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IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 65,124

3RD DCA CASE NUMBER: 81-1369

THE CELOTEX CORPORATION,

Petitioner,

vs.

LEE LLOYD COPELAND and VAUDEEN COPELAND,

Respondents.

BRIEF OF AMICUS CURIAE
PITTSBURGH CORNING CORPORATION

STEPHENS, LYNN, CHERNAY, KLEIN
& ZUCKERMAN, P.A.
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INTRODUCTION

Amicus Curiae PITTSBURGH CORNING CORPORATION was a nominal Appellee by operation of the Rules of Appellate Procedure in the companion COPELAND matter. That matter is still pending on rehearing before the Third District Court of Appeal. In this instance, PITTSBURGH CORNING CORPORATION has been allowed to file an amicus brief in support of the position of the Petitioner, pursuant to an order of this Court which was entered on April 23rd, 1984.

Petitioner OWENS-CORNING FIBERGLASS CORPORATION was a Codefendant in this trial court action, along with PITTSBURGH CORNING CORPORATION and the other Defendants who are named in the companion COPELAND matter. Respondents LEE LLOYD COPELAND and VAUDEEN COPELAND were the Plaintiffs before the trial court. In this brief, the parties will be referred to as Petitioners/Defendants and Respondents/Plaintiffs, as well as by name.

All emphasis has been supplied by counsel, unless indicated to the contrary.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The facts of this case have been adequately summarized in the decision of the Third District Court of Appeal, and in the briefs which have been submitted on behalf of the petitioning parties. Nevertheless, amicus PITTSBURGH CORNING CORPORATION believes that it would be appropriate to elaborate briefly upon those facts in order to emphasize certain aspects of the case which will be particularly relevant to the arguments which will be presented by PITTSBURGH CORNING CORPORATION.

In their Complaint, Respondents pled theories of strict liability, negligence and breach of warranty. The Complaint was dismissed four times, and was amended on each occasion. Respondents' Complaint was repeatedly dismissed as a result of the COPELAND'S failure to specifically identify those products which allegedly caused harm, the specific manufacturers, when the products were used, or where they were used. Although the Third District suggests in its opinion that market share liability was "anticipated" by the Plaintiffs, they did not in fact plead a market share liability theory of recovery.

In interrogatories which were sent to the Plaintiffs, Defendant CELOTEX CORPORATION asked MR. COPELAND to identify each product to which he had been exposed. Plaintiff identified products manufactured by JOHNS-MANVILLE CORPORATION and EAGLE-PICHER CORPORATION. In his deposition, MR. COPELAND once again identified JOHNS-MANVILLE CORPORATION and EAGLE-PICHER CORPORATION as the manufacturers of asbestos products to which he had been exposed. MR. COPELAND had no recollection whatsoever of having been exposed

to a CELOTEX product. "I don't remember using any products manufactured by Celotex." (Deposition of L.L. Copeland, Page 255). Thus, it affirmatively appears that Plaintiff could identify the products of some--but not all--Defendants.

In their initial brief, which was filed in the Third District Court of Appeal on September 9th, 1981, Plaintiffs argued that the trial court erred in dismissing their Complaint where the dismissal had purportedly been based upon the Plaintiffs' failure to identify any products manufactured by CELOTEX to which MR. COPELAND had been exposed. Plaintiffs argued that this was error to the extent that there had been testimony which suggested that the Plaintiff had in fact been exposed to CELOTEX products.

In response, Defendant CELOTEX argued that the trial court had been correct in dismissing the Complaint because it failed to plead ultimate facts as to product identification sufficient to support causes of action for strict liability, negligence or breach of warranty. Thus, according to CELOTEX, MR. COPELAND could not under any circumstances allege or prove any other element of his cause of action simply because he had failed to identify any products manufactured by CELOTEX.

It is clear from this brief synopsis that neither the Appellant nor the Appellee below addressed the market share theory of liability. Nevertheless, the Third District Court of Appeal adopted market share liability, and certified the question to this Court for resolution.

CERTIFIED QUESTION

WHETHER FLORIDA SHOULD ADOPT THE MARKET SHARE THEORY OF LIABILITY

ARGUMENT

FLORIDA SHOULD NOT ADOPT THE MARKET SHARE THEORY OF LIABILITY

Before venturing into a discussion of the myriad of policy and practical considerations which are before the Court in this instance, PITTSBURGH CORNING would initially take issue with the Third District's suggestion that it was "venturing into an area not yet explored by the Florida Supreme Court...." COPELAND decision, Page 9 at Note 5. To the contrary, as will become obvious from even a cursory review of the briefs which will be submitted on behalf of all parties Petitioner and the various amicus, the Third District's decision in fact plays havoc with any number of issues which have been thoroughly "explored"--and otherwise resolved--by this Court in prior opinions. Under the circumstances, and particularly in light of the fact that all the circuit courts of this state are currently bound by the Third District's opinion, see STATE v. HAYES, 333 So.2d 51 (Fla. 1976), PITTSBURGH CORNING would respectfully submit that the Third District should properly have refrained from adopting this radical theory of liability. See HOFFMAN v. JONES, 280 So.2d 431 (Fla. 1973).

