manufactured by defendant contained a combination of the materials alleged. This defendant admits that some of its products contained one of the materials alleged, but it is denied that any such products caused any injury to plaintiff.

This defendant does not have knowledge as to products manufactured by other defendants such that the undersigned counsel can answer under oath.

3.

In answer to Paragraph 14, this defendant denies that the insulation manufactured by it contains chemicals, minerals and deleterious substances and matter which are highly poisonous, dangerous and harmful to human beings and to the health of man. It likewise denies that such materials were defective and not suitable for the purposes for which they were intended; but to the contrary, such materials were not defective and were suitable for the types of insulation and insulation work for which they were intended.

The remainder of the allegations are denied.

4.

In answer to Paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, this defendant can neither admit nor deny the allegations contained in each separate paragraph for the reason that it is without information or knowledge.

5.

In reply to the allegations contained in Paragraph 37, this defendant moves to strike the second sentence of Paragraph

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37 for the reason that such allegations do not allege or state any cause of action or show the violation of any duty of care owing by this defendant to the plaintiff.

Subject to the objection, this defendant in reply to the allegations contained in Paragraph 37, says that it is without knowledge as to whether the plaintiff handled any insulation or any quantity of insulation mentioned in plaintiff's petition; however, it denies that plaintiff was required to or did handle any insulation material manufactured by this defendant. This defendant likewise denies that it compounded, manufactured and prepared the insulation materials referred to in Paragraphs 16 through 36 inclusive.

In answer to the second sentence contained in Paragraph 37, such allegations are denied, and it is denied that plaintiff was subjected to any product containing asbestos which was manufactured by this defendant. It is also denied that the plaintiff was required to work with insulation materials on or after August 1, 1961, when he was advised by his physician that he should discontinue working with insulation materials because of potential danger to his health.

6.

In answer to the allegations contained in Paragraph 38,this defendant denies that during the time plaintiff was employed as an insulator he was caused to come in contact with insulation and materials produced by this defendant due to the negligence and carelessness of this defendant, and this defendant denies that it was negligent and careless, and it denies that plaintiff sustained any injury or damage as a result of any act

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or omission of this defendant; but to the contrary, this defendant says that if plaintiff sustained any injury in the course of his employment as the result of working with insulation materials over a number of years, it was due to the nature of his occupation, and he knew, or should have known, that he was subjecting himself to dust which might be injurious to his health. Further, if he sustained any injury, such was due to his failure to exercise ordinary care for his own safety in failing to use and wear the proper, usual and customary safety devices which are used by employees in the trade working with such insulation materials, or was due to the sole negligence of his various employers in failing to furnish him with a reasonably safe place to work.

7.

In reply to the allegations contained in Paragraph No. 39, this defendant answers only for itself, but it denies that any injury or damage complained of by the plaintiff was directly and proximately caused by any negligence or carelessness of this defendant. Each subdivision in the paragraph will be answered separately.

(a) This defendant is unable to answer the allegations contained in Paragraph (a) because they are too vague, general and indefinite and do not apprise this defendant of any date or dates on which the plaintiff worked with any materials manufactured by this defendant, and he does not specify what the materials were. Plaintiff should be required to specify specific acts or omissions against each particular defendant, and particularly this defendant, and failing such, the allegations should be stricken.

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Subject to the objections, the allegations of Paragraph (a) are denied.

(b) This defendant cannot answer the allegations contained in Paragraph (b) for want of knowledge, in that the name of the product allegedly used, the date of its use, is not known and could not be known by this defendant, and it could not be known whether this defendant manufactured any product or products with which the plaintiff was working; therefore, this defendant says that such allegations should in all things be stricken

This defendant denies the allegations in Paragraph (b). If it should be charged that under certain circumstances a product containing asbestos is harmful to the lungs and respiratory system, then this defendant says that the plaintiff, his foreman and employer, had full knowledge that he was working with an asbestos product and that the insulator should be furnished with a properly ventilated area by his employer in which to work, and that he should wear respirators or masks, which facts are well known in the insulation industry and are well known among insulation workers such as the plaintiff. In this connection, insulation work in which any product manufactured by this defendant is used is performed by professional applicators and technicians who have full knowledge of the type of product which they are applying, and they likewise have knowledge of the fact that when such product is cut it will create dust which can be inhaled.

