IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED

JUL 12 1968

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

By [illegible] DEPUTY

CLAUDE J. TOMPLAIT

VS.

COMBUSTION ENGINEERING, INC., ET AL

CIVIL ACTION NO. 5402

MOTION TO STRIKE CERTAIN CLAIMS CONTAINED IN PLAINTIFF'S THIRD AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Fibreboard Paper Products Corporation, and files this, its motion to strike the paragraphs indicated in this motion and the claims of the plaintiff as follows:

1.

This defendant moves the Court to strike the allegations in Paragraph 37, as follows: "That in addition to the fact that plaintiff actually used the products named above, and many more as an insulator, and specifically many and various products containing asbestos, plaintiff on many of the jobs, while not using himself the specific products mentioned or perhaps not even using products containing asbestos himself, was nevertheless exposed to the dangerous materials and especially asbestos dust and fibers which were used by other workers in the same area in which the plaintiff was working.", for the following reasons:

(a) Said allegations fail to state a claim upon which a recovery can be made.

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(b) Said allegations are based solely upon speculation and conjecture, and no recovery could be had upon such a claim.

(c) Such allegations do not state a claim against the defendant, Fibreboard Paper Products Corporation, for the reason that it is not alleged that the plaintiff was using the products of this defendant or that the products of this defendant were being used on any job on which the plaintiff worked.

(d) Because the burden of proof is on the plaintiff in this case to show that a product or products manufactured by this defendant was used by him or that he came in contact with such a product, and the plaintiff has heretofore admitted by his deposition testimony that he does not know whose product he used and is unable to identify it, and the mere statement that he sustained injury as a result of using asbestos or coming in contact with asbestos dust and fibers does not place the burden of proof on this defendant to show that the plaintiff did not come in contact with its product.

2.

Defendant moves the Court to strike the allegations contained in Paragraph 39 (b) of plaintiff's third amended complaint for the following reasons:

(a) There existed no duty on the part of this defendant to provide knowledge to the plaintiff as to what would be reasonably safe and sufficient wearing apparel and proper protective equipment and appliances because there existed no relationship as between the plaintiff and this defendant which imposed any such duty.

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3.

Defendant moves the Court to strike Paragraph 39 (g) because such is repetitious.

4.

Defendant moves the Court to strike Paragraph 39 (h) for the following reasons:

(a) Because such fails to state a claim or cause of action upon which any recovery can be had.

(b) Because there exists no duty on the part of this defendant to remove its product from the market.

5.

Defendant moves the Court to strike Paragraph 39 (i) for each of the following reasons:

(a) Because there exists no duty on the part of this defendant to prescribe the method of application of its product by the plaintiff or by contractors using the defendant's product.

(b) Because there existed no duty on the part of this defendant to provide the plaintiff with a safe place to work in using asbestos products, but this duty was imposed on the plaintiff's employer.

6.

Defendant moves the Court to strike Paragraph 39 (j) for the following reasons:

(a) Because as a matter of law, an asbestos insulation product is manufactured for insulation, and it is not expressly or impliedly warranted for any other purpose.

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(b) As a matter of law, said product containing asbestos is merchantable for the purpose for which it was manufactured.

7.

Defendant moves the Court to strike Paragraph 40, wherein plaintiff claims that he is entitled to invoke the doctrine of res ipsa loquitur, for the following reasons:

(a) There are no facts alleged under which the doctrine of res ipsa loquitur would apply.

(b) As a matter of law, the doctrine of res ipsa loquitur does not apply to this factual situation, and the plaintiff merely by alleging or showing that he has asbestosis cannot cast the burden on this defendant to show that the plaintiff did not work with its product, but to the contrary, the burden is on the plaintiff to show that he did work with and use the product of this defendant and sustained injury therefrom.

