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IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION, :

Petitioner, :

vs. : CASE NO. 65,124

LEE LOYD COPELAND, et al., :

Respondents. :

OWENS-CORNING FIBERGLAS CORPORATION, :

Petitioner, :

vs. : CASE NO. 65,154

LEE LOYD COPELAND, et al., :

Respondents. :

AMICUS CURIAE BRIEF OF OWENS-ILLINOIS, INC.

JAMES C. RINAMAN, JR.
TRACEY I. ARPEN, JR.
MARKS, GRAY, CONROY & GIBBS
Post Office Box 447
Jacksonville, Florida 32201
(904) 355-6681
Attorneys for Owens-Illinois, Inc.

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PRELIMINARY STATEMENT

Owens-Illinois, Inc. adopts the Preliminary Statement included in the brief filed by Petitioner, The Celotex Corporation.

STATEMENT OF THE CASE

Owens-Illinois, Inc. adopts the Statement of the Case contained in the brief of Petitioner, Celotex, and provides the following additional information.

Although Owens-Illinois, Inc. was named as a defendant in this action, it was never served with process and entered no appearance. Owens-Illinois was not served with pleadings in the Circuit Court action, did not participate in any discovery undertaken, and was not a participant in the briefing or arguments at the Third District Court of Appeal.

STATEMENT OF THE FACTS

Owens-Illinois, Inc. adopts the Statement of the Facts contained in the brief of Petitioner, Celotex.

ISSUE PRESENTED

WHETHER MARKET SHARE LIABILITY AS ANNOUNCED IN SINDELL v. ABBOTT LABORATORIES, 26 Cal. 3d 588, 607 P. 2d 924, cert. denied, 449 U.S. 912, 101 S. Ct. 286, 66 L. Ed. 2d 140 (1980), SHOULD BE ADOPTED IN FLORIDA.

ARGUMENT

MARKET SHARE LIABILITY AS ANNOUNCED IN SINDELL v. ABBOTT LABORATORIES, 26 Cal. 3d 588, 607 P. 2d 924, cert. denied, 449 U.S. 912, 101 S. Ct. 286, 66 L. Ed. 2d 140 (1980), SHOULD NOT BE ADOPTED IN FLORIDA.

A. Introduction

In adopting a version of market share liability, the majority below concluded it was venturing into an area not yet explored by the Florida Supreme Court. The result, which the court contended was not precluded by Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), would destroy an entire body of existing Florida tort law. The majority has confused inability to apportion damages with inability to prove causation and liability. The remedy they adopt relieves the plaintiff of any burden to prove causation and abolishes joint and several liability.

Regardless of its possible applicability to other types of products, the Sindell theory of market share liability is clearly inapplicable to actions arising out of exposure to asbestos-containing products. Courts in Florida and across the nation have so held overwhelmingly.

Should this Court for any reason take the radical step of adopting any form of market share liability as to any type of product, it is essential that this Court apply the theory to all asbestos cases and also adopt the apportionment of damages aspect of that theory. To adopt the theory as to liability and to retain joint and several liability as

to damages would be to provide a windfall to the manufacturers with a large market share and to deal a tremendous injustice to those manufacturers with only a minimal market share.

B. Market Share Liability Is Contrary to Basic Principles of Tort Law in Florida.

The market share theory of liability and its development are thoroughly outlined in the Copeland majority in dissenting opinions, as well as the Celotex brief filed herein. This theory is not merely an expansion of existing tort law but rather, is a novel and radical departure from existing law adopted largely on public policy grounds. Sindell, supra, at 607 P.2d 936-38; Martin v. Johns-Manville Sales Corporation, No. 81-88, Civ.-T-GC (M.D. Fla. August 28, 1981).

In Martin, United States District Judge George C. Carr noted that the theory is grounded upon an extension of the traditional doctrine of alternative liability, but explained:

> "[T]he Sindell theory is a departure from one of the rudimentary precepts out of traditional tort law, i.e., that a plaintiff must be able to identify his tort feasor and show a causal connection between his injuries and the tort feasor's acts or omissions."

