IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

| | | |
|---|---|---|
| CLAUDE J. TOMPLAIT | ) | |
| | ) | |
| VS. | ) | CIVIL ACTION NO. 5402 |
| | ) | |
| COMBUSTION ENGINEERING, INC., ET AL | ) | |

FILED
FEB 4 - 1969
M 19
James R. Cooney, Clerk, U. S. Court
By Margaret Turner DEPUTY

ANSWER OF THE DEFENDANT, UNARCO INDUSTRIES, INC. TO PLAINTIFF'S THIRD AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Unarco Industries, Inc., one of the Defendants herein, and files this its Original Answer to Plaintiff's Third Amended Complaint and would respectfully show unto the Court and Jury the following:

I.

As to the allegations contained in Paragraph I of said Complaint, this Defendant does not have sufficient knowledge or information upon which to base a belief as to the truth or inaccuracy thereof, inasmuch as this Defendant does not have knowledge as to the citizenship of the parties hereto.

II.

This Defendant admits the allegations contained in Paragraph 2 to the effect that the amount in controversy herein exceeds the sum of $10,000.00, exclusive of interest and cost, but denies that the Plaintiff is entitled to any recovery herein against this Defendant in any sum.

III.

This Defendant does not have sufficient knowledge or information on which to make an admission or denial of the allegations contained in Paragraph 3 of the Third Amended Complaint.


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IV.

With reference to the allegations contained in Paragraphs 4, 5, 6, 7, 8, 9, 10, 11 and 12 of the Third Amended Complaint, the matters and allegations therein alleged pertain to Parties Defendant other than this Defendant and this Defendant does not have sufficient knowledge or information upon which to base an admission or denial of the allegations contained therein.

With reference to the allegations contained in Paragraph 13 of said Amended Complaint, this Defendant admits that during certain times mentioned therein, but not at all times referred to by Plaintiff, this Defendant has been engaged in the manufacture of materials used for insulation which were placed on the market to be purchased and used by the public, but denies that such materials are in all of the compounds alleged by the Plaintiff. Further, this Defendant does not have sufficient knowledge or information upon which to base an admission or denial as pertains to the products of the other Defendants who manufactured such products, if any, and the exact contents or compounds thereof.

V.

This Defendant denies the allegations contained in Paragraph 14 of the Third Amended Complaint.

VI.

With reference to the allegations contained in Paragraphs 15 through 36 inclusive of the Third Amended



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Complaint of Plaintiff, this Defendant says that it does not have sufficient knowledge or information upon which to make an admission or denial thereof and cannot admit nor deny the allegations as to the truth or inaccuracy thereof.

VII.

With reference to the allegations contained in Paragraph 37, pertaining to Plaintiff's employment, this Defendant does not have sufficient knowledge or information upon which to base an admission or denial thereof. This Defendant denies the remaining allegations contained in Paragraph 37 of said Amended Complaint.

VIII.

This Defendant denies the allegation contained in Paragraph 38 of said Amended Complaint.

IX.

This Defendant denies the allegations contained in Paragraph 39 and all subdivisions thereunder, Sub-Paragraphs (a) through (j) inclusive.

X.

This Defendant denies the allegations contained in Paragraph 40 of said Amended Complaint.

XI.

This Defendant denies the allegations contained in Paragraph 41 of said Amended Complaint.

XII.

This Defendant denies the allegations contained in Paragraph 42 of said Amended Complaint.



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XIII.

This Defendant denies the allegations contained in Paragraph 43 of said Amended Complaint and further denies that the Plaintiff is entitled to any recovery sought herein against this Defendant.

XIV.

This Defendant denies the allegations contained in Paragraph 44 of said Amended Complaint and further denies that Plaintiff is entitled to any recovery sought against this Defendant.

XV.

This Defendant denies the allegations contained in Paragraph 45 of said Amended Complaint and further denies that the Plaintiff is entitled to any recovery sought herein against this Defendant.

XVI.

This Defendant denies the allegations contained in Paragraph 46 of the Amended Complaint and denies that the Plaintiff is entitled to any recovery whatsoever against this Defendant.

This Defendant further denies the allegations contained in the last unnumbered paragraph of said Amended Complaint and the prayer to such Complaint and would specifically deny that the Plaintiff is entitled to any recovery herein or to any relief sought by him in this action against this Defendant.

AFFIRMATIVE DEFENSES

XVII.

For further answer, and by way of affirmative defense,



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this Defendant would show that any cause of action, if any, which the Plaintiff has or may ever have against this Defendant, which is not admitted but denied, accrued more than two years prior to the commencement of this suit against this Defendant and is barred by the Two-Year Statute of Limitations, Article 5526, Vernon's Texas Civil Statutes, and this Defendant pleads the same in bar to this suit.

XVIII.

For further answer, if such be necessary, this Defendant would show that any cause of action, if any, which the Plaintiff has or may ever have against this Defendant, which is not admitted but expressly denied, accrued more than four years prior to the commencement of this suit against this Defendant and is barred by the Four-Year Statute of Limitations, Article 5529, Vernon's Texas Civil Statute, and the Defendant pleads the same in bar to this suit.

XIX.

For further answer, and by way of affirmative defense, this Defendant says that the products which this Defendant manufactured and sold were at all times reasonably fit and suitable for the purpose for which manufactured and sold and this Defendant denies that the same were in anywise defective.

XX.

This Defendant denies that any product which it manufactured or sold in any manner caused or brought about any injury or illness, if any, to the Plaintiff and further that the physical condition of which Plaintiff now complains



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was in nowise caused or brought about by the product manufactured and sold by this Defendant and that such condition of the Plaintiff was due solely to disease and other causes and in nowise connected with this Defendant.

XXI.