The importance of this Court's decision in this case cannot be overstated. The issues presented to the Court by this appeal go beyond the rights and duties existing between the parties. Whether or not the state of Florida recognizes the theory of market share liability may well have a far reaching impact upon the economic system of our entire nation. See STARLING v. SEABOARD COAST LINE RAILROAD COMPANY, 533 F.Supp. 183, 190 (Ga. 1982) wherein

the court recognized that "judicial policy decisions to expand culpability in product liability cases may result in opening a Pandora's Box of undesirable economic and social effects." The STARLING court rejected the application of market share liability in asbestos litigation. See also SINDELL v. ABBOTT LABORATORIES, 607 P.2d 904 (Cal. 1980), dissenting opinion at Page 943.

When the Third District Court of Appeal embraced the market share theory of liability introduced by the California Supreme Court in SINDELL, supra, it did not merely endorse a novel interpretation of an old principle of law. To the contrary, it undermined the very foundation of tort liability as it has existed since before the birth of this nation. Indeed, market share liability is an anomaly in the law of torts, since the word "tort" in Anglo-Norman means "wrong." For the first time in the history of our common-law jurisprudence, the concept of liability without responsibility, fault or wrongdoing is under consideration by the courts of the fifty states. That fact alone should be cause for alarm.

The defendants in the SINDELL case were several manufacturers of the drug Diethylstilbestrol (DES), widely used from 1947 to 1971 to prevent miscarriage. DES was later found to cause adenocarcinoma in the children of women who had taken the drug. The plaintiff in SINDELL was the daughter of a DES user.

Because DES-related cancer does not manifest itself until twenty to twenty-five years from the time that the drug is ingested, it is difficult to identify the particular manufacturer of the DES which allegedly caused injury. It was purportedly

for this reason that the court in SINDELL adopted the theory of market share liability which, in effect, made it unnecessary for the plaintiff to identify the defendant whose product caused her injuries.

Under the market share liability theory, plaintiff need only show (1) that each defendant marketed a product that was defective or dangerous; (2) that the products of the defendants were identical in formula, so that the product could not be attributable to any one defendant; (3) that the defendants collectively produced a "substantial percentage" of the total market for that product; and (4) that the plaintiff had suffered damage. WINSCOTT, "Where Have All the Burdens Gone," 8 West S.L.R., 223 at 230 (1981). Once these threshold questions have been resolved, the market share burden shifts to the individual named Defendants, i.e., to show that they did not manufacture the product which caused the Plaintiff's injuries. Thus, the possibility remains that a producer can be held liable even though his product may not have caused any harm whatsoever to the plaintiff.

There are two primary reasons why market share liability is wholly unacceptable as a theory of recovery. First, the basis of liability is inconsistent with and offensive to our principles of jurisprudence. In addition, however, any practical application of the theory would be impossible, uncertain and inequitable.

MARKET SHARE LIABILITY IS OFFENSIVE TO OUR FUNDAMENTAL NOTIONS OF JUSTICE AND BASIC TENETS OF FLORIDA JURISPRUDENCE

Courts and commentators are once again waging the classic debate over shifting the burden of proof from plaintiff to defen-

dant. On prior occasions, this debate has arisen in those rare instances where circumstances made it impossible for an injured plaintiff to obtain relief because he could not identify the culpable party. In the past, in response to such rare situations, the courts have cautiously--albeit rarely--shifted the burden of proof from the plaintiff to the defendant. As a result, limited theories of recovery such as res ipsa loquitur are available, which essentially place the burden upon the defendant to show that he did not cause the plaintiff's injuries.

The theory of market share liability is a variation of the alternative liability theory first established in SUMMERS v. TICE, 199 P.2d 1, (Cal. 1948). In that case, two hunters were shooting at quail simultaneously in the direction of the plaintiff. The court held that both hunters were negligent and that each was liable for the plaintiff's injury.

> "The injured party has been placed by Defendants in the unfair position of pointing to which was the one that caused the harm. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury."

From the context of the decision, it is clear that the SUMMERS court believed that it was essentially considering a res ipsa situation.

In SUMMERS, the California Supreme Court relied upon YBARRA v. SPANGARD, 154 P.2d 687 (1944). In YBARRA, the court allowed a patient to recover using the theory of res ipsa loquitur, which put the burden on the defendant doctors to establish which had caused of the patient's injuries. It is clear that the court

allowed the patient to avail himself of the res ipsa doctrine because the patient had been unconscious at the time of the alleged negligence.

> If the doctrine is to continue to serve a useful purpose, we should not forget that the particular force and justice of the rule...consists in the circumstance that the chief evidence of the true cause...is practically accessible to defendants, but inaccessible to the injured person. Supra at 689.

Thus, the SUMMERS and YBARRA cases require that the defendants be in a better position than the plaintiff to offer evidence on the causation issue.

It should also be pointed out that all of the allegedly negligent Defendants were joined as parties in the SUMMERS and YBARRA lawsuits. This assured (1) that the actual wrongdoer was before the court, and (2) that each party having the wherewithal to prove causation had the incentive to do so.

In contrast, in the DES drug cases like SINDELL, it is actually the plaintiff who is in the best position to determine the identity of the actual wrongdoer. The plaintiff's mother has had actual contact with the drug, and may know where she purchased it, or what the packaging or pill looked like. The manufacturer, on the other hand, has had no contact with the ultimate users and, therefore, is in no position to prove the identity of the manufacturer of the drug which allegedly caused harm to the plaintiff.

This rationale applies with equal force in asbestos cases. And more important, under the SINDELL market share theory, there is no guarantee that the actual wrongdoer is even a defendant

in the lawsuit, since the only requirement is that the plaintiff join a "substantial percentage" of the market.

