

NORTH CAROLINA
NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
80 CVS 2893

JOSEPH W. HOLLAND,)
)
Plaintiff)
)
VS.)
)
JOHNS-MANVILLE SALES)
CORPORATION, et als,)
)
Defendants)

NOTICE OF DEFENDANT,
FORTY-EIGHT INSULATIONS, INC.

TO: Babcock & Wilcox, Inc.
P. O. Box 1713
Wilmington, N.C. 28402

YOU ARE HEREBY NOTIFIED that on or about the 11th day of April, 1983, Joseph W. Holland, Plaintiff, an employee of Babcock and Wilcox, Inc., filed a Complaint in a civil action seeking damages in excess of TWO MILLION DOLLARS (\$2,000,000.00) from various corporate defendants, including Forty-Eight Insulations, Inc., for bodily injuries as a result of his alleged exposure to asbestos and asbestos-related insulation materials from 1953 to present date. In this action, it is alleged that plaintiff was, and still is, employed by Babcock and Wilcox, Inc. During this time he was allegedly injured during the course and scope of his employment as a result of exposure to asbestos and asbestos-related insulation materials. Defendant Forty-Eight Insulations, Inc. is informed and believes that a claim for worker's compensation benefits has been filed against Babcock and Wilcox, Inc. by plaintiff on the basis of such injury. Defendant Forty-Eight Insulations, Inc. has filed defenses and answer alleging and contending that the injury of plaintiff resulted from actionable negligence at Babcock and Wilcox, Inc. in producing the alleged injury of plaintiff, and this defendant has requested in its defenses and answer that an issue be submitted to the jury in this case to determine

whether or not Babcock and Wilcox, Inc. was guilty of actionable negligence in producing the alleged injury of plaintiff. A copy of such defenses and answer is attached hereto and is being served pursuant to the provisions of North Carolina General Statute §97-10.2(e).

This the 9th day of September, 1983.

WALLACE, BARWICK, LANDIS,
RODGMAN & BOWER, P.A.

BY:

F. E. Wallace, Jr.
Attorneys for Defendant
Forty-Eight Insulations, Inc.
Post Office Box 3557
Kinston, North Carolina 28501
Telephone: (919) 522-4445

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this pleading in the above entitled action upon all other parties to this cause by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office Department, properly addressed to the attorney or attorneys for said parties.

This the 9th day of Sept, 1983
F. E. Wallace, Jr. Attorney
for Wallace, Barwick & Landis, P.A.

LAW OFFICES OF WALLACE, BARWICK, LANDIS, RODGMAN & BOWER, P.A., KINSTON, N.C.

NORTH CAROLINA
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JOSEPH W. HOLLAND,
Plaintiff
VS.
JOHNS-MANVILLE SALES
CORPORATION, et als,
Defendants

ANSWER OF DEFENDANT
FORTY-EIGHT INSULATIONS, INC.
TO PLAINTIFF'S AMENDED COMPLAINT

The defendant, Forty-Eight Insulations, Inc., answering the amended Complaint of the plaintiff herein, alleges:

FIRST DEFENSE

The Complaint fails to state a claim against this defendant, either as to compensatory damages or punitive damages, upon which relief can be granted. Rule 12(b)(6).

SECOND DEFENSE

Plaintiff's Complaint fails to join all proper and necessary parties. Rule 12(b)(7).

THIRD DEFENSE

Plaintiff's Complaint violates the provisions of G.S. 1A-1, Rule 8(a)(2) in that plaintiff's Complaint seeks damages for a specified amount and the ad damnum prays for damages in a specified amount against a manufacturer or supplier of a product which is alleged to be defective. That such allegations are improper, inflammatory and prejudicial to defendant. Plaintiff's Complaint should be dismissed for such violation or such allegations should be stricken from the pleadings.

FOURTH DEFENSE

1. Paragraph 1 of plaintiff's Complaint is denied for lack of sufficient knowledge or information to form a belief.

2. With respect to paragraph 2 of plaintiff's Complaint, it is not denied that Forty-Eight Insulations,

Inc., is incorporated under the laws of a state other than North Carolina, but the other allegations contained in said paragraph as they may apply to this defendant are denied.

3. Paragraph 3 of the Complaint as it may relate to this defendant is denied.

4. Paragraphs 4 through 11 of the First Claim for Relief of the Complaint as they may relate to this defendant are denied.

5. Paragraphs 12 through 16 of the Second Claim for Relief of the Complaint as they may relate to this defendant are denied.

6. Paragraphs 17 through 21 of the Third Claim for Relief of the Complaint as they may relate to this defendant are denied.

7. Paragraphs 22 through 24 of the Fourth Claim for Relief of the Complaint as they may relate to this defendant are denied.

8. Paragraphs 25 through 27 of the Fifth Claim for Relief of the Complaint as they may relate to this defendant are denied.

9. Paragraphs 28 and 29 of the Complaint as they may relate to this defendant are denied.

FIFTH DEFENSE

1. In the event that it should be determined that there was some contractual or warranty relationship between this defendant and plaintiff, all of which is denied, then this action is governed by the applicable provisions of the North Carolina version of the UCC as set out in North Carolina General Statutes Sec. 25-2.