Answering still further, if such be necessary, and by way of further affirmative defense, this Defendant specially denies that the Plaintiff sustained any injury as a result of contact or use with or of any product manufactured by this Defendant and specially denies any fault or breach of warranty on the part of this Defendant and specially denies that this Defendant was guilty of any negligence proximately causing or contributing to cause Plaintiff's alleged injuries and damages, but to the contrary, this Defendant alleges that the Plaintiff himself was guilty of various acts, wrongs and omissions, each and all amounting to negligence, which, acting together or separately, were the sole proximate cause of his alleged injuries and damages, if any, or in the alternative, were a proximate cause thereof.

XXII.

For further answer, pleading in the alternative, this Defendant would show that Plaintiff's alleged injuries and damages, if any, were caused solely, or in the alternative, were proximately caused by acts, wrongs, omissions and negligences of third-parties or a third-party, in nowise connected with this Defendant and for whom this Defendant is in nowise liable or responsible; or, in the alternative, the physical



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condition of which Plaintiff complains was due solely to causes other than any negligence, fault or breach of warranty, none of which are admitted but denied, on the part of this Defendant.

XXIII.

Answering still further, if such be necessary, and in the alternative, this Defendant would show that Plaintiff's injuries and damages, if any, were the result of an unavoidable accident as that term is defined in law.

XXIV.

For further answer, and pleading in the alternative, this Defendant would show that all situations and conditions of which Plaintiff complains, and the danger or dangers, if any, arising from the continued use of insulation material of which he complains, were open and obvious to him, and if any dangers existed as claimed by him, which are not admitted, then the same, if existing, were apparent and easily discernible, and the Plaintiff knew as much about the same as did this Defendant and the same were well known to the Plaintiff, or should have been known to him, and he appreciated any dangers arising therefrom and the conditions, if existing, were not such that these Defendants would be legally liable to the Plaintiff therefor.

XXV.

For further affirmative answer herein, this Defendant would show that the Plaintiff with full knowledge of the fact that he was working in dust and creating dust from the insula-



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tion products knew that he would be subject to injury and that such working conditions and any risks attendant thereto were open and obvious to him and this Defendant here and now invokes the doctrine of volente non fit injuria as that term is known and defined in law, showing unto the Court that the Plaintiff knew and appreciated any dangers or risks attendant thereto and nevertheless voluntarily exposed himself to any such alleged risks.

XXVI.

Answering still further, if such be necessary, this Defendant would show that Plaintiff voluntarily assumed the risk of performing the work in which he was engaged on the occasions in question, and he had actual notice and knowledge of all conditions and situations surrounding the work which he was performing and of any dangers, if any existed, arising therefrom, fully appreciated the same, and he had been specifically and directly warned as to any dangers in connection with such insulation material, and had been instructed and directed by a physician of his own choosing to cease working with and around insulation materials, but nevertheless Plaintiff voluntarily proceeded and continued over a period of years to work with and around insulating materials, and voluntarily exposed himself to all such conditions, dangers or hazards incident to such work, and for these additional grounds this Defendant invokes the doctrine of volente non fit injuria as that term is known and defined in law.

XXVII.

Answering still further, in the alternative, this



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Defendant would show that there is and was no legal liability on the part of this Defendant because of the fact that the alleged occurrences or happenings in question were brought about or caused by transitory conditions arising in the course of the work the Plaintiff was doing, and ordinarily incident thereto, the Plaintiff using his and his employers' own manner, method and means of doing the work and this Defendant owed no duty with respect thereto.

XXVIII.

For further affirmative defense herein, this Defendant says, in the alternative, that in the year 1961, Plaintiff was instructed and directed by a physician of his own choosing to cease work with and around insulating material, but nevertheless the Plaintiff, in the face of such instructions, directions and warnings by said physician, continued over a period of several years thereafter to work with and around insulating materials and thus voluntarily exposed himself to any conditions, dangers or hazards incident to such work, and this Defendant pleads all of such facts in bar of Plaintiff's right, if any, to recovery for his alleged injuries and damages.

XXIX.

For further answer herein, in the alternative, this Defendant would show that its products were reasonably fit and safe for the purpose for which they were made,



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manufactured and sold, and that if Plaintiff was in fact injured as he alleges and claims as a result of the use of any of the products of this Defendant, then such injury was the result of the negligence of Plaintiff's employers or contractors and not this Defendant in failing to adopt and enforce safe working practices and methods; or alternatively, Plaintiff failed to use and utilize any safety devices, such as gloves, protective clothing, masks and respirators for breathing and thus is not entitled to recover against this Defendant.

XXX.

For further grounds of relief, this Defendant says that if any judgment is entered herein jointly and severally against this Defendant and the other Defendants herein, then in such event this Defendant is entitled to contribution over and against such other Defendants in accordance with the provisions of Article 2212 of Vernon's Civil Statutes of Texas.

WHEREFORE, this Defendant having fully answered herein prays judgment of the Court that Plaintiff take nothing against this Defendant by his suit and that this Defendant go hence without day for its cost; or in the alternative, that this Defendant have judgment for contribution as set forth above.

Respectfully submitted,

VINSON, ELKINS, SEARLS & CONNALLY

By: Gerald P. Coley

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Houston, Texas 77002-CA5-2411
ATTORNEYS FOR UNARCO INDUSTRIES, INC.



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CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing Answer was on this the 3rd day of February, 1969, served upon counsel for the Plaintiff by depositing the same in the United States mails, postage paid, addressed to Mr. Ward Stephenson, Attorney at Law, Stephenson Building, Orange, Texas and also a true copy was served on all other interested counsel of record.

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Unarco Industries, Inc.

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ANSWER OF THE DEFENDANT, UNARCO INDUSTRIES, INC. TO PLAINTIFF'S THIRD AMENDED COMPLAINT

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