(c) In reply to the allegations contained in Subdivision (c), this defendant has no knowledge as to any insulation material manufactured by it which was allegedly used by the plaintiff, nor

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does he allege the date or dates of such alleged contact, and therefore, this defendant is without knowledge or information about the matters inquired about. The remainder of the allegations are denied.

(d) The allegations contained in Subdivision (d) are denied.

(e) The allegations of Paragraph (e) are denied.

(f) This defendant cannot admit or deny specifically the allegations contained in Subdivision (f) because the plaintiff does not specify the material or materials allegedly manufactured by this defendant, nor the date or dates on which the plaintiff is alleged to have come in contact with them. Further, this defendant denies that it had any duty to warn the plaintiff of any potential danger in the installation of insulation materials or potential danger to his lungs or respiratory system, and denies the existence of any duty to instruct the plaintiff in the proper handling of insulation materials, and denies any duty or obligation to adopt or enforce a reasonably safe plan and method of handling and installing said insulation and insulation materials.

In this connection, this defendant moves the Court to strike said allegations because they fail to state a claim upon which any recovery can be had.

Except where this defendant says that it cannot admit or deny such allegations and has specifically denied the same, this defendant denies the remainder of the allegations in said Paragraph (f).

(g) The allegations of Paragraph (g) are denied.

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(h) This defendant moves to strike the allegations in Paragraph (h) for the reason that the allegations do not allege or state any claim on which a recovery can be had.

Subject to the motion to strike, this defendant denies the allegations in Paragraph (h).

(i) This defendant moves to strike the allegations contained in Paragraph (i) for the reason that they fail to state a claim upon which any recovery can be had, and for the further reason that as a matter of law there existed no duty on this defendant to perform such acts. Subject thereto, the allegations of Paragraph (i) are denied.

(j) The allegations of Paragraph (j) are expressly denied. The plaintiff does not allege that he actually worked with any product manufactured by this defendant, and insofar as this defendant is able to ascertain he did not do so. This defendant further says that the product which it manufactured was reasonably fit for the purpose for which it was designed, to-wit, industrial insulation, and it denies that it breached any warranty of merchantability.

8.

In reply to the allegations of Paragraph 40, this defendant denies that the plaintiff sustained any injury as a result of any act or omission on the part of this defendant; this defendant has no knowledge or information at this time as to the cause or causes of plaintiff's disability, if any, except that it does have knowledge through investigation that plaintiff made a claim in 1961 that he was disabled as a result of an occupational disease known as asbestosis, as a result of which

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he claimed he was totally disabled, and he recovered a judgment in said cause on September 16, 1964.

This defendant does know from investigation that the plaintiff was advised in July, 1961, to discontinue his work with insulation materials because it was injurious to his health, and that he should seek other employment, but despite this drastic warning the plaintiff continued to subject himself to dust emanating from the use of various insulation materials, including asbestos.

Except as admitted, this defendant is without knowledge or information as to the nature and the extent of the plaintiff's disability or the cause thereof, but it denies that such disability or condition has resulted from any act or omission of this defendant.

9.

The allegations of Paragraph 41 are denied.

10.

The allegations of Paragraph 42 are denied.

11.

The allegations contained in Paragraph 43 of said petition are denied.

12.

This defendant denies that plaintiff is entitled to recover any sum or amount against this defendant.

13.

First Affirmative Defense

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

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14.

Second Affirmative Defense

If plaintiff did sustain any injury as a result of the use of any product manufactured by this defendant, then such injury was sustained as a result of the occupation of the plaintiff, in that he had been engaged as an insulator or a worker in the insulation field for a number of years, and at all times he knew that he was working in dust laden air, part of which was created by his own work and the work of other insulators, and by the failure of his employer to provide facilities for the elimination of dust laden air, and therefore such injury as he may have sustained was either asbestosis or silicosis or some occupational disease resulting from his long continued occupation as an insulator and not as a result of any isolated incident or contact with any products manufactured by this defendant. This defendant is not legally liable or responsible for any occupational disease which was suffered or sustained by plaintiff in the course of his various employment over a number of years.

15.

