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IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION,

Petitiner,

vs. Case No. 65,124

LEE LLOYD COPELAND, et al.,

Respondents.

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

v. Case No. 65,154

LEE LOYD COPELAND and VAUDEEN COPELAND,

Respondents.

RESPONDENTS' ANSWER BRIEF

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PRELIMINARY STATEMENT

The Third District Court of Appeals has certified the following question of great public importance to this Supreme Court:

> "Whether market share liability as announced in Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, 163 Cal.Rptr. 132 cert. denied 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1980), should be adopted in Florida."

In answering this question, it is imperative that this Court fully appreciate the legal parameters of the Sindell decision. At issue in Sindell was the sufficiency of the plaintiff's complaint to plead a cause of action against the manufacturers of diethylstilbesterol (DES), where, through no fault of her own, the plaintiff was unable to identify the precise manufacturer of the product that harmed her. With this issue before it, the California Supreme Court reasoned:

> The most persuasive reason for finding plaintiff states a cause of action is that advanced in Summers: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury. Here, as in Summers, plaintiff is not at fault in failing to provide evidence of causation, and although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug, the effects of which are delayed for many years, played a significant role in creating the unavailability of proof.

Sindell, 607 P.2d at 936.

Thus, it held that the plaintiff had sufficiently plead a cause of action and established causation where she identified and filed suit against a substantial percentage of the manufacturers that might have caused her injury:

> [W]e approach the issue of causation from a different perspective: we 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.
>
> . . . .
>
> If plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished.

Id. at 937.

Similarly, in the present case, the issue before this Court is solely one of legal causation. Has the plaintiff in this case sufficiently plead a cause of action against the manufacturers of asbestos containing insulation materials where he has alledged, inter alia, that the manufacturers of the injurious products to which he was exposed are unidentifiable? The only inquiry today is whether under Florida law, a form of collective liability[1] is available as an alternative theory of relief where identification of the precise tortfeasor eludes verification. When the question before this Court is viewed in its proper perspective, the limited nature of its scope is readily revealed.

1. The term "collective liability" is used throughout this brief as a general term referring to the procedure of shifting the burden of proof on the issue of causation to a group of negligent defendants when the precise agents causing injury cannot be identified. As will be developed in this brief, courts have used different terms in arriving at this procedural end - i.e. alternative liability, concert of action, enterprise liability and market share liability. In an effort to avoid confusion, this brief will refer to "collective liability" in its broad sense, as encompassing each of these legal theories supporting a shift in the burden of proof on the issue of causation.

It must also be stressed, as a preliminary matter, that Respondents do not endorse, in full, the majority opinion of the court below. As pointed out by Judge Nesbitt in his dissent, the majority opinion merges problems of causation with problems concerning apportionment of damages by requiring that damages be apportioned according to market share. See Copeland v. The Celotex Corporation, ___ So.2d ___ (Fla. 3rd DCA 1984) (9 F.L.W. 537 at 542). Thus, Respondents propose that collective liability be adopted by this Court in order to shift the burden of proof on the issue of causation from the innocent plaintiff to the negligent defendants. Each defendant, however, should remain accountable to the plaintiff on a joint and several basis. This is the theory alleged by the plaintiffs in their Complaint (R. 1326-27), and it is the theory urged today before this Court. As will be discussed in this brief, Florida law provides ample precedent for shifting the burden of proof on causation to multiple defendants. No Florida law exists, however, as precedent for apportioning damages according to market share.

STATEMENT OF THE FACTS AND OF THE CASE

LEE LLOYD COPELAND was employed as a boilermaker in and around the State of Florida throughout his adult life until his retirement in 1975 (R.756). During the course of his career, he was injuriously exposed to asbestos products manufactured, sold and/or distributed in Florida.

On May 11, 1970, LEE LLOYD COPELAND and his wife VAUDEEN COPELAND, filed their Original Complaint against sixteen Defendants including THE CELOTEX CORPORATION (R.1-71A). Plaintiffs' Third Amended Complaint was filed against the same Defendants on March 20, 1981 (R.1312-1331) which, for purposes of this Appeal, contains substantially the same allegations as those found in the Original Complaint. In their Third Amended Complaint, Plaintiffs allege that: the Defendants and/or each Defendants' predecessor-in-interest manufactured, sold and distributed asbestos insulation products without warning the ultimate users of such products that the asbestos contained therein posed a grave health risk; that Plaintiff, LEE LLOYD COPELAND, in his trade as a boilermaker, was, on many occasions, exposed to asbestos products manufactured by the named Defendants or their predecessors-in-interest; that as a direct and proximate result of such exposure, Plaintiff, LEE LLOYD COPELAND, suffered severe mental, physical and economic injury and his wife, VAUDEEN COPELAND, suffered the loss of her husband's consortium; and, finally that each Defendant should be held liable under well established product liability theories of strict liability in tort, negligence and breach of warrantly for Plaintiffs' damages.