In SINDELL, the plaintiff's inability to prove a causal connection had nothing whatsoever to do with the defendants. Rather, the failure of proof was merely the result of the passage of time. Given that fact, the defendant is in no better position to prove its "non-negligence," and the rationale which underlies an alternative liability theory of recovery does not exist, i.e., one cannot say that the defendant's negligence had anything to do with the fact that the plaintiff is now unable to prove causation or product identity. Nor is the defendant in a better position than the plaintiff to carry the burden of proof. This is in stark contrast to the equitable basis which may otherwise support application of a res ipsa loquitur theory in any given action, since in those instances one may reasonably argue that the plaintiff's injuries could only have been caused by the defendant's negligence. Further, in those cases, the defendant is truly in a better position to prove otherwise.

In GOODYEAR TIRE AND RUBBER COMPANY v. HUGHS SUPPLY INC., 358 So.2d 1339, 1341 (Fla. 1978), this Court expressed its concern for the "judicial gloss" which had been developing over the principle of res ipsa loquitur. Because of these concerns, the HUGHS SUPPLY court determined to restore res ipsa to its "historically proper balance," i.e., the doctrine of res ipsa loquitur is only to be utilized where "direct evidence of negligence is unavailable to the plaintiff due to the unusual circumstances of the injuring incident." Even within those bounds, this Court

admonished that res ipsa "is a doctrine of extremely limited applicability," which should only be applied where the plaintiff's injuries could only have been caused by the defendant's negligence. Supra at pages 1341 and 1343.

Where a market share theory is applied, it is the evidence of the identity of the wrongdoer which is unavailable to the plaintiff, not evidence of negligence. Under a market share theory, therefore, given the number of defendants that may be named in a lawsuit, it most probably was not any particular defendant's negligence that caused the plaintiff's injury. It would seem, therefore, that the market share liability theory knows no proper bounds, unlike the limited parameters of res ipsa loquitur as they have been defined by the courts of this state. Truly, in an asbestos case, (if the Court will pardon the paraphrase from HUGHS SUPPLY), the defendant is not the "probable actor." HUGHS SUPPLY, supra at 1342. See also CHENOWETH v. KEMP, 396 So.2d 1122 (Fla. 1981).

In CITY OF NEW SMYRNA BEACH UTILITIES COMMISSION v. McWHORTER, 418 So.2d 261 (Fla. 1982), this Court reaffirmed its position with respect to the parameters of liability under res ipsa loquitur. Once again, the plaintiffs were unable to show an appropriate causal link between their injuries and any alleged negligence on the part of the named defendant. In reversing the lower court, this Court repeated its prior concerns over liberalization of the doctrine of res ipsa loquitur, and implicity warned against expansion of its intended parameters, notwithstanding the plaintiff's plight:

> Certainly, the district court's desire to provide relief to the McWhorters is understandable. The family's suffering, occasioned by such a disgusting invasion of their home, would incite the sympathy of any feeling person. But regardless of the magnitude of the McWhorters' misfortune, the facts of this case do not justify the Court's efforts to provide that relief through the invocation of res ipsa loquitur. Supra at 263.

Clearly, the McWHORTER court refused to expand an otherwise limited doctrine of proof, notwithstanding the sympathetic nature of the plaintiff's problem in that case. Yet that appears to have been the precise motivation for the SINDELL court's holding, and for the Third District's decision to expand traditional theories of liability in wholesale fashion.

The SINDELL court would have us believe that it merely shifted the burden of proof from plaintiff to defendant. This is a myth--an illusion. In fact, the SINDELL court actually established "'a liability which would exceed absolute liability'" for the producers of generic products in favor of the consumers of those products. SINDELL, dissent of Justice Richardson, supra at 938.

It appears that the decision in SINDELL was principally grounded upon the California Supreme Court's efforts to find someone to pay for the plaintiff's damages, and a general feeling that "somebody must pay." This determination rings true notwithstanding the court's discussion of alternative or enterprise theories of liability, and its colorable attempt to base the result in that case upon some rule of reason or some other logical extension of appropriate legal precedent. Yet the McWHORTER decision makes

it clear that this Court does not feel that it would be appropriate to use sympathy for a particular class of plaintiffs as a grounds for ignoring or otherwise plowing under hundreds of years of legal precedent.

With all due respect for the motives of the California Supreme Court, its decision in SINDELL runs contrary to the law of Florida,which is based upon individual rights and freedoms. SINDELL therefore fails to provide an acceptable solution to the injured plaintiff's problem, i.e., his inability to identify all proper defendants. The collectivist jurisprudence advanced by SINDELL simply cannot be reconciled with Florida's notions of justice and fairness, since market share liability is predicated upon the premise that companies which produce generic items have no property rights, no ownership interests and, indeed, no identity beyond that which makes their collective existence "an industry."

Presumably, causation-in-fact is a requirement of Florida law in order to guarantee that a citizen's constitutional right to due process will not be violated. That is, one citizen's property cannot be taken to pay the liability or debt of another citizen. To hold otherwise is to impair that citizen's fundamental property rights. See, SPEISER v. RANDALL, 357 U.S. 513 (1958) for an example of the due process concerns which may be occasioned where the burden of proof is shifted.