2. Plaintiff is barred from any remedy against this defendant by his failure to notify this defendant of any alleged breach of warranty within a reasonable time after he discovered or should have discovered such breach as required by North Carolina General Statutes 25-2-607(3)(a).

3. Additionally, plaintiff's action as to this defendant is barred by the provisions of North Carolina General Statutes 25-2-725.

SIXTH DEFENSE

Any claim that the plaintiff may have is barred by the North Carolina General Statutes in those sections thereof dealing with specific statutes of limitation including but not limited to N.C.G.S. Section 1-15, Section 1-50, Section 1-52, Section 1-53, Section 1-56, Section 1-15(b) and Chapter 25 and all sections thereof and any and all applicable statutes of this jurisdiction and other jurisdictions that may be applicable providing for specific times in which a claim must be asserted or would have or should have discovered, including conditions about which plaintiff now complains, and this defendant relies upon the Statutes of Limitations of this jurisdiction and the Statutes of Limitations of other jurisdictions as may be applicable as a bar to the cause of action herein.

SEVENTH DEFENSE

If it should be determined that this defendant was negligent in a way that proximately caused any injury to the plaintiff, all of which is denied, then and in that event this defendant alleges upon information and belief that plaintiff himself failed to exercise ordinary care for his own protection, that he failed to use reasonable safeguards to prevent injury to himself, and that he failed to secure proper and adequate medical attention, when he had the time and opportunity to do so, and such conduct on the part of plaintiff would be contributory negligence which is expressly pleaded as a bar to this action, including but not limited to the conduct described in North Carolina General Statutes 99B-4.

EIGHTH DEFENSE

If it should be determined that this defendant breached any duty owing to plaintiff in a way that proximately caused any injury to the plaintiff, all of which is denied, then and in that event, this defendant alleges upon information and belief that plaintiff knew and fully appreciated the risks involved in working with asbestos products; however, he

voluntarily chose to encounter such risk so that if such risk was unreasonable as alleged by plaintiff, plaintiff thereby assumed for himself such unreasonable risk of injury relating thereto; and this voluntary and affirmative assumption of a known risk which was fully appreciated is hereby expressly pleaded as a bar to this action, including but not limited to the conduct described in North Carolina General Statutes 99B-4.

NINTH DEFENSE

This defendant alleges that there was no concert of action between this defendant and any other defendant or among the defendants, so that this defendant may not be held jointly and severally liable with the other defendants.

TENTH DEFENSE

This defendant is not liable to the plaintiff because if there was any alteration or modification of the product such as is described in North Carolina General Statutes 99B-3, the same would constitute and is a bar to any claim against this defendant.

ELEVENTH DEFENSE

This defendant is not presently aware of the identity of the past employers of plaintiff during the periods of time when he was allegedly exposed to asbestos; and additionally, defendant is not presently aware of whether or not any workers' compensation benefits were paid by any one or more of such employers, or on their behalf, as a result of any injury, illness or disease related to exposure to asbestos; however, as to any such employers identified during the course of discovery in this lawsuit, defendant expressly pleads the provisions of North Carolina General Statutes 97-10.2 and further alleges that each such employer was actionably negligent as to the alleged exposure of plaintiff to asbestos in that it failed to properly and safely equip plaintiff with the necessary protection; it provided the orders and directions under which plaintiff worked involving any asbestos that may have been in his work area and allowed asbestos

products to be used by plaintiff and others on its premises in a manner so as to create a condition of danger for plaintiff; that as to any asbestos containing products that may have come from this answering defendant, said employer knew or should have known in the exercise of ordinary care the general warnings contained on, shipped with, and generally noted by any defendant so shipping and others, yet it failed to pass on these warnings to plaintiff and others; it failed to provide suitable training and education for its employees, including plaintiff, as well as its subcontractors and contractors about its premises or it failed to enforce such safety training; and it failed to require the plaintiff or other employees to keep the premises clean and dust-free in normal good housekeeping and cleanliness so that if this answering defendant was negligent in any regard, which is denied, the aforementioned negligence of each of the plaintiff's employers was at least a proximate cause of any injury done to plaintiff by asbestos and such negligence joined and concurred with any alleged negligence of this defendant in producing any injuries and damages sustained by plaintiff.

Under the provisions of North Carolina General Statutes 97-10.2(e) as well as the common law established by the North Carolina Courts, this defendant is entitled to have submitted to the jury an issue as to whether the negligence of any such employer which paid workers' compensation benefits on account of any illness, injury or disease related to asbestos joined and concurred with the negligence of this defendant, in producing the damages to plaintiff, and if such issue should be answered in the affirmative, this defendant is entitled to have the verdict reduced by the amount of any workers' compensation payments or like payments made to plaintiff or made on his behalf.

TWELFTH DEFENSE

The plaintiff is barred from any recovery against this defendant as a result of the application of the doctrine of laches.