Florida has always required proof in a products liability action that the defendant manufactured or sold the product allegedly injuring the plaintiff. At the time this Court adopted strict liability in Florida, it continued the requirement that the plaintiff "must establish the manufacturer's relationship to the product in question". West v. Caterpillar Tractor Company, Inc., 336 So.2d 80, 87 (Fla. 1976). In accord are

numerous other product liability cases, including Clark v. Boeing Company, 395 So.2d 1226, 1229 (Fla. 3rd DCA 1981); Watson v. Lucerne Machinery & Equipment, Inc., 347 So.2d 459, 461 (Fla. 2d DCA 1977); Matthews v. GSP Corporation, 368 So.2d 391, 392 (Fla. 1st DCA 1979); and Morton v. Abbott Laboratories, 538 F.Supp. 593, 595 (M.D. Fla. 1982).

Most recently, the Fourth District Court of Appeal faced this issue in Vecta Contract, Inc. v. Lynch, 444 So.2d 1093 (Fla. 4th DCA 1984). At issue was the question of whether the defendant manufactured a defective chair. The court initially recognized the necessity of presenting evidence that the defendant manufactured or produced the product that caused the injury (citing Morton v. Abbott Laboratories, supra). In reviewing the evidence they concluded while the jury could have found the defendant was the manufacturer of the chair in question, the evidence equally supported an inference that the chair was manufactured by a predecessor company. The court found no legal justification for tipping the scales in favor of either alternative, describing the choice as "rank speculation". Similarly, a theory of market share liability necessarily speculates that the manufacturer of the product causing injury to the plaintiff may be among the defendants sued.

The Sindell court based its theory of market share liability upon an extension of the alternative joint and several liability expressed in section 433B(3) of the Restatement (Second)

of Torts (1965). The Copeland majority found this theory, which assumes that only one tort feasor is the actual causative force behind the injury, satisfactory in asbestos-related cancer cases where only one exposure to the product may cause the injury. On the other hand, in asbestosis cases where the injury results from cumulative exposures, the court reasoned that market share liability "would more logically be reached via section 433B(2) of the Restatement (Second) of Torts". That section provides:

> "Where to tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor".

As Judge Nesbitt correctly noted in his dissent any theory of market share liability, whether based on section 433B(2) or B(3), eliminates one of the fundamental bases of tort liability, that is that the burden is upon the plaintiff to prove that the defendant caused the injury complained of. Where liability is based upon section 433B(2) it is necessarily assumed that the actual wrongdoer is among the defendants before the court. Such is not the case where defendants are joined merely because they are a part of the total asbestos market and are minimal to suit in this jurisdiction.

Section 433B(3) assumes that all tort feasors before the court combine to bring about harm to the plaintiff.

As Judge Nesbitt noted, in market share liability it is not clear that each of the defendants has injured the plaintiff. He continued:

> "Thus, ... the basic issue here is liability, not apportionment of damages. By using this section, the majority has confused plaintiff's inability to allocate damages with his inability to prove liability." 9 FLW at 452.

Florida has steadfastly recognized the causation-in-fact requirement for tort liability. In negligence actions Florida courts require proof that the negligence probably caused the plaintiff's injury. Tampa Electric Co. v. Jones, 138 Fla. 746, 190 So.2d 26 (1939); Bryant v. Jax Liquors, 352 So.2d 542 (Fla. 1st DCA 1977, cert. denied, 365 So.2d 710 (Fla. 1978).

This Court reaffirmed the causation-in-fact requirement earlier this year in Gooding v. University Hospital Building, Inc., 445 So.2d 1015 (Fla. 1984). This Court, obviously aware of the equitable and policy considerations, nevertheless concluded:

> "Relaxing the causation requirement might correct a perceived unfairness to some plaintiffs who could prove the possibility that the medical malpractice caused an injury but could not prove the probability of causation, but at the same time could create an injustice." 445 So.2d at 1019.