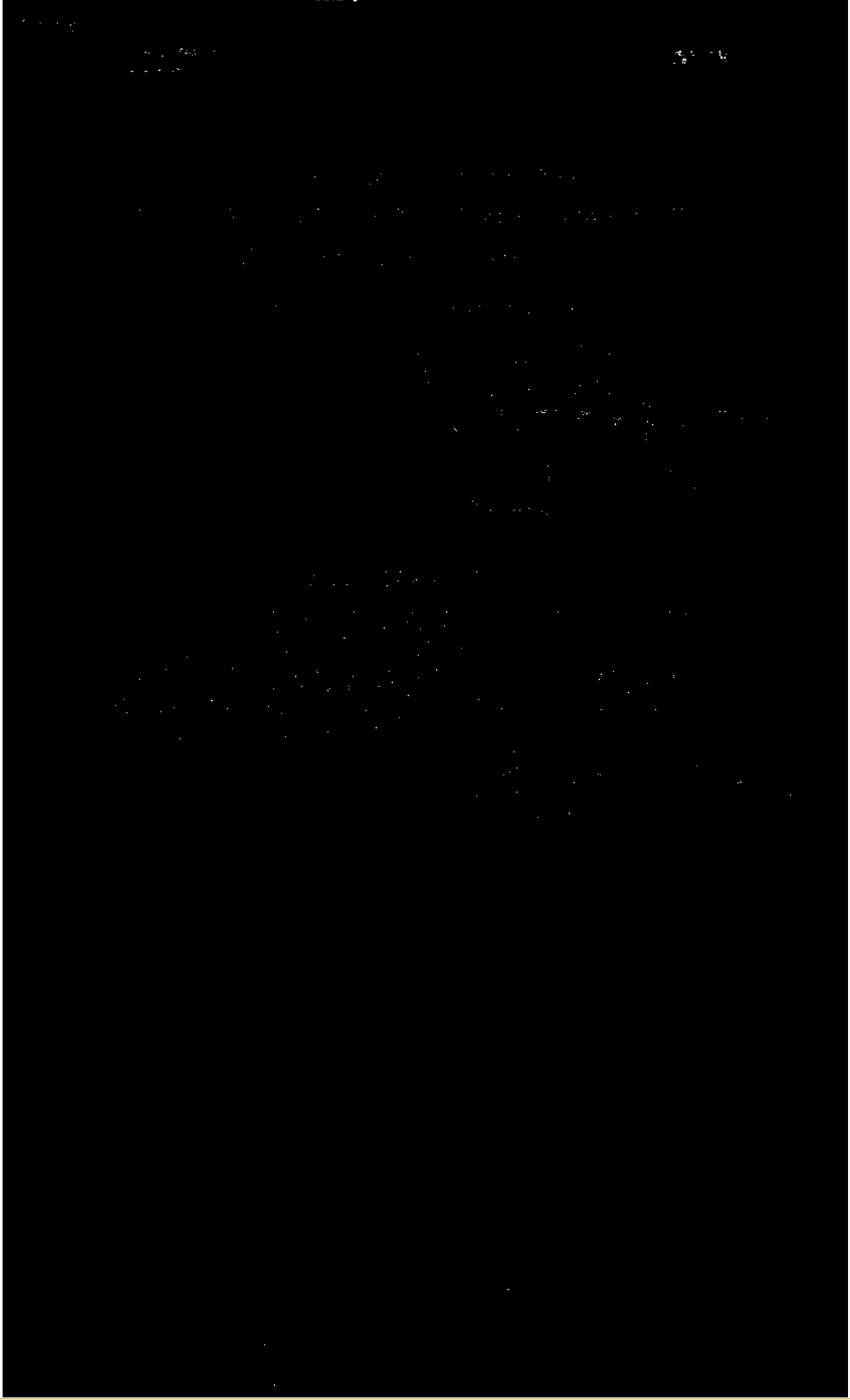
8.

Defendant moves the Court to strike Paragraph 46 for the reason that such is a duplication of Paragraph 44 and would result in a double damages claim.

9.

Defendant moves the Court to strike Paragraph 45, which is a claim for gross negligence, for the reason that the petition does not allege or state any facts which would entitle the plaintoff to recover exemplary damages, or any facts which show any gross negligence on the part of the defendants, or either of them.

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