IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED
May 16 1967
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

MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL OF THE EVIDENCE

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, Fibreboard Paper Products Corporation, at the close of all of the evidence, moves the Court to instruct the jury to return a verdict for the defendant, and as grouns for this motion would show the Court:

1.

The plaintiff has wholly failed to discharge the burden of proof resting upon him to show that the insulation product manufactured by this defendant was defective and not suitable for the purpose for which such products were intended and were therefore dangerous and harmful to human beings and to the health of man.

2.

The evidence is insufficient to establish that the insulation product manufactured by this defendant was defective and not suitable for the purpose for which such products were intended and were therefore dangerous and harmful to human beings and to the health of man.

3.

Because the undisputed evidence in this case establishes that the insulation product containing asbestos manufactured by

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this defendant was reasonably safe and suitable for the purpose for which such product was intended, and if there was any danger in the use of the product such danger occurred in the manner and means and under conditions prescribed by the contractor or owner for whom the plaintiff worked, and such conditions were transitory and were conditions over which this defendant had no control, and this defendant therefore owed no duty to the plaintiff which was violated by this defendant.

4.

An instructed verdict should be given in this case because the plaintiff wholly failed to discharge the burden of proof resting upon him to show that he actually worked during the years 1959, 1960, and during 1961 prior to August 1, 1961, with products containing asbestos which were manufactured by this defendant; therefore, there is no basis for the plaintiff's claim that he was injured during such period of time by working with products manufactured by this defendant.

5.

An instructed verdict should be given in this case because the evidence is insufficient to show that the plaintiff actually worked during the years 1959, 1960, and during 1961 prior to August 1, 1961, with products containing asbestos which were manufactured by this defendant; therefore, there is no basis for the plaintiff's claim that he was injured during such period of time by working with products manufactured by this defendant.

6.

Because as a matter of law the plaintiff cannot recover for any alleged injury or damage to his person which may have accrued to him as a result of exposure to asbestos products

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manufactured by this defendant, when such exposure occurred on or after August 1, 1961, which was the date plaintiff was fully advised as to his physical condition and was advised that he could no longer work with asbestos products without injury to himself.

The sole basis of plaintiff's claim as made by his pleading is that during the years 1959, 1960, 1961, 1962, 1963 and 1964 he came in contact with various products containing asbestos manufactured by various manufacturers and as a result thereof sustained the disease known as asbestosis which caused physical injury and disability, and the plaintiff has failed to establish any claim against this defendant for the period 1959, 1960, and prior to August 1, 1961. As a matter of law there can be no recovery by the plaintiff for any exposure to this defendant's product after August 1, 1961.

7.

Because the undisputed evidence establishes as a matter of law that the plaintiff's claim for alleged injury and damage, if any, is barred by the Statute of Limitation of two (2) years of the State of Texas.

Because the plaintiff has failed to discharge the burden of proof upon him to show that the defendant, Fibreboard Paper Products Corporation, prior to August 1, 1961, could by the reasonable application of human skill and foresight have known that construction workers applying its insulation product in construction work under usual and ordinary conditions, such as the plaintiff, Tomplait, would sustain asbestosis by working with its insulation product which contained some asbestos.

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9.

Because the plaintiff has wholly failed to discharge the burden of proof resting upon him to show that any act or omission of this defendant was a failure to exercise ordinary care in relation to the plaintiff and that any act or omission of this defendant in the manufacture of its product proximately caused or contributed to cause the plaintiff's alleged injury and damage, if any.

10.

Because the evidence is insufficient to show that any act or omission of this defendant was a failure to exercise ordinary care in relation to the plaintiff and that any act or omission of this defendant in the manufacture of its product proximately caused or contributed to cause the plaintiff's alleged injury and damage, if any.

11.

The undisputed evidence shows that the plaintiff's alleged claim for damage is barred by the two (2) year Statute of Limitation because he made a claim in December, 1961, that he was disabled as a result of an occupational disease known as asbestosis and silicosis, as a result of which he was totally disabled, and a final judgment was rendered against the workmen's compensation carrier of Armstrong Contracting and Supply Company, his employer, on September 16, 1964, more than two (2) years prior to the time that this suit was filed, and therefore the claim is barred by the two (2) year Statute of Limitation of the State of Texas.

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12.

Because the undisputed evidence in this case establishes that the products which this defendant manufactured and sold were at all times reasonably fit and suitable for the purposes for which they were manufactured and sold, and that such products were not in anywise defective for the use for which they were manufactured and sold.