Health care providers, the court noted, would then be faced with a burden of liability without the requirement that plaintiffs prove the alleged negligence probably rather than possibly caused the injury. This court refused to approve

the 'substitution of such an obvious inequity for a perceived one'. 445 So.2d at 1020.

Since the adoption of the Sindell theory in California DES cases, the overwhelming majority of courts considering the issue have refused to abandon the traditional causation-in-fact requirement, even in DES cases. Both majority and dissenting opinions in Copeland, as well as the brief of Petitioner, Celotex, list the numerous decisions rejecting market share liability in DES cases and those are not repeated here. Of particular interest is Morton v. Abbott Laboratories, supra, in which then-Chief Judge Krentzman rejected theories of concert of action, enterprise liability, alternative liability, and market share liability in an action brought by a plaintiff injured as a result of her mother's use of the drug DES. Judge Krentzman rejected plaintiffs' argument that Florida's adoption of strict liability and comparative negligence reflected a trend in Florida to abandon the element of causation. Rather, he found that there was no indication that Florida courts would follow Sindell and depart from the fundamental requirement of causation.

C. Market Share Liability is Particularly Inappropriate in Asbestos Litigation.

Market share liability should not be adopted under any circumstances, but particularly not in the case of asbestos-containing products. There are key factual distinctions between asbestos products and DES, for example, which preclude the application of market share liability.

Even in California, the state which created the Sindell theory of market share liability, its applicability to asbestos cases has been rejected. In Re Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982). As noted by the California court, numerous factors make it difficult to ascertain any accurate division of liability along market share lines. First, while DES is a fungible commodity, asbestos fibers are of several varieties. Each type of asbestos is used in varying quantities or proportions in manufactured products and each variety differs in its harmful effects. Id. at 1158. Second, any attempt to define the relevant product in geographic markets would be an extremely complex task due to the numerous uses of asbestos products and the fact that some of the products would undoubtedly be purchased out of state. Id. Third, plaintiffs often work with asbestos over a period of many years, during which time manufacturers may begin or discontinue making asbestos products. Id.

As Judge Nesbitt noted in his dissent, asbestos manufacturers are not as difficult to identify as DES producers, due to the packaging and marketing of the products. 9 FLW at 543. This distinction was also recognized in Starling v. Seaboard Coastline Railroad Company, 533 F.Supp. 183, (S.D. Ga. 1982) and Martin v. Johns-Manville Sales Corporation, supra.

Two federal courts, anticipating state law, initially allowed market share liability in asbestos litigation. Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981),

rev'd on other grounds, 681 F.2d 334 (5th Cir. 1982); Burke v. Johns-Manville, no. C-1-81-289 (S.D. Ohio, Oct. 27, 1981). However, as noted in the Celotex brief filed herein, subsequent orders of the same court reversed these initial positions.

Finally, as Judge Nesbitt noted, there are so many practical difficulties inherent in determining the relevant market and market share that it cannot be said that any manufacturer's liability would approximate the damages he had caused. These practical difficulties are thoroughly discussed in Judge Nesbitt's dissent and the Celotex brief and are not repeated here.

D. In the Event Market Share Liability Is Adopted It Should Apply to All Asbestos Cases, Include All Manufacturers, and Provide For Apportionment of Damages.

For the reasons outlined herein, this Court should reject any theory of market share liability. Should this Court depart from existing tort principles and adopt market share liability, it should apply to all cases and constitute an abandonment of joint and several liability in favor of apportionment of damages in accordance with each defendant's share of the market. Further, the market must include all manufacturers, regardless of whether named by the plaintiff, whether there is product identification, or whether the manufacturer has settled or is unavailable through bankruptcy or otherwise.