With shocking disregard for the defendants' rights, the court in SINDELL suggested that joining a substantial share of the DES market as defendants would diminish any injustice that might otherwise result from shifting the burden of proof. SINDELL,

supra at 937) In reality, joining a substantial share of the market does not and cannot diminish injustice; it merely diminishes an innocent producer's "damages," i.e., his financial obligation to an injured plaintiff. The California Supreme Court was playing the odds, ignoring the fact that an individual defendant could be liable even though the odds might be one hundred to one against its liability in any given case. Under these circumstances, that which the courts have so long rejected has become a reality, to wit: a manufacturer has become the insurer of its products. Yet the SINDELL court takes this quantum leap even one step farther, to the extent that individual manufacturers become the insurers of the products of others. See SINDELL dissent, supra at 942; RYAN v. ELI LILLY & COMPANY, 514 F.Supp. 1004 at 1017 (D.S.C. 1981); accord, STARLING v. SEABOARD COASTLINE RAILROAD COMPANY, 533 F.Supp. 183 at 190 (S.D.Ga. 1982).

In this instance, the COPELANDS have claimed that the Defendants are strictly liable for MR. COPELAND'S injuries. The Plaintiffs are thus alleging that they need not prove that the Defendants owed them a duty of care, or that the Defendants were in fact negligent. See, e.g., WEST v. CATERPILLAR TRACTOR COMPANY, INC., 336 So.2d 80 (Fla. 1976). Through the use of a market share theory, the Plaintiffs would also be able to avoid having to prove a causal relationship between MR. COPELAND'S injuries and the Defendants' products. The net effect of the conjunctive use of these two theories would be to put the various Defendants in the position of having to pay damages to the Plaintiffs simply because those defendant were producers of asbestos-related products, and

MR. COPELAND has allegedly sustained an asbestos-related injury. PITTSBURGH CORNING would submit that such a result would run contrary to the notions of causation which were re-emphasized by this Court in WEST, ironically at the very moment that the Court was adopting strict liability for application in Florida.

In WEST, the Court noted that strict liability "does not make the manufacturer or seller an insurer." Rather, the effect of adoption of strict liability was simply "to remove the burden from the user of proving specific acts of neligence." Yet the opinion in WEST was careful to note that adoption of the Restatement rule of strict liability would not abrogate "ordinary rules of causation and the defenses applicable to negligence...." WEST, supra at 90.

> In other words strict liability should be imposed only when a product the manufacturer places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being....In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between such condition and the user's injuries or damages. Supra at 86-87.

Obviously, adoption of a market share theory of liability would radically alter these standards for recovery.

Through the use of a market share theory of liability, a plaintiff would be able to avoid having to prove that any given manufacturer's product actually caused injury. The plaintiff would not have to establish "the manufacturer's relationship to

the product in question," and would not have to demonstrate the "proximate causal connection" between any defect in a particular manufacturer's product and the "user's injuries or damages," all contrary to this Court's mandate in WEST. In short, as was noted above, manufacturer's would become insurers of their own products and the products of others, contrary to this Court's statement of policy in the WEST case.

It is little comfort that the market share theory would allow a manufacturer to escape liability by proving that it did not produce the specific asbestos-related product which injured the plaintiff. The Third District has already acknowledged that such proof is virtually impossible for even the plaintiff to obtain; yet the plaintiff is certainly in as good a position, if not a better position, to identify actual tortfeasors. Thus, in order to avoid liability, a particular defendant is left to prove it was not producing asbestos <u>at any time</u> during the years of the Plaintiff's exposure. PITTSBURGH CORNING would submit that this alteration of traditional standards of proof would seriously undermine the notion of probability which has been adhered to throughout Florida jurisprudence.

For example, assume that a particular defendant has produced asbestos-related products for only the last few months of a plaintiff's twenty year history of exposure to similar products. It is <u>possible</u>, although not at all <u>probable</u>, that the plaintiff was exposed to that particular defendant's product. However, according to the SINDELL rationale, the improbability of this causal connection does nothing to mitigate the defendant's

liability to the plaintiff, since the SINDELL decision makes it clear that a defendant must show the complete absence of a possible nexus between its product and the plaintiff's injuries. The plaintiff, on the other hand, must only prove that the defendant produced asbestos. The rest of plaintiffs' case, including the extent of defendant's liability, is presumed. This type of presumption certainly runs contrary to the traditional notions of proximate causation which have been espoused by this Court.

In CONE v. INTERCOUNTY TELEPHONE AND TELEGRAPH COMPANY, 40 So.2d 148 (Fla. 1949), this Court issued what has become the definitive pronouncement in this state on proximate causation.

> Not every negligent act of ommision or commission gives rise to a cause of action for injuries sustained by another. It is only when injury to a person...has resulted directly and in ordinary natural sequence from a negligent act without the intervention of any independent efficient cause, or as such as ordinarily and naturally should have been regarded as a probable, not a mere possible, result of the negligent act, that such injured person is entitled to recover damages as compensation for his loss. Conversely, when the loss is not a direct result of the negligent act complained of, or does not follow in natural ordinary sequence from such act but is merely a possible, as distinguished from a natural and probable, result of the negligence, recovery will not be allowed. Supra at 149.

Application of these principles caused the CONE court to reverse a jury verdict, since the Court did not feel that the plaintiff's injuries could be viewed as the probable consequence of the defendant's negligence.

