IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

FILED

JUN 13 1969

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

By Virginia M. Lewis DEPUTY

CLAUDE J. TOMPLAIT

VS.

FIBREBOARD PAPER PRODUCTS CORPORATION

CIVIL ACTION NO. 5402

REPLY TO PLAINTIFF'S MOTION FOR NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the defendant, Fibreboard Paper Products Corporation, and files this, its reply to plaintiff's motion for new trial, and for such reply says:

Statement

The plaintiff, Tomplait, asserts that because the Court required him to specify where he was employed beginning in the year 1959, and he amended his pleading, specifying the name of his employer and places of employment, that the jury got the impression that plaintiff was trying to establish that he had used this defendant's products since 1959 to the date of filing suit in December, 1966. The plaintiff further asserts that his theory was that his condition was the result of an occupational disease "contracted over many years' period of time and in all likelihood originating several years before 1959."

The Record

Plaintiff in Paragraph 14 of his original complaint, alleged that various types of insulation compounded, manufactured and placed in containers, sold by the defendants (naming all defendants) contained chemicals and minerals and deleterious

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substances and matter which were highly poisonous, dangerous and harmful to human beings and to the health of man; that such materials were defective and were not suitable for the purposes for which they were intended.

In Paragraph 6 of the original complaint, plaintiff alleged that he is suing all defendants and alleging he is suing whichever one is responsible for the manufacture, production and distribution of insulation materials hereinafter mentioned, but it is not known by plaintiff at this time which of said corporations is responsible.

This defendant, along with all other defendants, filed a motion for more definite statement on the basis that the allegations wholly failed to allege a time and place or the name of the material or other means of identification of the alleged product which he claims caused his alleged injury. The Court granted this motion.

Plaintiff, in his third amended complaint, which was the pleading upon which he proceeded to trial, in Paragraph 15 alleged that beginning with the year 1959 and through the year 1964, he was employed by various contractors on various construction projects and came in contact with certain insulation materials which he designated. He also alleged generally in Paragraph 38 that during the period of time in which he was employed as an insulator that due to the negligence of the defendants he was caused to come into contact with insulation products produced by defendants which caused him damage. At no place in this pleading does he allege that he was caused to come in contact with insulation products manufactured by various defendants in the year 1941, but this contention was made upon the trial of the case.

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The plaintiff offered part of the deposition testimony of the plaintiff, and this defendant offered the testimony of Mr. Tomplait from the deposition which demonstrated the places where he had worked and demonstrated that he was unable to identify any particular product or products as having been manufactured by this defendant. This testimony was offered without objection.

This defendant likewise offered certain requests for admissions of fact and interrogatories which showed the places where the plaintiff alleged that he had worked beginning in 1959, and the fact that he was unable to identify any particular product or products with which he had worked.

The plaintiff was permitted to testify that sometime, someplace, he had worked with products manufactured by Fibreboard Paper Products Corporation. Of course, he never produced any evidence which confirmed his testimony and this testimony and claim was highly disputed by this defendant through various witnesses and documentary evidence.

In plaintiff's argument to the jury he strongly argued the theory of his case, that is, that Mr. Tomplait worked with insulation products, including those manufactured by Fibreboard, beginning in 1941 up to 1966, when the suit was filed, and that Mr. Tomplait had testified that he had worked with Fibreboard products during this period. Of course, Mr. Tomplait's testimony only raised an issue of fact for the jury, and defendant argued that the plaintiff wholly failed to discharge the burden of proof resting upon him to show that he worked with products manufactured by this defendant. It was also argued that to the contrary, this

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defendant had assumed a burden of going forward with the evidence to show that in truth and in fact that on the jobs identified by Tomplait, even in 1941 through 1946, and from 1959 to 1966, Fibreboard's product was not used on the jobs on which Tomplait said he worked.

The Court did not permit this defendant to offer the plaintiff's third amended petition, but testimony of Tomplait and requests for admissions answered by him and offered in evidence disclosed the claims made as to the places worked, but he could not identify any product.

The Court's Charge

The Court charged the jury on each and all of the claims of negligence asserted by plaintiff against this defendant. The Court likewise charged the jury on the theory of a breach of warranty, stating that this is a theory of strict liability and that contributory negligence on the part of plaintiff is not a bar to plaintiff's recovery.

The Court likewise charged the jury that the defendant denied that the plaintiff sustained any injury as a result of contact or use of any product manufactured by it. The Court further instructed the jury: "Now to find for the plaintiff and against the defendant you must find from a preponderance of the evidence that the plaintiff worked with some product manufactured by the defendant which contained asbestos prior to August 1, 1961, and that, as the result of working with such product manufactured by the defendant, that he contracted the occupational disease known as asbestosis, and which became manifested and known to him as of August 1, 1961."

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The jury was further instructed that if the jury did not believe from a preponderance of the evidence that plaintiff worked with any materials manufactured by the defendant which contained asbestos prior to August 1, 1961, then they would find for the defendant. Also, the question of whether the plaintiff, Tomplait, had asbestosis in 1961 or even in 1963 was controverted and there was evidence to the effect that he did not have this condition.

Another defense upon which the Court charged the jury was that any unreasonable risk or danger to an insulator from using this defendant's product must have been reasonably foreseen by the manufacturer. This is clearly in accord with the law of the State of Texas and the cases on products liability as decided by the U. S. Court of Appeals of the Fifth Circuit.

The jury in the form of verdict found in favor of the defendant, Fibreboard Paper Products Corporation, and also found that the six named manufacturers did contribute to the occupational disease of asbestosis suffered by plaintiff, if he is so suffering.

Conclusion

It is respectfully submitted that whatever fact issues there were in this case were decided by the jury adversely to the contention of the plaintiff. In the Federal Courts there is a great reluctance to disturb verdicts of the jury, and I think this Court will agree that the plaintiff had a fair trial of his claim before the jury and the jury decided the factual issues adversely to his claim.

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WHEREFORE, this defendant prays that the plaintiff's motion for new trial be denied.

Respectfully submitted;

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

I certify that a copy of the foregoing reply to plaintiff's motion for new trial was served on Mr. Ward Stephenson, Stephenson, Thompson & Morris, Stephenson Building, Orange, Texas, attorney for plaintiff, by mailing a copy by certified mail to said address on the 13th day of June, 1969.

_____
OF COUNSEL FOR DEFENDANT

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