Third Affirmative Defense

Further answering, and by way of affirmative defense, this defendant says that the insulation product which this defendant manufactured and sold was at all times reasonably safe and fit for the purpose for which they were made, manufactured and sold. Further, said product had a utility, in that it was designed solely as an insulation product to be applied by competent insulators, foremen and industrial contractors, who were versed in their trade, and said product had

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a high utility and was widely used for the purpose of insulating materials against high temperatures and extremely low temperatures.

16.

Fourth Affirmative Defense

Further answering herein, and while denying that the plaintiff sustained any injury as a result of contact or use of any product manufactured by this defendant, if he did sustain injury or did sustain an occupational disease as a result of use of any insulation product manufactured by this defendant separately, which is denied, or in conjunction with products manufactured by other defendants, which is denied, then this defendant says that plaintiff was guilty of various acts and omissions constituting negligence in the performance of his work, in that he failed to use and utilize any safety devices such as respirators and masks, and he failed to require that the place where he was working be properly ventilated; and further, he continued to work with insulation materials after he knew that his work with such materials was adversely affecting his health, and one or more of such acts and omissions on his part was a proximate cause of his alleged injury and any disability flowing therefrom. Further, the plaintiff was fully advised as to his susceptibility to injury from insulation products in the year 1960, or in July, 1961, and his physician diagnosed his condition and advised him to seek other employment where he would not come in contact with insulation materials. Nevertheless, the plaintiff, knowing of his susceptibility to insulation materials and having been fully advised by his physician, failed to seek other employment and failed to remove himself from contamination from insulation materials in the air, but to the

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contrary, continued to work with insulation materials with full knowledge that such were harmful to his health. Plaintiff cannot recover for any injury, damage or aggravation of a condition which existed at the time he was advised and told by his physician to remove himself from the possibility of contamination with insulation materials, and having voluntarily subjected himself to such risk of danger and injury, he assumed the risk of harm or damage to his physical well being.

17.

Fifth Affirmative Defense

This defendant says that if plaintiff sustained any injury as a result of the use of any material or materials manufactured by this defendant, which is denied, the danger, if any, arising from continued use of such material or materials without the use of respirators or masks and other protective devices and without proper ventilation, was open and obvious and was well known to the plaintiff, or should have been known to him, but nevertheless, he continued to work as an insulator and continued to subject himself to air which was laden with insulation materials, and if he did use products manufactured by this defendant after having been advised that he had asbestosis and should not continue to work as an insulator, then he assumed any risk in connection with the use of such product, and such danger, if any, in the use of insulation products was open and obvious, apparent and well known to the plaintiff, and he cannot recover for any period of time in which he deliberately subjected himself to the dangers, if any,

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involved in working with insulation materials, and he cannot recover for any additional injury or aggravation of a prior existing condition, if any.

In the alternative, if there was any danger and such danger was not open and obvious and apparent to plaintiff at all times, nevertheless, he knew at all times of the dangers involved in working with insulation materials, some of which he knew were asbestos, and in working in dust laden air where insulation materials were in use, and he continued to use and to work with such materials and under such conditions with such knowledge; therefore, this defendant owed him no duty to warn him of any dangers involved, and he is therefore barred from any recovery under the theory of volenti non fit injuria.

In the further alternative, in the event plaintiff did not have knowledge of any potential danger of working in dust laden air of insulating materials, then from and after the date on which plaintiff was advised and had full knowledge that he was sustaining injury from working with insulation materials, if this defendant had ever owed him any duty to warn of the possible effects of working with insulation materials, which is denied, then this defendant owed the plaintiff no duty to warn him of any alleged dangers involved after he had full knowledge of his condition and was fully warned to remove himself from insulation work or the area where he could be subjected to air which had insulation dust in it. He is therefore barred from recovery on the basis that this defendant owed him no duty and this defendant violated no duty of care owing to the plaintiff.

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18.

Sixth Affirmative Defense

If plaintiff did sustain any injury as the result of use of any product manufactured by this defendant, which is denied, then such occurred 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 of Texas.

19.