Plaintiffs also plead the following:

> In that Plaintiff is unable to identify each injurious exposure to the asbestos products, he would show the court that there is a substantial liklihood that he was exposed to products manufactured and/or distributed by each Defendant and that the Defendants as a group supplied virtually all of the asbestos products to which he was exposed. Under the doctrine of enterprise liability or alternative liability as described in Sindell v. Abbott Laboratories, 607 P.2d 924 (Cal. 1980), this court should apply joint and several liability to each Defendant found by the Jury to have supplied such products to which there is a substantial liklihood that Plaintiff was injuriously exposed.

(R.1326-27.)

On November 17, 1980, Defendant, THE CELOTEX CORPORATION, filed a Supplemental Motion to Strike and to Dismiss wherein Defendant requested that Plaintiffs' pleadings be struck and suit dismissed solely on the ground that Plaintiff, LEE LLOYD COPELAND, had failed to state in his interrogatory answers whether he had been exposed to asbestos products manufactured by Defendant, THE CELOTEX CORPORATION or its predecessor-in-interest, THE PHILLIP CARY MANUFACTURING COMPANY. (R.672-677). On April 7, 1981, the Trial Court granted Defendant CELOTEX' Supplemental Motion to Strike and to Dismiss and entered final judgment in favor of Defendant CELOTEX. (R.1906-1909).

This Order was duly appealed, and on March 6, 1984, the Third District Court of Appeals issued its opinion adopting market share liability in Florida. Copeland, 9 F.L.W. 537. It was the holding of the District Court that the Plaintiffs had sufficiently plead an alternative cause of action based on market share liability.

Although LEE LLOYD COPELAND had identifed exposure to products manufactured by THE CELOTEX CORPORATION's predecessor-in-interest in his deposition testimony taken on February 23, 1982, (R.R1006-21,1102), the sufficiency of this testimony had not yet withheld the test of summary judgment. Thus, it was the conclusion of the Third District Court of Appeals that, notwithstanding Plaintiff's attempt at product identification, LEE LLOYD COPELAND could proceed on an alternative theory of market share liability in Florida.

I. The Instant Case is Properly Before This Court

Petitioners urge that the theory of market share liability cannot be passed upon by this Court because it was neither asserted at trial nor argued on appeal and is contrary to established precedent of this Court. See Brief of Petitioner OWENS-CORNING FIBERGLAS CORP. at 7-11. Neither of these arguments are meritorious.

Initially, Respondents note that the issue in both courts below was the sufficiency of Respondent's pleadings. The trial court and Third District Court of Appeals resolved precisely this issue - the same issue before this Court. This Court may decline to review only issues not raised by the pleadings or matters which the trial court had no opportunity to consider. Northeast Polk County Hospital District v. Snively, 162 So.2d 657 (Fla. 1964); Lipe v. City of Miami, 141 So.2d 738 (Fla. 1962). Not only were the various theories of liability at issue and considered below, they were central to each court's decision in this case - the sufficiency of Plaintiff's pleadings.

Similarly, the opinion of the Third District Court of Appeals does not violate the doctrine of Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), that intermediate appellate courts may not render decisions in conflict with established Florida Supreme Court precedent. In Hoffman, the lower court adopted comparative negligence in the face of nearly a century of firmly preclusive precedent. Such adoption was held an abuse of discretion. In the instant case, there is no holding by this Court on any theory

of collective liability, and thus the District Court ruling violates no previous binding authority. See 9 F.L.W. 541, n.5. Petitioners' assertion that the ruling somehow violates related precepts of Florida products liability law is unwarranted. As will be demonstrated in this brief, the District Court's ruling is fully in accord with the conceptual development of the law in Florida. Since the ruling below contravenes no established authority and squares fully with the related precedent, the District Court complied fully with the admonition of Hoffman.