> The responsibility of a tort-feasor for the consequences of his negligent acts must end somewhere, and under our legal system the

> liability of the wrongdoer is extended only to the reasonable and probable, not the merely possible, result of a dereliction of duty. CONE, supra at 150.

Yet as was noted above, application of a market share theory of liability would often result in an assessment of money damages against a defendant whose product had possibly--but not probably--caused injury to the plaintiff.

More recently, in GOODING v. UNIVERSITY HOSPITAL BUILDING, INC., 445 So.2d 1015 (Fla. 1984), this Court reaffirmed the long standing principle that a plaintiff in a negligence action in Florida has the burden of proving that a defendant's negligence "more likely than not" caused the plaintiff's injuries. Citing from Dean Prosser's treatise on torts, the GOODING court through Justice McDonald stressed that a mere "'possiblity of such causation'" is not enough. Rather, "'when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.'" GOODING, supra at 1018, citing to Prosser, Law of Torts, §41 (4th Ed. 1971).

In GOODING, the court refused to "approve the substitution of...an obvious inequity for a perceived one," i.e., the court declined to relax traditional burdens of proof merely because existing causation requirements might ultimately prove too burdensome for those plaintiffs "who could prove the possibility that the medical malpractice caused an injury but could not prove the probability of causation...." GOODING, supra at 1019-1020. Similarly, in this instance, the Court should refuse to judicially

negate time worn burdens of proof and theories of causation solely because some plaintiffs may have a difficult time identifying virtually every asbestos-related product to which they have been exposed. Adoption of the market share theory would be particularly inappropriate in this case, where MR. COPELAND has in fact identified several asbestos-related products which he used during his career.

Subsequent application of the "law" created by the California Supreme Court in SINDELL has demonstrated the limitlessness of this indefensible basis for liability. In MYLES LABORATORIES v. SUPERIOR COURT, etc., 184 Cal.Rptr. 98 (App. 1982), for example, the defendant was able to show that it never marketed DES in any form for use by women. The court ruled that the defendant could be held liable, since it knew or should have known that pharmacists would put its DES to such use. "The defendant gained a market share by acquiescing in the drug's use for an unintended purpose. Such conduct, if true, is certainly actionable under the logic and spirit of the SINDELL decision." The dissenting justice in that case wrote a scathing opinion regarding the direction the law has taken in the State of California.

Similar results are possible under SINDELL. In MERTAN v. E.R. SQUIBB & SONS, INC., 190 Cal.Rptr. 349 (App. 1983) where the evidence overwhelmingly supported the defendant's contention that the DES ingested by the plaintiff's mother had been produced by Eli Lilly Company, the jury returned a verdict in favor of Defendant Squibb. On appeal, the court ordered a retrial and permitted the plaintiff to state a market share cause of action

against Squibb. The appellate court felt that there was at least a possibility that defendant Squibb was the culpable manufacturer. (Eli Lilly & Company was inexplicably no longer a party to the action, therefore giving rise to the inference that the "somebody must pay" mentality was once again a factor.)

Market share liability also creates serious equal protection concerns. Parties who avail themselves of the market share liability theory (those who cannot identify the manufacturer) are in a more favorable position than those plaintiffs in asbestos actions who base their claims upon standard tort law. They are certainly in a more favorable position than plaintiffs in other tort actions, e.g., plaintiffs in medical malpractice lawsuits. Thus, the plaintiff who cannot prove any causation whatsoever may pick and choose among any number of potential defendants, thereby increasing his opportunity for recovery.

Obviously, unequal protection under the law in favor of plaintiffs who are unable to identify specific manufacturers provides an incentive for a plaintiff to withhold evidence of identity. This is particularly true where a manufacturer whom the plaintiff can readily identify is insolvent, or where that manufacturer may not be amenable to service of process in the plaintiff's jurisdiction.[1]

1 / At this point, it is worth mentioning that the largest single producer of asbestos-related products, JOHNS-MANVILLE, is currently undergoing reorganization. Pursuant to the applicable bankruptcy regulations, all proceedings against MANVILLE in this state have been stayed, although asbestos-related bodily injury claims remain pending as to all other named defendants.

Thus, the manufacturer who cannot escape liability to the plaintiff may be left "holding the bag" for another defendant, even though the other defendant's circumstances are not the result of an abundance of caution or a lack of negligence, but rather are strictly fortuitous. Similarly, it does not make sense nor is it fair that defendant manufacturers are liable for their products as a collective whole under a market share theory, but may nevertheless avoid liability by reason of individualized circumstances, e.g., where a manufacturer's records are sufficient to allow that manufacturer to prove conclusively that a plaintiff could not possibly have been exposed to its product. If the existence of a causal relationship is not necessary to liability then it makes no sense that a lack thereof should be a valid defense. Yet the "rough justice" of the market share approach mandates that the manufacturer who keeps the best records for the longest time will have the best chance of avoiding liability.

That market share liability violates equal protection was most aptly expressed by Justice Richardson in his dissenting opinion in SINDELL.

> 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 defendant's who are poor or who have modest means. SINDELL at 941.

From a historical perspective, the dimensions and parameters of tort liability have expanded to an alarming extent. Judicial

rulings which are tacitly based upon a "deep pocket" theory or which are otherwise designed to adjust for problems of proof should be strictly applied within the bounds of constitutional principles. Historically, the courts have said "we will go this far but no further," only to decide years later that perhaps it is time to take that next step. Recognizing this alarming trend, this Court has curtailed the expansion of one such "deep pocket" theory, res ipsa loquitur, and has otherwise refused to relax traditional burdens of proof in medical malpractice actions. This Court refused to take "that extra step" in the GOODING and HUGHES SUPPLY cases. Adoption of a market share liability theory of recovery would represent a major step beyond the lines which were drawn by the Court in those two cases.