13.

Because the undisputed evidence in this case shows and establishes that if the plaintiff has asbestosis he acquired such asbestosis as a result of an occupational hazard or working in dust laden air which contained asbestos dust over a period of years from 1941 to 1959, and that he had the disease of asbestosis from such prior exposures, and the evidence does not establish that he sustained asbestosis as a result of exposures during the years 1959, 1960 and 1961 prior to August 1, 1961.

14.

Because the undisputed evidence in this case shows that the plaintiff was guilty of a failure to exercise ordinary care for his own safety and that such failure was a proximate cause of his condition, in that he failed to use and utilize any mask or respirators for breathing and that he worked in dust laden air of asbestos dust with full knowledge that he was inhaling such dust laden air and he failed to remove himself from such dust laden air.

15.

An instructed verdict should be given in this case because the undisputed evidence shows that at all times the

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plaintiff knew that he was working with insulation products containing asbestos and it was common knowledge that the inhalation of asbestos dust, as well as other dust, was harmful, and he knew that certain work with asbestos products created dust, but nevertheless, he continued to work in dust laden air where insulation materials containing asbestos were used, and he continued such work with full knowledge that he was inhaling asbestos dust, therefore he is barred from any recovery under the theory of volenti non fit injuria.

16.

The plaintiff failed to exercise ordinary care for his own welfare and such failure was a proximate cause of at least part of his disability, in that after the plaintiff 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 nevertheless continued to work with such product and subjected himself to dust created by insulation products without using any respirator or mask.

17.

Because the undisputed evidence in this case shows that the plaintiff's employer knew at all times that they were working with insulation products containing asbestos and that such product created dust and that such dust was harmful if proper ventilation was not provided to the employee, and the employer likewise knew that respirators or masks should be used under dusty conditions, and under the law of Texas the plaintiff is charged with the same knowledge which his employer had.

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18.

Because the undisputed evidence in this case shows that the plaintiff was exposed to insulation products containing asbestos and worked with products manufactured by Johns-Manville Corporation, Eagle-Picher Industries, Inc., Pittsburgh-Corning Corporation, Owens-Corning Fiber Glass Corporation, Combustion Engineering, Inc., R & I Refractory & Insulation Corporation, and Unarco Industries, Inc., and that plaintiff alleges and claims he worked with each and all of said products and that each and all of said products caused or contributed to cause his injury and disability, therefore the alleged acts or omissions of this defendant could not proximately cause the plaintiff's alleged injury and damage.

19.

An instructed verdict should be given in this case because the undisputed evidence shows that the utility and need of the asbestos insulation products in industry far outweigh the possibility of harm to construction workers, and the imposition of strict liability against this defendant because the plaintiff may have sustained the disease of asbestosis over a period of twenty-five years would be an undue impediment to business and an intolerable injustice because under the evidence the scope of liability would not be confined to the zone of danger which could reasonably have been foreseen before these products were sold.

20.

There is no evidence of gross negligence which would entitle the plaintiff to any exemplary damage because there is no evidence of an entire want of care which would raise the

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belief that any act or omission complained of as to this defendant was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.

21.

Because as a matter of law the plaintiff cannot recover punitive damages for liability based upon an alleged breach of warranty.

22.

The evidence is insufficient to show any gross negligence which would entitle the plaintiff to any exemplary damage because the evidence is insufficient to show an entire want of care which would raise the belief that any act or omission complained of as to this defendant was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it.

23.

Any finding of gross negligence or exemplary damages in this case would be so against the great weight and preponderance of the evidence as to be clearly wrong.

24.

There is no evidence of any willful negligence or acts so gross as to indicate indifference to the safety of others, wantonness, recklessness or malice, or that the defendant had a fixed purpose to bring about the alleged injury of which the plaintiff complains.

WHEREFORE, at the close of all of the evidence, this defendant prays that the Court withdraw this case from jury consideration and that the Court render and enter a judgment in favor of this defendant; or in the alternative, instruct

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the jury to return a verdict in favor of this defendant upon all grounds set forth herein, and for the further and additional reasons set forth in this defendant's motion for summary judgment.

Respectfully submitted;

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BY _____
GEO. A. WELLER,
ATTORNEYS FOR DEFENDANT,
FIBREBOARD PAPER PRODUCTS
CORPORATION.

Defendant's motion for a Directed Verdict on the close of all of the evidence is denied -

Judge Presiding

(Just prior to the time the jury returned its verdict)

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