

IN THE COURT OF APPEALS OF MARYLAND

No. 23

September Term, 1994

ON MOTION FOR RECONSIDERATION

ACandS, Inc. et al.

v.

THOMAS GODWIN et al.

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Raker,

JJ.

Opinion by Rodowsky, J.

Filed: December 1, 1995

In their motion for reconsideration plaintiffs have brought to our attention a factual error in the opinion filed October 18, 1995. In Part II.B of the opinion we treated the finding that Porter Hayden Company (PH) was liable for punitive damages to users as having been mooted by a settlement of that issue, effected during the pendency of the appeal. We stated that "PH settled with all consolidated plaintiffs other than Leaf, Russell, and McNiel." ____ Md. ____, ____, ____ A.2d ____, ____ (1995) [slip op. at 50]. The settlement does not, in fact, include consolidated plaintiffs who are represented by other counsel than those engaged by Leaf, Russell, and McNiel. Plaintiffs estimate this group to number approximately 600 out of the approximately 8,555 plaintiffs involved in the consolidation. Thus, the finding of PH's liability for punitive damages is not moot as to a non-settling consolidated plaintiff who was exposed on or after 1965 to a PH distributed asbestos product, if:

1. the plaintiff was exposed as a user;
2. the exposure occurred while the user was in the employ of a person other than PH; and
3. the user has never been covered by workers' compensation while in the employ of PH. (See *Lowery v. McCormick Asbestos Co.*, 300 Md. 28, 475 A.2d 1168 (1984)).

In this revised posture of the case we apply the same analysis as the applied in Part II.C.3 of the opinion filed October 18, 1995

where we held that there was insufficient evidence of the liability of ACandS to users for punitive damages. ____ Md. at ____, ____ A.2d at ____ [slip op. at 64-66]. There was some evidence of isolated sales by ACandS, without installation, in the Baltimore-Washington region. We nevertheless concluded that "the extent is *de minimis* to which ACandS might have sold asbestos products, without installing them through its own employees." ____ Md. at ____, ____ A.2d at ____ [slip op. at 64].

The evidence that PH sold asbestos products for installation by other insulation contractors, or by the employees of property owners, is even weaker than the evidence that ACandS did so. In the face of our holding as to ACandS, plaintiffs in their motion for reconsideration have not referred us to evidence of such sales by PH. Further, the evidence bearing directly on the subject does not support the plaintiffs' position.

PH's business was described by Theodore Mannell (Mannell) who had been employed by PH from 1952 until 1988. From 1952 to 1961 he was a sales engineer in the Newark office, responsible for estimating and selling contracts for insulation. From 1961 to 1966 he was the Newark office assistant manager, and from 1966 to 1974, when he became a vice president of PH in Baltimore, he was manager of the Newark office. He said that PH basically was an insulation contractor that specialized in industrial work, generally power plants, chemical plants, and refineries. Mannell testified that

"[c]ompetitors [*i.e.*, other insulation contractors] generally did not wish to buy materials from a contractor competitor, so they find other ways to do it." Consequently, as with ACandS, we hold that PH cannot be found by clear and convincing evidence to have marketed in conscious or deliberate disregard of the threat to the safety of a class of non-employee users.

Except to the extent hereinabove set forth, the motion for reconsideration is denied.