THIRTEENTH DEFENSE

The plaintiff failed to diligently pursue any claim for relief or cause of action that he may have and so claim or claims are now time-barred by laches; that many years have passed since any alleged injury or exposure occurred or alleged claim accrued and, under the Rules of Admiralty, all such claims are time-barred and this defendant relies upon the doctrine of laches as a bar to the cause of action herein.

FOURTEENTH DEFENSE

If any cause in admiralty may have existed in favor of plaintiff, which is denied, plaintiff is barred by reason of the provisions of 46 U.S.C.A. Section 763(a) which is specifically pleaded in bar thereof.

FIFTEENTH DEFENSE

That there was no privity of contract between plaintiff and this defendant in matters referred to in the plaintiff's Complaint and such lack of such privy is plead in bar of the plaintiff's alleged cause and any recovery by plaintiff.

SIXTEENTH DEFENSE

The plaintiff's sole remedy for recovery for any injury arising out of the facts as alleged in the plaintiff's Complaint is through any remedies provided by applicable state and federal worker's compensation laws, for the reason that plaintiff's injuries occurred during the course and scope of his employment, and thereby any recovery by plaintiff for injuries arising out of the facts alleged in the Complaint is barred.

SEVENTEENTH DEFENSE

That the punitive damages claim is barred for that allowance of punitive damages in this case would violate the Constitution of the United States and the Constitution of North Carolina, to-wit, Articles IX, IV, and I, Sections 19, 25, 27, 35 and 36. The Fifth and Fourteenth Amendments of the United States Constitution are also, of course, pleaded as a bar to punitive damages. That to punish someone twice or more for the same act is not due process, fair play or justice.

LAW OFFICES OF WALLACE BARWICK LANDIS, RODGMAN & BOWER, P.A. WINSTON NC

EIGHTEENTH DEFENSE

Products of this defendant containing asbestos, if used on United States Navy ships or in United States Navy shipyards, which is denied, were so used in accordance with specifications of third-party contractors and/or the United States Government. Products of this defendant containing asbestos, if used on any job or site through which plaintiff claims exposure, all of which is denied, were used under contract and/or specifications between independent contractors and owners or as fixed by the United States Government to which this defendant was not privy and such use, exposure and damages, if any, were caused by others.

NINETEENTH DEFENSE

That if this defendant's products were so used, as alleged, which is denied, then such use was in full compliance with the standards and/or specifications issued by the United States Government with respect to asbestos-containing products. These standards and/or specifications required the use of asbestos.

TWENTIETH DEFENSE

Plaintiff's Complaint fails to join all necessary and proper parties and there is a misjoinder of parties. Rule 19 and 21.

TWENTY-FIRST DEFENSE

If plaintiff sustained injuries as a result of exposure to asbestos or asbestos-containing products (such being denied), then such injuries were or may have been due to exposure to products of manufacturers not named as defendants in this action including Johns-Manville, Unarco Industries, Inc. and Amatex Corporation.

TWENTY-SECOND DEFENSE

This defendant states that its involvement with asbestos or asbestos-related products, if any there be, with relationship to plaintiff, the existence of which is specifically denied, was in compliance with the existing known technology and information available at that time and

conformed to the recognized State of the Art at the time of said involvement and this defendant relies upon the same as a bar to plaintiff's claim.

TWENTY-THIRD DEFENSE

Any claim that the plaintiff may have against this defendant for breach of expressed or implied warranties is barred by North Carolina General Statute 99B-2(b) in that the plaintiff, as an employee of a purchaser, was covered by Workmen's Compensation insurance and therefore cannot recover from the manufacturer of any asbestos containing product who only sold to or contracted with employers of the plaintiff.

NOW, THEREFORE, having answered the plaintiff's Complaint, the defendant, Forty-Eight Insulations, Inc., demands the following relief:

1. That plaintiff have and recover nothing of this defendant and that plaintiff's action be dismissed with prejudice.
2. That the costs of this action be taxed to the plaintiff.
3. That should it be determined during the course of discovery that plaintiff was paid Workmen's Compensation benefits as a result of any asbestos illness, injury or disease, that an issue as to the actionable negligence of plaintiff's employer be submitted to the jury pursuant to North Carolina General Statutes 97-10.2(e) or North Carolina common law and that should such issue be answered against said employer, that any award to plaintiff be reduced by the amount of the compensation benefits paid.
4. That this Answer be served upon plaintiff's employer or employers when their identity becomes available and that an issue be submitted to the jury as to their negligence which bar any recovery for money paid in connection with any workmen's compensation.
5. That this defendant have trial by jury of all issues so triable.

6. For such other and further relief as to the Court seems just and proper.

This 18th day of May, 1983.

WALLACE, BARWICK, LANDIS,
RODGMAN & BOWER, P.A.

BY: Original Signed by F. E. Wallace, Jr.
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JUL 11 1979

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the foregoing pleading upon all counsel of record by depositing a copy of the same in the United States Mail, postage prepaid, addressed as follows:

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This the 18th day of May, 1983.

WALLACE, BARWICK, LANDIS,
RODGMAN & BOWER, P.A.

Original Signed by F. E. Wallace, Jr

BY:

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