II. A Cause of Action Founded on Collective Liability Should Be Adopted in Florida.

A. Asbestos Litigation - Legal and Factual Background

In Borel v. Fibreboard Paper Products Corporation, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 896 (1974), manufacturers of asbestos containing insulation products were held judicially liable, for the first time, to an insulation worker injured as a result of exposure to asbestos fibres. In this landmark decision, the Fifth Circuit struggled with difficult issues of duty to warn, assumption of risk, causation in fact, apportionment of damages and statute of limitations. In the end, it concluded that asbestos litigation requires, in essence, the application of established principles of tort law to the new legal context of "occupational disease."

> In reaching our decision in the case at bar, we recognize that the question of the applicability of Section 402A of the Restatement to cases involving "occupational diseases" is one of first impression. But though the application is novel, the underlying principle is ancient. Under the law of torts, a person has long been liable for the forseeable harm caused by its own negligence . . . . Where the law has imposed a duty, courts stand ready in proper cases to enforce the rights so created.

Borel, 493 F.2d at 1103 (emphasis added).

In the shadow of Borel, courts across the country have undertaken the difficult, but necessary, task of adjusting and applying historical tort doctrine to the modern reality of occupational disease. The inherent flexibility of the tort system to embrace the novel questions raised in asbestos litigation has been demonstrated in state after state. See, e.g., Karjala v.

Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1974); Nolan v. Johns-Manville Asbestos & Magnesia Materials Company, 74 Ill.App.3d 778, 392 N.E.2d 1352 (1979), affirmed, 85 Ill.2d 161, 421 N.E.2d 864 (1981); Louisville Trust Co. v. Johns-Manville, 580 S.W.2d 497 (Ky. 1979); Harig v. Johns-Manville Products Corp., 284 Md. 78, 394 A.2d 299 (1978). Indeed, the Florida courts have recently resolved several important issues arised in the context of asbestos and other occupational disease litigation. See, e.g., Universal Engineering Corp. v. Perez, ___ So.2d___ (Fla. 1984), 9 F.L.W. 189 (Case No. 66,152, decided May 17, 1984); Dombroff v. Eagle-Picher Industries, Inc., ___So.2d ___ (Fla. 3rd DCA 1984) 9 F.L.W. 1319 (Case No. 83-2276, decided June 12, 1984); Brown v. Armstrong World Industries, 441 So.2d 1098 (Fla. 3rd DCA 1983); Villardebo v. Keene Corp., 431 So.2d 620 (Fla. 3rd DCA 1983).

In the instant case, this Court is presented with the opportunity to further adopt traditional tort precepts to the reality of modern-day occupational injury. The long standing doctrine of alternative liability as codified in Section 433B of the Restatement (Second) of Torts and modified by the California Supreme Court in Sindell v. Abbott Laboratories, is before this Court for consideration. Although it may be tempting, at times, to abandon legal theory in the face of perceived practical difficulties, this Court must not lose sight of the factual underpinnings giving rise to the problem of establishing legal causation (i.e. product identification) in asbestos litigation.

Asbestosis and mesothelioma are asbestos releated

diseases that manifest long after actual exposure to asbestos containing products. See, e.g., Brown; Borel.[2] Because of the long latancy period characteristic of asbestos disease, and because asbestos products, once removed from their cartons are virtually indistinguishable as to brand, tremedous problems concerning manufacturer identification typically arise in asbestos litigation. In some cases, the plaintiff never sees the actual carton containing manufacturer identification. And in many instances, even if the actual carton has been viewed, the passage of ten to forty years after exposure often renders unsure the plaintiff's recollection of the actual product used. Moreover, as in the present case, many asbestos workers perform what is known in the trade as "rip-out" work which involves removing old asbestos materials from pipes and other fixtures. This operation creates dustier conditions than the process of applying new asbestos products. Nevertheless, it is impossible to identify the precise producers of the old asbestos materials removed during rip-out because the products are completely void of distinctive manufacturer markings. Thus, asbestos workers are often left in the anomalous position of having spent a lifelong career exposed to a variety of products which have caused them physical harm, yet the identity of the injurious product eludes verification.[3]

2. For a thorough discussion of the medical aspects of asbestos diseases, see, Comment, Asbestos Litigation: The Dust Has Yet to Settle, 7 FORDHAM URBAN L.J. 55 (1978).

3. The impossibility of exacting precise product identification in asbestos cases is even more pronounced in mesothelioma death cases, where the sole means of identifying products is by testimony of surviving co-workers, if available. Thus, in asbestos litigation, the more serious the injury, the less likely product identification will be available.

