

IN THE COURT OF APPEALS OF MARYLAND

NO. 92

SEPTEMBER TERM, 1995

ACandS, INC. et al.

v.

IDA SARA MASKET ASNER
et al.

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

JJ.

DISSENTING OPINION BY BELL, J.

FILED: October 11, 1996

The Court of Special Appeals, per Bishop, J., issued a comprehensive, well-reasoned opinion in this case. I agree both with its analysis and its conclusions. Accordingly, I would affirm the judgment of the Court of Special Appeals.

In reversing and remanding for a new trial on compensatory liability, the majority rejects two of the intermediate appellate court's conclusions, namely that the evidence relating to TLVs offered by the petitioners was properly excluded and that the evidence offered in support of punitive damages was sufficient under the test enunciated in Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 462, 601 A.2d 633, 653-54, reh'g denied, 325 Md. 665, 602 A.2d 1182 (1992). In neither instance is the rejection justified.

The intermediate appellate court pointed out that the respondents did not rely, as the majority seems to insist had to be done, on the state of the art evidence to prove the extent of the petitioners' knowledge or what they should have known. Instead, they proved the petitioners' actual knowledge-- that the petitioners were aware of the dangers of asbestos. Consequently, pointing out that "[i]t is not mandatory ... that knowledge, or lack thereof, be established with state of the art evidence," ACandS v. Asner, 104 Md. App. 608, 638, 657 A.2d 379, 394_(1995), citing and quoting Zenobia, 325 Md. at 433, 601 A.2d at 639, the court concluded, appropriately, I believe,

once a defendant's actual knowledge is shown, state of the art evidence is not necessary to show what the defendant "should have known" or "could have known." The "should have known" component can make the heavy burden

placed on a plaintiff in a strict liability failure to warn case less onerous. If a plaintiff is successful, however, in proving actual knowledge, it is axiomatic that the plaintiff need not prove what the defendant "should have known."

Id. at 639, 657 A.2d at 394.

The Court of Special Appeals was also correct in holding that the punitive damages evidence was sufficient. The contrary argument proceeds on the premise that the petitioner ACandS did not have actual knowledge because, even though they were exposed to the same conditions at the same location, the respondents were "by-standers," rather than insulators. Rejecting that argument, the intermediate appellate court reasoned:

In [U. S. Gypsum Co. v. Mayor & City Council of Baltimore, 336 Md. 145, 188-89, 647 A.2d 405, 427 (1994)] ... the injured class of persons, to which the Court referred in the above quotation^[1], were ordinary building users exposed to an asbestos product after it had already been installed in the building. The evidence actually introduced in Gypsum

¹In stating the petitioner ACandS's position, the court quoted from U.S. Gypsum Co. v. Mayor & City Council of Baltimore, 336 Md. 145, 188-89, 647 A.2d 405, 427 (1994), as follows:

"Evidence of a generalized knowledge that asbestos poses a danger to a narrow class of unprotected persons who are exposed during the application or removal of asbestos-containing materials in buildings will not, under the strict requirements for a submissible punitive damages case, support an inference that [defendants] had knowledge of a danger to the much broader class of persons who were merely present in such buildings at other times[.]"

(quoting Kansas City v. Keene Corp., 855 S.W.2d 360, 375 (Mo.1993) (en banc)).

focussed solely upon hazards posed to industry workers and workers in related trades, workers such as Asner and Wilson, and not hazards posed to building users. *Id.* at 190, 647 A.2d 405. In Smith v. Celotex Corp., 387 Pa.Super. 340, 564 A.2d 209 (1989), also relied upon by AC & S, the court made a justifiable risk distinction between asbestos factory workers handling raw asbestos and construction workers handling the finished product at locations with different working conditions. Although we agree with AC & S that risk distinctions can exist between classes of persons exposed to asbestos, depending on the degree, frequency, and duration of exposure, the evidence in the case sub judice supports the conclusion that Asner and Wilson were exposed to AC & S products in a comparable degree, frequency, and duration as AC & S insulators. Any risk distinction in the case sub judice between AC & S insulators and Asner and Wilson, as it relates to the "actual malice" necessary for punitive damages is, therefore, illusory.

Id. at 624-25, 657 A.2d at 387. As previously stated, I am in complete accord.²

²The majority finds admissible one of the three purchase requisitions, from the Fairfield Shipyard directly to Johns Mansville, that the petitioner Porter Hayden Company, Inc. offered to show that the respondent Payne's exposure to Johns Mansville products was not necessarily caused by it. ___ Md. ___, ___, ___ A.2d ___, ___, ___ (1996) [slip op. at 23-5]. I find the Court of Special Appeals' resolution of the issue more persuasive.