PRACTICAL APPLICATION OF MARKET SHARE LIABILITY WOULD BE IMPOSSIBLE, UNCERTAIN AND INEQUITABLE

According to the court in SINDELL, the formula for determining the extent of a defendant manufacturer's liability under a market share theory is as follows:

> [W]e hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. Supra at 937.

The court further required that a "substantial share" of the "appropriate market" be joined as defendants.

> [This] also provides a ready means to apportion damages among the defendants. Each defen-

> dant will be held liable for the portion of the judgment represented by its share of that market. Supra at 937.

PITTSBURGH CORNING would submit that the SINDELL court--in its attempt to "diminish the injustice,"--has provided a formula which is so susceptible to alternate interpretations that it is virtually incapable of practical application.

It would seem rather obvious that a defendant's proportionate share of liability must be capable of precise measurement, where liability is based upon the mere "fact" of production, and is otherwise "measured" by that defendant's share of the market, since liability in such circumstances bears no relationship to the concept of fault. The determination of a defendant's "market share" based upon the "appropriate market" requires an economic formula, which is only designed to provide a means of risk distribution, since such a determination would have little to do with any true assignation of fault, by definition. For this reason, it is essential that the formula be capable of fair and equitable application between each of the defendant manufacturers.

What is the appropriate or relevant market? Time, geographic area, the forum in which the defendant's product is marketed, and the quantity of asbestos in that product are all relevent variables affecting a defendant's market share. Chase, Market Share Liability: A Plea for Legislative Alternatives, 1982, No.4, U. Ill.L.Rev. 1003 (1982); Newcomb, Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification, 76 N.W. U.L.Rev. 300 (1981)

What year constitutes the relevant market? In a DES

context, the relevant market in terms of time would be the time when plaintiff's mother ingested the DES. However, in an asbestos context, since exposure is continuous over a period of time, every year, month or day during the years of exposure would be relevant, since arguably it cannot be determined when the Plaintiff contracted the asbestos-related disease. It is likely that a defendant's liability will vary greatly depending upon the year chosen, and in fact it would appear that some kind of formula would have to be worked out so as to include virtually every moment of exposure.

Absent some kind of ruling which would require that a the relevant market include the entire period of the plaintiff's exposure to asbestos-related products, who is to decide which year will determine the relevant market? If the decision is to be dictated by the whim of the plaintiff, then the plaintiff will have the means of optimizing his own recovery. If this period were left open to selection, a plaintiff would presumably bring suit against those manufacturers who are best able to pay an award, and who otherwise held the greatest share of the market during the period of exposure.

Which asbestos products will be considered in determining the relevant market? Many different products contain asbestos. Plaintiff may have been exposed to some asbestos products, but not others. Moreover, each type of product will contain varying quantities of asbestos depending upon the manufacturing formula, the nature of the product, and the identity of the manufacturer. Such equations will be even more confused by the fact that each

manufacturer may not have produced specific products during different periods of time.

Apportionment is yet another aspect of market share liability upon which the California Supreme Court in SINDELL elected not to elaborate. That is, the Court failed to specify whether or not each defendant's market share is to be determined in proportion to every other defendant's share or in relation to the entire relevant market. This problem is illustrated by the following scenario:

> Assume that plaintiff's damages are $100,000 and he joins enough asbestos manufacturers to represent 60% of the relevant market. Defendant X occupies 20% of the relevant market and 33 and 1/3% of the market that all joined defendants represent. If each defendant is liable only for the percentage of the judgment that is equivalent to its share of the relevant market, then Defendant X would be liable for 20% of the damages, or $20,000. If defendants are required to pay 100% of the judgment, however, then Defendant X must pay 1/3 of the judgment or $33,333, which is equivalent to 1/3 of the market that all joined defendants represent. In other words, Defendant X would have to pay 67% ($13,333) more than its share of the relevant market. Fischer, Products Liability--An Analysis of Market Share Liability, 34 Vanderbilt L.Rev. 1623 at 1646 (1981).

Thus, it can be seen that the extent to which a defendant's market share and the defendant's liability are disproportionate will ultimately depend upon whether or not a "substantial percentage of the market" is involved in the suit.

Assuming arguendo that a court may be able to devine a manageable and fair method for calculating both the relevant market and the individual market shares of the defendants, that method must be applied to reality. This would largely depend

upon the continuing existence of relevent market data. Yet there is no guarantee that each of the various defendant manufacturers have kept such records over the twenty to forty year period involved. If a particular manufacturer has not kept such records, may it escape liability, or should the court speculate as to its share of the market?

Market share liability makes easy targets of large, well-publicized asbestos manufacturers. These manufacturers will be forced to join as many of the smaller manufacturers as possible in order to spread the losses. (Assuming, of course, that these smaller manufacturers will be amenable to suit in the jurisdiction recognizing market share liability.) This transforms the traditional tort/products liability lawsuit into multi-defendant/multi-district litigation and involves tremendously increased litigation costs.