Further, even where an asbestos worker can positively identify every product to which he was exposed, the unique nature of asbestos diseases frustrates his efforts to establish legal causation. For, as several courts have recognized, there is no "magic moment" when asbestosis or mesothelioma occurs. E.g., Karjala; Brown; Hardy v. Johns-Manville Sales Corporation, 509 F.Supp. 1353 (E.D. Tex. 1981), rev'd on other grounds, 681 F.2d 334 (5th Cir. 1982). As a result, asbestos manufacturers avail themselves of the defensive argument that despite product identification, plaintiff has failed to isolate the precise causative agent of his disease. When they succeed, the plaintiff is completely stripped of his legal remedy. See Hardy at 1358.

These precise obstacles to product identification and legal causation have prompted courts across the country to allow plaintiffs to go forward with a cause of action based on collective liability when, through no fault of their own, they cannot determine the manufacturers of the products which caused them harm. E.g., Abel v. Eli Lilly and Company, ___Mich.___,343 N.W.2d 164 (1984); Collins v. Eli Lilly Co., 342 N.W.2d 37 (Wis. 1984); McElhaney v. Eli Lilly Co., 564 F.Supp. 265 (D.S.D. 1983); Bichler v. Eli Lilly and Company, 55 N.Y.2d 571, 436 N.E.2d 182 (N.Y. 1982); Hardy v. Johns-Manville Sales Corp., supra; Sindell v. Abbott Laboratories, supra; Ferrigno v. Eli Lilly & Co., 175, N.J. Super. 551, 420 A.2d 1305 (1980); Hall v. E.I. DuPont de Nemois and Company, Inc., 395 F.Supp 353 (E.D. N.Y. 1972). In each of these cases, a form of collective liability is imposed based on modified application of the long standing common law

doctrines of alternative liability and concert of action. Much like in the states adopting collective liability above, Florida law provides strong support for applying collective liability in cases where product identification is rendered impossible.

B. Florida Law Provides Strong Support for the Imposition of Collective Liability.

When this Court adopted strict liability in tort[4] in the area of product liability, it set forth the policy underlying the rule and the matters to be proven.

> The user should be protected from unreasonably dangerous products or from a product fraught with unexpected dangers. 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 users' injuries or damage.

West v. Caterpillar Tractor Company, Inc., 336 So.2d 80, 86-87 (Fla. 1976). Thus, this Court recognized the necessity of fashioning new theories of liability in order to serve the laudable public policy of protecting consumers from the hazards of modern products. Accordingly, it removed the burden from the user of proving specific acts of negligence and removed the defense of privity and contributory negligence in the strict liability context. Id. at 90.

4. Significantly, the instant case is proceeding under a simple negligence theory and not under strict liability in tort. This is because Judge Harold Vann struck all plaintiffs' counts of strict liability in the asbestos cases consolidated before him. See, Order Granting Defendant Celotex Corporation's Motion to Strike and Denying Said Defendant's Motion to Dismiss, dated July 15, 1982. (A.1). Respondents cite West, however, because it is this Court's best articulation of the policy underlying products liability law. Moreover, Respondents recognize that a similar test of legal causation is required under simple negligence theory. W. PROSSER, LAW OF TORTS, §41, (4th Ed. 1971).

In the instant case, it is not the wrongful activity of the manufacturers that evades proof, but the identification of the precise tortfeasor. "The manufacturer's relationship to the product in question" exists, as required by West, but that relationship is of a general, rather than specific, nature. The plaintiff may identify a group of manufacturers that represent a substantial share of the market producing the types of products to which he was exposed. He cannot, however, identify with certainty the precise manufacturers that have caused his injury.

Florida courts have long recognized that where joint tortfeasors combine in producing one indivisible injury, alternative theories must be applied in order to protect the plaintiffs right to recovery. Although the theory of liability applied may not always be apparent, unquestionably Florida courts will allow an injured party to file suit against two or more defendants without definitively proving the responsible party or parties. The burden then shifts to the defendant to exonorate itself or else to share, joint and severally, in the compensation of injury. Generally, this result is reached through the application of the traditional doctrines of concert of action or alternative liability.