Seventh Affirmative Defense

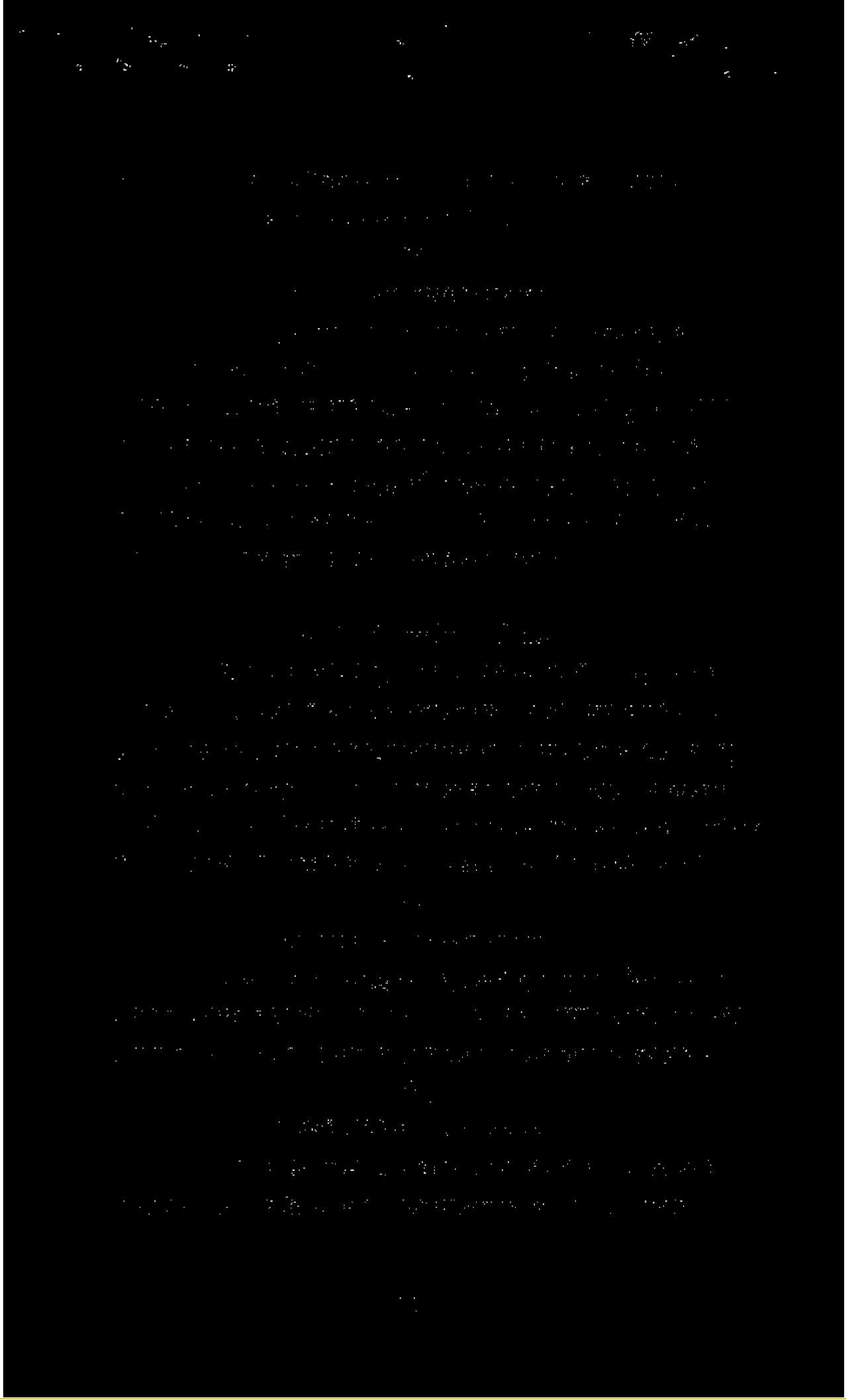
If plaintiff did sustain any injury as a result of the use of any product manufactured by this defendant, which is denied, then such occurred more than four (4) years prior to the filing of this suit on December 23, 1966, and such cause of action for personal injury is barred by the four (4) year statute of limitation of the State of Texas.