In STUART v. HERTZ, 351 So.2d 703 (Fla. 1977), this Court specifically prohibited a defendant in an automobile accident lawsuit from bringing a third party action for indemnity against a physician who allegedly had aggravated the injuries which the plaintiff sustained in the original accident. In its decision in STUART, this Court clearly proscribed what it characterized as an inappropriate attempt to expand third party practice.

> To hold otherwise would in effect permit a defendant to determine the time and manner, indeed the appropriateness, of a plaintiff's action for malpractice. This decision eliminates the traditional policy of allowing the plaintiff to chose the time, forum and manner in which to press his claim.
>
> * * *
>
> A complete outsider, and a tortfeasor at that,

> must not be allowed to...make the plaintiff's case against the original tortfeasor longer and more complex through the use of a third party practice rule which was adopted for the purpose of expediting and simplifying litigation.
>
> * * *
>
> [A] third party action...would not only incorrectly expand traditional concepts of indemnity to the point of making it indistinguishable from contribution, but also expand the applicability of the third party rule and make it a tool whereby the tortfeasor is allowed to complicate the issues to be resolved in a personal injury suit and prolong the litigation through the filing of a third-party malpractice action. STUART, supra at 706.

Thus, this Court refused to allow the third party indemnity action in STUART.

Notwithstanding these laudable policy considerations, however, it would hardly seem fair to bar a third party action where a named defendant in a particular asbestos-related injury suit attempts to plead market share liability in a third party action against manufacturers who had not been named by the plaintiff in the original complaint. This kind of third party practice would certainly be attractive to the smaller manufacturers, and would undoubtedly be appropriate in any case where a plaintiff could not state conclusively that he had only been exposed to those products which were manufactured by the original defendants.

Thus, a plaintiff who is virtually certain that he had been exposed solely to one product, but who is honest enough to concede that he might have worked with the products of other manufacturers, will be put in the unenviable position of being subjected to a massive third party action which was not of his own choosing.

This kind of third party practice has other ominous implications as well.

If each defendant's share of the judgment is relative to the share of the other defendants, the defendants will be in an adversarial position vis a vis each other. In all likelihood, each defendant will be required to hire it own accountants and actuaries for the purpose of determining the extent of its liability. If the larger manufacturers are successful in joining the smaller manufacturers as parties defendant, the latter will have the same litigation costs as the former. The total potential cost of such complex litigation is staggering.

Furthermore, there is no guarantee that it would be possible to pass these costs on to consumers, because the price of a product must bear some rational relationship to its value to the consumer. Damages in the asbestos-related cases have been estimated into the hundreds of billions of dollars. Add that to the litigation costs and the resulting figure may well be in excess of that which can be passed on to the consumer. If this is the case, the risk distribution purposes of market share liability will be defeated. Newcomb, supra at 316; Fischer, supra at 1654. In addition, risk distribution cannot possibly be accomplished where any number of manufacturers are no longer in the market place, or have otherwise gone out of business.

In that regard, there are several other considerations which warrant more than a mere footnote, although the broadness of each of these considerations would warrant a separate brief. For example, where does the liability of wholesalers or distributors

fit into the broad scheme of market share liability? Certainly, such entities are liable where they have passed along otherwise defective products, pursuant to this Court's adoption of strict liability.

Under the circumstances, are distributors to be held liable where they have sold asbestos-related products? If so, how is a distributor's market share to be determined?

While such sugggestions might appear academic under ordinary circumstances, given a distributor's potential cause of action for indemnity against an "actively negligent" manufacturer, the absence of fault in a market share approach should arguably render indemnity questions meaningless. If that is the case, then the distributor's share of the market becomes a factor, and, in fact, in some instances, the largest distributors may actually have profited to a greater degree from the distribution of asbestos-related materials than did some of the smaller manufacturers.

These inquiries alone should be sufficient to call the advisability of adoption of this theory of recovery into question. As can be readily seen from the considerations which have been raised above, profit and market share begin to assume greater prominence than do such questions as the identity of a particular tortfeasor or proximate causation where a market share theory is utilized. Yet PITTSBURGH CORNING would respectfully submit that market share liability will not serve the purpose for which it was intended.

In a traditional product liability jurisdiction, a manu-

facturer ordinarily has the incentive to produce a safe product, because the manufacturer is only responsible for its own products. However, where market share liability is implemented, manufacturers will almost certainly be held liable for injuries which were actually caused by another manufacturer's product. In this setting, the manufacturer of a relatively safe product may actually be subsidizing manufacturers of defective products. Thus, since the manufacturer is being held liable for a percentage of all damages caused by a generic product, and the larger manufacturers will almost always be defendants, there is really no incentive for a smaller manufacturer to improve upon its production of that particular generic product.

The possibility of being subjected to a product liability suit will only operate as an incentive to an individual manufacturer where potential liability bears some relationship to a product over which that particular manufacturer has some control. For example, where a manufacturer believes that it may curtail its exposure to litigation and/or a judgment by improving its product, the manufacturer has additional incentive to take appropriate measures to remedy any perceived defect in his product line. On the other hand, where market share liability is implemented, there is no limit to the number of times that a company can be sued. The threat of litigation, therefore, serves as no real deterent to the individual manufacturer, since that manufacturer's liability has no direct correlation with anything over which the individual defendant manufacturer has any control. As axiomatic as this principle of behavioral science may be, it has apparently escaped

those who would advocate market share liability.

