IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED

JUL 17 1968

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

By Hazel E. Stoddard DEPUTY

CLAUDE J. TOMPLAIT

VS.

COMBUSTION ENGINEERING, INC., ET AL

CIVIL ACTION NO. 5402

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO CERTIFY UNDER TITLE 28, JUDICIARY AND JUDICIAL PROCEDURE, CHAPTER 83 - COURTS OF APPEALS - SECTION 1292(b), INTERLOCUTORY DECISIONS

TO THE HONORABLE JOE J. FISHER, JUDGE:

Title 28, Judiciary and Judicial Procedure, Chapter 83 - Courts of Appeals, Section 1292(b), Interlocutory Decisions, provides:

> "(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: xxx."

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The legislative history of Subsection (b) of Section 1292 was added to the Judiciary and Judicial Procedure Title in 1958. As this Court will realize from reading the statute, the District Judge must certify in writing that the order involved in the appeal involves a controlling question of law and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. It is then up to the Court of Appeals, in its discretion, to permit an appeal to be taken from such an order, if the application is made to the Court of Appeals within ten days after the entry of the order.

In the case of Hadjipateras vs. Pacific, S.A., 5th Circuit, 1961, 290 F. (2d) 697, opinion by Chief Judge Brown, an interlocutory appeal was allowed. There, the court held that although a literal application of Section 1292(b) would confine it to a "civil action" that in keeping with the secondary meaning now attributed to that term by the Federal Rules of Civil Procedure, the court held in Continental Grain Company vs. Federal Barge Lines, 5th Circuit, 1959, 268 F. (2d) 240, 241-42, 1959 A.M.C. 2158, that it extended to admiralty cases as well. The Supreme Court by its affirmance agreed, 361 U. S. 811, 80 S. Ct. 79, 4 Law Ed. (2d) 59. At Page 702, the court said:

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"(11) Likewise, we have thus far resisted the temptation to chart out the types of cases or the circumstances in which this new type of an appeal should be allowed. The statute was framed in broad language and the term 'controlling question of law as to which there is substantial ground for difference of opinion * * *' which 'may materially advance * * * termination of the litigation * * *' avoids casting it in the unyielding molds of prior terms of procedural art. United States v. Woodbury, 9 Cir., 1959, 263 F. 2d 784, 787.

"(12, 13) Each application is to be looked at then in the light of the underlying purpose reflected in the statute. Sperry Rand Corp. v. Bell Telephone Laboratories, Inc., 2 Cir., 1959, 272 F. 2d 29; Mueller v. Rayon Consultants, 2 Cir., 1959, 271 F. 2d 591. We need have no apprehensions about its abuse. For unlike many procedural facilities, this is committed wholly to Judges - and then only by a 3/4ths majority.

"(14) Moreover, it was a judge-sought, judge-made, judge-sponsored enactment. Federal Judges from their prior professional practice, and more so from experience gained in the adjudication of today's complex litigation, were acutely aware of two principal things. First, certainty and dispatch in the completion of judicial business makes piecemeal appeal as permitted in some states undesirable. But second, there are occasions which defy precise delineation or description in which as a practical matter orderly administration is frustrated by the necessity of a waste of precious judicial time while the case grinds through to a final judgment as the sole medium through which to test the correctness of some isolated identifiable point of fact, of law, of substance or procedure, upon which in a realistic way the whole case or defense will turn. The amendment was to give to the appellate machinery of §§ 1291 through § 1294 a considerable flexibility operating under the immediate, sole and broad control of Judges so that within reasonable limits disadvantages of piecemeal and final judgment appeals might both be avoided. It is that general approach rather than the use of handy modifiers -- which may turn out to be Shibboleths -- that should guide us in its application and in determining whether the procedure specified has been substantially satisfied."

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In United States vs. Woodbury, U. S. Court of Appeals, 9th Circuit, 1959, 263 F. (2d) 784, 786, the court said:

> "(1) The opinion of the district judge that a controlling question is involved, while deserving of careful consideration, is not binding upon this court when we are called upon to exercise our discretion under the statute. We accordingly re-examine that point.
>
> "(2) Section 1292(b) was intended primarily as a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit. Examples of such questions are those relating to jurisdiction or a statute of limitations which the district court has decided in a manner which keeps the litigation alive but which, if answered differently on appeal, would terminate the case."

In the foregoing case, it is noted that the court recognizes that a question of application of the statute of limitation which the district court has decided in a manner which keeps the litigation alive, but which, if answered differently on appeal, would terminate the case, is the type of situation where certification of a legal question is proper.