Asbestos products were manufactured by numerous defendants over many years. Typically an asbestos plaintiff sues multiple defendants comprising but a portion of all asbestos manufac-

turers. At times the plaintiff has proof of exposure as to all defendants and at other times is able to establish exposure to some, but not all, of the named defendants. Frequently, exposure is also shown to products of manufacturers not named as defendants, including those companies in bankruptcy.

The majority below and the Sindell court rejected traditional theories of causation largely on public policy grounds. In so doing those courts adopted an entirely new theory which they contend satisfies considerations of fairness and justice. They measured the likelihood that a named defendant applied the defective product by that defendant's percentage of the entire industry production. For example, if a manufacturer supplied seven percent of the production of the product, it would bear seven percent of the total liability to a given plaintiff. Sindell, supra at 937.

For this correlation to work and for considerations of fairness to be satisfied, market share liability must apply in all situations, regardless of whether the plaintiff is able to identify individual products. Otherwise, a manufacturer is subjected to liability consistent with its share of the market in those cases in which it cannot be identified and is also jointly and severally liable in those cases in which its products can be identified. Concepts of fairness are not satisfied where market share liability operates as a powerful sword for the plaintiff without providing a reasonable hield to the defendants. Adoption of market share liability

other than across the board allows the plaintiffs to pick and choose those cases in which to utilize the theory. As already noted by Judge Nesbitt in his dissent:

> "Relieving the plaintiffs of the burden of identifying the actual tort feasor encourages the injured party to become lazy. There is no motivation to seek the truth; as a matter of fact, in some situations it would be better for the plaintiff not to identify a particular defendant". 9 FLW at 543.

Any equitable theory of market share liability must not operate only as a theory of liability but also to apportion damages in accordance with each defendant's share of the total market. This market must include all manufacturers regardless of exposure and regardless of the manufacturers availability. Otherwise, a plaintiff will be allowed to keep all defendants in an action to enable him to satisfy his judgment against the wealthiest defendant or defendants. As noted in the dissenting opinion in Sindell (also quoted by Judge Nesbitt),

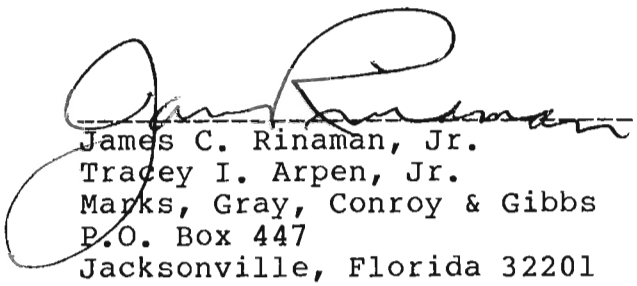
> "A system priding itself on 'equal justice under the law' does not flower when the liability as well as the damage aspect of a tort action is determined by a defendant's wealth. The inevitable consequence of such a result is to create and perpetuate two rules of law - one applicable to wealthy defendants, and another standard pertaining to defendants who are poor or have modest means". 607 P.2d at 941.

CONCLUSION

Market share liability abandons one of the most fundamental principles of tort law by no longer requiring a plaintiff to establish causation-in-fact. The theory is particularly inapplicable to asbestos products because of the unique nature of those products and the practical problems in defining a market and market share. For these reasons Owens-Illinois respectfully requests this Court to reverse the majority opinion below and remand with instructions that allow plaintiff to only recover from those defendants whose products he can identify.

Should this Court, on grounds of public policy, depart from traditional principles and adopt market share liability, fundamental requirements of fairness and justice require that the theory be applied to all asbestos cases and allow apportionment of damages in accordance with each manufacturer's share of the market.

Respectfully submitted,



James C. Rinaman, Jr.
Tracey I. Arpen, Jr.
Marks, Gray, Conroy & Gibbs
P.O. Box 447
Jacksonville, Florida 32201
(904) 355-6681
Attorneys for Owens-Illinois, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 21 day of May, 1984, to all counsel listed on the attached Schedule of Counsel.

ATTORNEY