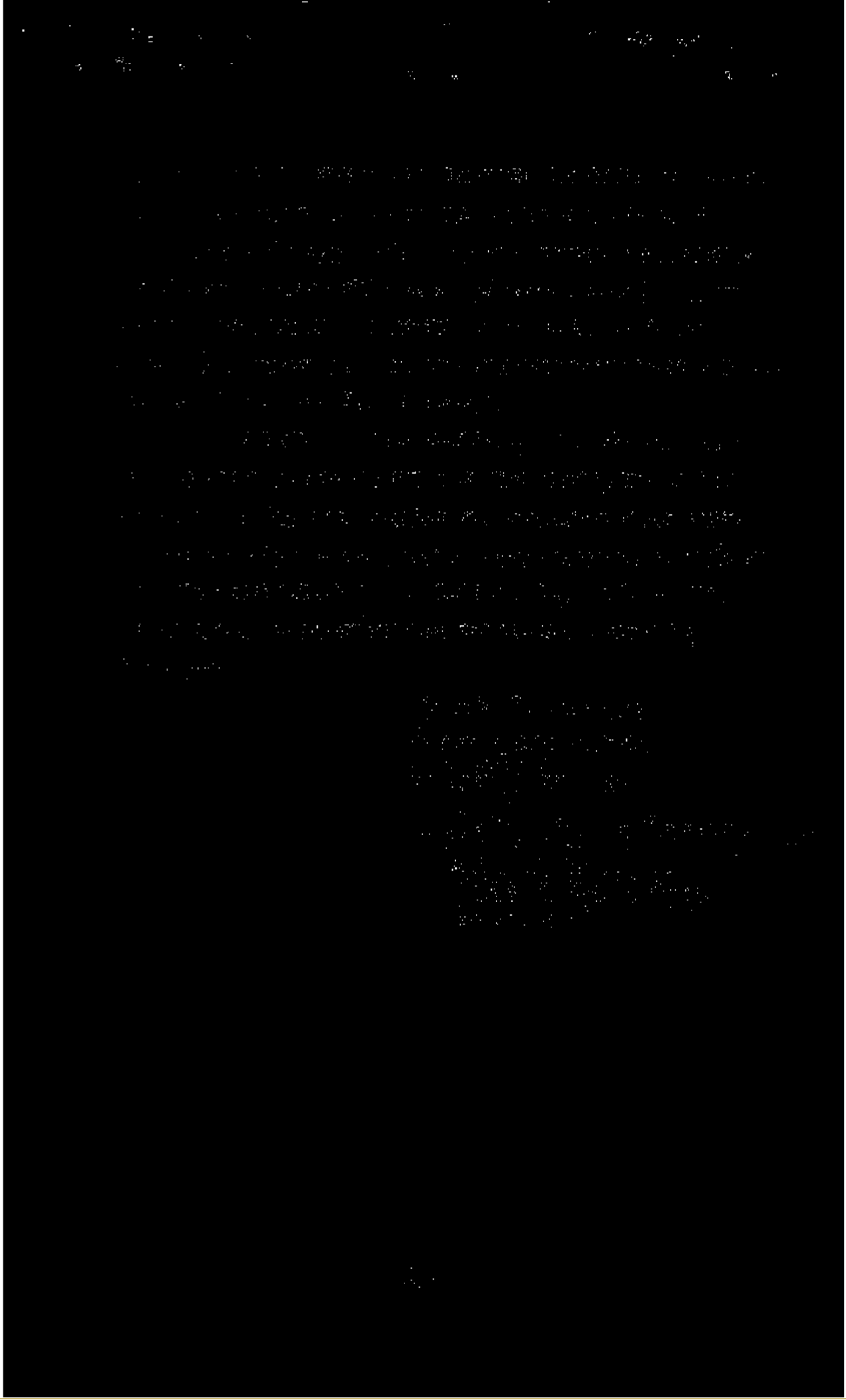
20.

Eighth Affirmative Defense

Further answering, this defendant says that plaintiff was a long experienced insulation worker and knew at all times that he was working with asbestos and asbestos products, or in the alternative, if he did not know this, his foreman and his employers at all times knew that they were working with insulation materials which contained asbestos, and they had knowledge of the fact that particles from the product would enter the air when the product was cut, and it is common knowledge that if an individual works in an area where air is laden with dust that the individual will breathe this dust into his nose and into his

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A copy of the foregoing first amended answer of defendant, Fibreboard Paper Products Corporation, to plaintiff's second amended complaint was mailed to the following attorneys of record:

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FIRST AMENDED ANSWER OF DEFENDANT, FIBREBOARD PAPER PRODUCTS CORPORATION, TO PLAINTIFF'S SECOND AMENDED COMPLAINT

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