In the case of Chappell & Company vs. Frankel, U. S. Court of Appeals, 2nd Circuit, 1966, 367 F. (2d) 197, 200, the court said:

> "xxx Of course, in some cases, we can review interlocutory denials of summary judgment motions under the Interlocutory Appeals Act of 1958 which grants the Court of Appeals discretion to review any interlocutory order in a civil case if the trial judge decides that the

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issue he ruled upon involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the interlocutory order may materially advance the ultimate termination of the litigation. xxx."

Again, at Page 204, the Court said:

"That Act (referring to the Interlocutory Appeals Act of 1958 - Section 1292(a)) explicitly grants to the Courts of Appeals discretion to review any interlocutory order if the trial judge determines that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C.A., Para. 1292(b). This new avenue of interlocutory review, with its carefully devised limitations, seems well suited to permit appeal from a lower court order denying summary judgment and permanent injunctive relief in those cases in which appeals should be available immediately."

The purpose of the foregoing rule is to expedite litigation pending in the District Court in consideration of time and expense of the parties where there is a controlling question of law. Winston v. Roe, District Court, Tennessee, 1965, 246 F. Supp. 246; Cleveland-Cliffs Iron Company vs. Grosse Ile Bridge Company, District Court, Michigan, 1964, 239 F. Supp. 872; Haraluerda vs. U. S. Steel Corporation, District Court, Michigan, 1960, 187 F. Supp. 86.

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Plaintiff Cannot Recover Damages for Voluntary Exposures to Asbestos Products and Asbestos Dust After He Was Warned and Told to Get Out of This Business and Knew That He Had Suffered Injury From Contact With Such Product

There are two reasons why the plaintiff cannot recover damages for those exposures to asbestos products and asbestos dust after he had knowledge that he had suffered injury as a result of contact with such product and that further contact would further injure him and affect his health.

The rule is well recognized that a person cannot voluntarily encounter a danger, suffer injury from the voluntary encounter with danger and then recover damages because of his voluntary exposure to this danger. See Delhi-Taylor Oil Corporation vs. Henry, Sup. Ct. Tex., 1967, 416 S.W. (2d) 390; Western Auto Supply Company vs. Campbell, Tex. Sup. Ct., 1963, 373 S.W. (2d) 735; McKee vs. Patterson, 153 Tex. 517, 217 S.W. (2d) 391; Wesson vs. Gillespie, Sup. Ct. Tex., 1964, 382 S.W. (2d) 921 (the 8-Ball Lounge case); Safeway, Inc. vs. Johnson, 5th Cir., 311 F. (2d) 387.

In 17 Tex. Jur. (2d), Para. 32, Damages, Page 110, the rule is stated:

> "A person who has been injured either in his person or in his property rights by the actionable conduct of another, must exercise reasonable care and diligence to avoid loss and to minimize the consequences of the injury. xxx And if he fails to do so and by reason of his failure his injury or damage becomes aggravated he may

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not recover for such part of the injury as may be attributed to his omission to take preventive measures, and his recovery will be limited only to those damages that would have resulted had he fulfilled his duty."

In 17 Tex. Jur. (2d), Para . 33, Damages, the text states: "An injured person, in attempting to mitigate damages, is required to use ordinary care."

Para. 45, Tex. Jur. (2d) - "There may be no recovery for any injury that is the consequence of his failure to act as an ordinarily prudent person."

Under the doctrine of avoidable consequences, a party cannot recover damages flowing from consequences which that party could reasonably have avoided. 22 Amer. Jur. (2d), Para. 30, Page 51, Note 19; Restatement, Torts, Para. 918.

The court will not allow damages for those consequences of the injury which the plaintiff could reasonably have avoided. This doctrine should be viewed as a "no right to recover for reasonably avoidable damages."

We think it clear that as a matter of law the plaintiff, Tomplait, cannot recover damages which may have accrued due to subsequent exposures to asbestos and asbestos dust and products after he knew that he would probably suffer injury by such action. As indicated by the undisputed evidence, he was advised by his

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doctor that he had a condition and that he should no longer work as an insulator with insulating products, which included asbestos. Nevertheless, he did so work and is now attempting to recover damages for his own acts and omissions in failing to exercise ordinary care in following the instructions of the physician. No recovery can be had and there was no cause of action available to him after he knew of his injury and knew that he should not subject himself to further injury.

This is just another strong reason why the Court should grant the motions for summary judgment of the various defendants in this case on the basis of the two year statute of limitation, but failing to do so, we believe that the Court in the exercise of his discretion should certify this question to the Court of Appeals for the Fifth Circuit, as it will dispose of this litigation.

Respectfully submitted in behalf of all defendants who are signatory to the motion to certify;

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