(i) Concert of Action

The doctrine of concert of action is well accepted and integrated into the common law of Florida. See Symmes v. Prairie Pebble Phosphate Co., 63 So. 1 (Fla. 1913); Standard Phosphate Co. v. Lynn, 63 So. 429 (Fla. 1913); Skroh v. Newby, 237 So.2d 548 (Fla. 1st DCA 1971). See discussion Morton v.

Abbott Laboratories, 538 F.Supp. 593, 596 (M.D. Fla. 1982).

Skroh provides a text book example of cause of action based on concert of action. In that case, the plaintiff established that the two defendants were traveling in vehicles alongside one another at the speed of 90 miles per hour when one defendant's automobile struck the motorcycle of plaintiff's decedent. The court held that the jury could reasonably infer from the defendants' conduct that they had a plan to race one another. Consequently, it ruled that the plaintiff could proceed against both defendants despite the fact that the accident directly involved only one participant in the race. Skroh at 550.

In proceeding under a classic theory of concert of action, the plaintiff must prove, either directly or through inferrence, a "common plan or design to commit a tortious act." W. PROSSER, LAW OF TORTS §41 (4th ed. 1971). Nevertheless, it is not the elements of proof in establishing concert of action that is significant, but the analysis of the courts that is instructive and directly applicable in the instant case. Under a theory of concert of action, two or more defendants may be held jointly and severally liable for the injury to plaintiff even though, as in Skroh, the relationship of the defendants to the actual injury suffered may be of a general, rather than specific, nature. Thus, Florida courts will apply a broader theory of causation where joint tortfeasors have acted together to cause injury. Plaintiff need not establish a precise relationship between injury and the wrongful actor under this circumstance.

It is reasoning similar to this that pursuaded the

highest court of New York to extend collective liability under a concert of action theory to the manufacturers of DES where specific manufacturer identity could not be established by the plaintiff.

> Products liability law cannot be expected to stand still where innocent victims face "inordinately difficult problems of proof" [citation omitted]. Thus, courts as well as commentators have proposed means which permit recovery by prenatally exposed DES daughters. The proposals involve the application of already accepted tort principles of "concerted action" and "alternative liability" to the unusual DES fact pattern as well as resort to more novel theories of "enterprise" and "market share liability." [Footnote omitted.]

Bichler v. Eli Lilly and Co., 436 N.E.2d at 185 (N.Y. 1982). The New York court then concluded that collective liability on a joint and several basis could be asserted against manufacturers of DES where "consciously parallel conduct" is alleged. Bichler at 188. Florida law provides similar precedent. Symmes; Lynn; and Skroh.

(ii) Alternative Liability

When a plaintiff establishes the elements of concert of action, each defendant is conclusively presumed to be a cause-in-fact of plaintiff's injury. Under the theory of alternative liability, however, defendants are subject to a lesser inference. Under alternative liability, defendants face a rebuttable presumption of causation.

In its classic form, alternative liability is exemplified by the case of Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (Cal. 1948) and has been codified in Restatement (Second) of Torts §433B (1965). In Summers, two hunters negligently shot in

the direction of the plaintiff and one actually struck the plaintiff in the eye. Plaintiff, through no fault of his own, could not identify which hunter was responsible for his injury. If he was required to proceed under a strict theory of causation, it was clear that each negligent actor would escape liability. Rather than allow the plaintiff to suffer without a remedy, the court held that the plaintiff could proceed against both parties, and the burden was shifted to the wrongdoers "each to absolute himself if he can." Summers at 4. Thus, once again, when the plaintiff could not identify the precise tortfeasor which caused him harm, he was able to proceed, on the basis of joint and several liability against those with a general causal relationship to the injury suffered.

As recognized by the Third District Court of Appeals in this case, a "casebook example" applying an aspect of alternative liability is pollution cases where defendants have combined to create an indivisible injury. 9 F.L.W. 540. The case of Landers v. East Texas Salt Water Disposal Co., 248 S.W.2d 731 (Tex. 1952), is illustrative. In Landers, an oil company and a salt water disposal company each owned pipelines running near the plaintiff's land. At about the same time, each pipeline broke, pouring oil and salt water onto the plaintiff's land and into his lake. The plaintiff sought to hold the defendants liable for the entire harm. In upholding the joinder of the two defendants, the Supreme Court of Texas noted that prior cases

> seem to have embraced the philosophy . . . that it is better that the injured party lose all of his damages

> than that any of the several wrongdoers pay more of the damages than he individually and separately caused. If such has been the law, then from the standpoint of justice it should not have been; if it is now, it will not be hereafter.

