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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

RECEIVED
CIRCUIT COURT

DENNIS EMRICK,
Plaintiff,
v.
ACandS, INC., et al.,
Defendants.

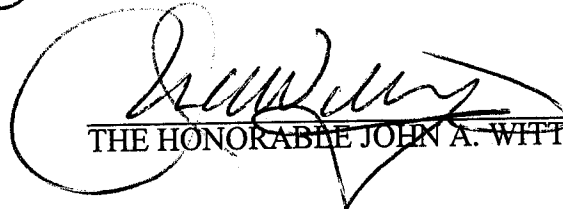
No. 0002-02019

**ORDER DENYING PLAINTIFF'S
MOTION FOR NEW TRIAL**

Plaintiff's motion for new trial came for hearing on January 11, 2001 at 8:30 a.m. Plaintiff was represented by Gil Purcell, Ray Thomas, and Jim Coon. Defendant ACandS was represented by Terry Hall; defendant Asten Group, Inc. was represented by Tre Kennedy and Ren Wilkes (via telephone); defendant Quimby Welding Supplies was represented by Rudy Lachenmeier; defendant Scapa Dryer Fabrics, Inc. was represented by George Pitcher and Lane Young (via telephone); and defendant United States Mineral Products was represented by Kevin MacNaughton and James Case. The court, having heard oral argument on the matter and having considered the written submissions of the parties hereby ORDERS

that plaintiff's motion for new trial is denied for the reasons stated in the attached letter opinion of January 22, 2001.

DATED this 6th day of Feb 2001.


THE HONORABLE JOHN A. WITTMAYER

Submitted by:
George S. Pitcher, OSB #96398
Attorneys for Scapa Dryer Fabrics, Inc.



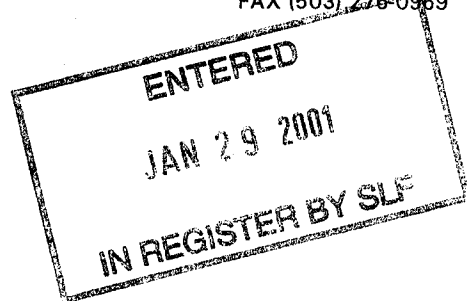
CIRCUIT COURT OF THE STATE OF OREGON

FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. FOURTH AVENUE
PORTLAND, OR 97204-1123

JOHN A. WITTMAYER
JUDGE

PHONE (503) 988-3165
FAX (503) 276-0969

January 22, 2001



SENT VIA FAX

Gilbert Purcell & Ray Thomas, for Plaintiff
Terry Hall & Barry Groce, for ACandS
Lane Young & George Pitcher, for Scapa
F. Ren Wilkes & John (Tre) Kennedy, for Asten
Rudy Lachenmeier, for Quimby
Kevin McNaughton & James Case, for United States Mineral Products

Re: Emrick v. A.J. Zinda Co., et al.
Case No. 0002-02019

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Dear Counsel:

Plaintiff's Motion for a New Trial is denied. Unless the defense lawyers agree to the contrary, Mr. Pitcher will prepare an Order reflecting this decision. If the defense lawyers decide to have someone else prepare the Order, please notify my office.

ACandS - Limpet Issue:

Whatever the state of the law may have been before January 11, 2001, it is clear to me from Parrott v. Carr Chevrolet, Inc., ___ Or ___ (January 11, 2001) that a Motion for a Directed Verdict is not a prerequisite to a litigant making a Motion for a New Trial.

ACandS argues that the jury here rendered a general verdict. Whether the first question to the jury on the verdict form constituted a "general verdict" or a "special interrogatory" to the jury is not a significant question. In question number one on the products liability verdict form, the jury was asked the following: "[w]ere the asbestos containing products manufactured, supplied, or sold by one or more of the defendants defective as defined in the jury instructions?" To this question the jury answered "No" as to ACandS (and all other defendants). ACandS certainly did contest the issue of whether they "manufactured, supplied, or sold" the product. From the jury's answer to question number one, the jury clearly could have concluded any or all of the following with regard to ACandS: that ACandS was not in the "business of selling" the product; that the product was not unreasonably dangerous; or that the product was not defective. The jury was free to reach any or all of these conclusions, and by answering "No" to question number one on the verdict form, they expressed their answer. Had Plaintiff wanted a more specific interrogatory to be submitted to the jury, Plaintiff could have sought a verdict form that

included that. My recollection is that the verdict form was much closer to what Plaintiff requested than to what defendants requested.

Jury Misconduct:

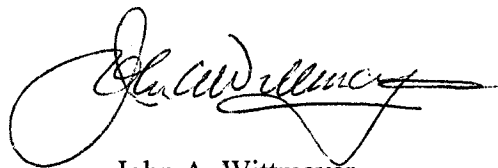
Defendant Quimby Welding Supplies, Inc. argues that Plaintiff's Motion for a New Trial is untimely because it was not supported by an affidavit. Although the Motion was timely filed, the "affidavit" attached was not, in fact, an affidavit, because it was not signed by the Mr. Eichler, and it was not notarized. Of course, Quimby is correct. Quimby argues that I can not consider the unsigned "affidavit" in support of the Motion, and that without this "affidavit," there is no support for the Motion. Quimby argues that I can not consider the late-filed affidavit because it is untimely. Quimby is correct about this, also. Despite this, the Court has the authority to grant Plaintiff an extension of time within which to file the affidavit. However, Plaintiff apparently thought little enough of this requirement to only ask for an extension in a footnote in his Reply memorandum. The better practice is to affirmatively ask for such an extension at the time the Motion is filed. I note this so as to encourage counsel to comply with the requirements of ORCP, and to notify counsel that the Court expects compliance. However, in this case, to avoid an undue hardship on Mr. Emrick, resulting from his lawyers' lack of compliance with the rules, I grant plaintiff leave to late-file Mr. Eichler's affidavit.

Defendants object to the receipt of Mr. Eichler's affidavit with the argument that it attempts to impeach the verdict via a disclosure of the "mental process" of the jurors. I do not read Mr. Eichler's affidavit as Defendant's read it. Mr. Eichler's affidavit discloses the "fact" of jury discussions, not the "content" of those discussions. The "content" is the "mental process" that the litigants may not use to impeach the verdict. Carson v. Brauer, 234 Or 333 (1963).

I do not believe Mr. Eichler's affidavit reaches the "threshold" level that justifies either granting Plaintiff's Motion, or in the alternative, bringing the jurors in for a hearing to inquire of the jurors about the issues raised in Mr. Eichler's affidavit. Ertsgaard v. Beard, 310 Or 486 (1990), State v. Miller, 1167 Or App 72 (2000). The affidavit is too conclusionary in nature to justify either approach.

Plaintiffs agree that it is discretionary as to whether the Court should grant a Motion for a New Trial. "A former judgment *may* be set aside and a new trial granted ..." ORCP 64(B)(2). Emphasis added. To the extent that Plaintiff's Motion and the affidavit of Mr. Eichler raise issues in this regard, with due respect for the efforts of the jurors in this lengthy trial, I decline to exercise my discretion to grant the Motion.

Very truly yours,



John A. Wittmayer