Most courts have rejected market share liability because of the belief that it fails to serve the deterent and risk distribution purposes for which is was designed. However, most of these same courts have also been concerned about the injustices which are inherent in the theory and the difficulties which arise when attempting to determine the relevent market. PATENT v. ADVERT LABORATORIES, 437 N.E. 2nd 171, Mass. 1982; COLLINS v. ELI LILLY & COMPANY, 342 N.W. 2nd 37, Wis. 1984); RYAN v. ELI LILLY & COMPANY, supra.; MIZELL v. ELI LILLY & COMPANY, 526 F.Supp. 589 (D.S.C. 1981); STARLING V. SEABOARD COASTLINE RAILROAD COMPANY, 533 F.Supp. 183 (S.D.Ga. 1982); MORTON v. ALBERT LABORATORIES, 538 F.Supp. 593 (M.D.Fla. 1982); IN RE RELATED ASBESTOS CASES, 543 F.Supp. 1152 (N.D.Cal. 1982); HANNON v. WATERMAN STEAMSHIP CORPORATION, 567 F.Supp. 90 (E.D.La.); THOMPSON v. JOHNS-MANVILLE SALES CORPORATION, 714 F.2d 581 (5th Cir. 1983). In asbestos cases, rejection has been unanimous because the difficulty of determining relevant market shares is particularly acute where there has been continuous exposure to the product. See, e.g., STARLING, supra; IN RE RELATED ASBESTOS CASES, supra; HANNON, supra; THOMPSON, supra.

PITTSBURGH CORNING would finally address the problem of joint and several liability and contribution among joint tort feasors which will arise should this Court decide to adopt market share liability. Aside from the implications for third party practice, which were raised earlier, PITTSBURGH CORNING feels compelled to point out that a market share theory of recovery

would hopelessly confuse contribution actions among joint tort feasors, pursuant to Florida law, and otherwise render meaningless this state's jurisprudential concept of joint and several liability. For example, would any given defendant in an ongoing asbestos lawsuit have the right to seek contribution from all other manufacturers (or distributors or wholesalers) who were not joined in the suit? Would all defendants be jointly and severally liable, or would each defendant simply be responsible for paying his "share" of the plaintiff's damages?

Clearly, if a defendant could only be held liable for his share of the damages caused to the plaintiff as among those defendants who are actually joined in a lawsuit, then that defendant would have the right to file a third party action against any other potential defendant who had not been named in the suit. What will this do to the cost of asbestos litigation, particularly if trial court judges get into the habit of denying leave to file third party complaints, pursuant to this Court's mandate in STUART?

These and a plethora of similar questions will arise--and have arisen in California--with the advent of market share liability. In the final analysis, therefore, PITTSBURGH CORNING would submit that a plaintiff's inability to identify specific tort feasors does not provide a sufficient reason to change fundamental principles of tort law which have evolved over hundreds of years. To the contrary, PITTSBURGH CORNING would respectfully submit that this is the wrong forum for redress of such concerns.

If there is a sense of <u>collective responsibility</u> for a generic product which has been manufactured on an industrywide

scale, then imposition of liability on an individual basis is inherently unjust. Our court system was designed to correct such injustices, not to create them. And while our courts have long since recognized that our judicial system is designed to protect individual rights and freedoms, the mandate which we have given our courts applies with equal force to defendants, as well as plaintiffs.

It is respectfully submitted that only the legislature can impose liability on an entire industry. Only the legislature has that power and that capability. Yet PITTSBURGH CORNING would suggest that there is a real question as to whether even the legislative branch of any given state would have the authority to legislate the kind of liability which has been created by the lower court in this instance solely within a single state, since this is truly a nation-wide problem.

Undoutedly, were the legislature of the State of Florida to pass a law which would require a handful of manufacturers to pay for damage which had been caused by the entire membership of a particular industry, that statute would be subjected to strict judicial scrutiny, and would otherwise be of doubtful constitutionality. It is respectfully submitted that a similar result would be no less repugnant from a constitutional standpoint where that result has been achieved through judicial fiat.

At the very least, action by the legislature rather than the courts aids efficiency and assures uniformity. National legislature on this topic will preclude "choice of law" jurisdictional problems, which will otherwise arise repeatedly, and which

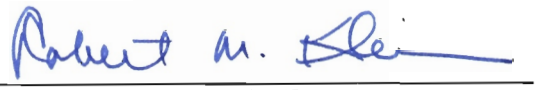
will undoubtedly induce forum-shopping should market share liability be adopted in only a few states. Many courts and commentators have urged a legislative solution for the problems of those plaintiffs who are incapable of identifying the proper defendant. STARLING V. SEABOARD COAST LINE RAILROAD COMPANY, supra at 186 and 190; NAMM v. CHARLES E. FROSST & COMPANY, 427 Atl.2d 1121 at 1129 (N.J.App. 1981).

For the reasons which have been set forth at length in this brief, and for the reasons which will be expressed by the other Petitioners and Amicus, PITTSBURGH CORNING would earnestly submit that this is indeed a problem which should be left to the legislature, and most appropriately for resolution by the Congress of the United States.

CONCLUSION

For all of the above cited reasons, Amicus Curiae PITTSBURGH CORNING CORPORATION respectfully requests this Court to enter an order quashing the decision of the Third District Court of Appeal, and otherwise rejecting market share liability as a theory of recovery for plaintiffs in asbestos-related bodily injury actions pending in Florida.

Respectfully submitted,



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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 21st day of May, 1984, to the attached list of addressees.

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