Landers, 248 S.W.2d at 734.

The court then explained that where the tortious acts of two or more wrongdoers combine to produce an indivisible injury, each wrongdoer may be joined and will be held jointly and severally liable for plaintiff's damages. Id.

This "indivisible injury" rule was recognized in the area of asbestos litigation by the Fifth Circuit in Borel.

> [W]here several defendants are shown to have each caused some harm the burden of proof (or burden of going forward) shifts to each defendant to show what portion of the harm he caused. If the defendants are unable to show any reasonable basis for division, they are jointly and severally liable for the total damages.

Borel, 493 F.2d at 1094.

The Supreme Court of Florida has long recognized this theory of liability and has relaxed stringent requirements of proving causation where tortfeasors combine to produce one injury:

> It is a general principle of negligence, where an injury results from two separate and distinct acts of negligence committed by different persons operating concurrently, that both are regarded as the proximate cause and that recovery can be had against either or both.

Hernandez v. Pensacola Coach Corporation, 193 So. 555, 558 (Fla. 1940). See also Jackson v. Florida Weathermakers, Inc., 55 So.2d 575 (Fla. 1951); C.F. Hamblen, Inc., v. Owens, 172 So. 694 (Fla. 1937); Feinstone v. Allison Hospital, 143 So. 251 (Fla. 1932); Booth v. Mary Carter Paint Company, 182 So.2d 293 (Fla. 2nd DCA 1966). Florida courts have repeatedly applied this rule

to cases where the injury is indivisible, but the acts of negligence are not concurrent. See, e.g., Schwab v. Tolley, 345 So.2d 747 (Fla. 4th DCA 1977); Randle-Eastern Ambulance Service, Inc. v. Millens, 294 So.2d 38 (Fla. 3rd DCA 1974); Washewich v. LeFare, 248 So.2d 670 (Fla. 4th DCA 1971); Hollie v. Radcliff, 200 So.2d 616 (Fla. 1st DCA 1967); Wise v. Carter, 119 So.2d 40 (Fla. 1st DCA 1960).

Moreover, in the context of res ipsa loquitor, Florida courts have combined the "indivisible injury" rule with the inference of negligence arising from the application of res ipsa loquitor. In Holman v. Ford Motor Company, 239 So.2d 40 (Fla. 1st DCA 1970), a Florida plaintiff pled a cause of action based on res ipsa loquitor against two defendants where the negligence of either of the two parties could have caused the accident at issue. In holding that the plaintiff could proceed on such a theory, the Florida court reasoned that "res ipsa loquitor is not confined to a fact situation where there is only one possible defendant whose negligence could have caused the injury." Id. at 44. In reaching its decision, the Holman Court relied heavily on the "well written decision" of the Fifth Circuit in Demet v. Olin-Mathieson Chemical Corporation, 282 F.2d 76 (5th Cir. 1960).

The Demet case has very broad analytical reach. In Demet, a plaintiff was injured when a dynamite charge detonated near him. The manufacturers of both component parts of the charge, the electric blasting cap and the gelatin dynamite, were joined as defendants. Expert testimony revealed that either component could have been defective; however, it could not be

established with certainty which component actually caused the blast. The Fifth Circuit held that plaintiff was entitled to a rebuttable presumption of negligence as to both defendants. It reasoned that it was not necessary that "one particular force must be severed out, identified and held as a matter of law to be the cause of the premature explosion." Id. at 82. Rather, plaintiff was entitled to presume that each defendant was a cause-in-fact of plaintiff's damages in its entirety. Thus, under the rule of "indivisible injury" the defendants were jointly and severally liable unless they could overcome the presumptions established.

The holdings of Holman and Demet reflect the rule of Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944) which, together with the rule of Summers v. Tice, supra, form the basis of the California Supreme Court's holding in Sindell. See Sindell at 929. In Yabarra, the plaintiff awoke after an operation with paralysis which had not been present prior to surgery. Although it appeared that the injury had been caused by negligent conduct during the operation, plaintiff could not identify the wrongdoer or establish the wrongful conduct. He joined a group of six doctors and nurses as defendants, each of whom had exercised control over the instrumentalities which most likely caused plaintiff's injury. Rather than allow plaintiff to go without a remedy, the California Supreme Court relied on the doctrine of res ipsa loquitor and imposed rebuttable presumptions on the issues of both negligence and causation as against each defendant. The effect of these presumptions was to shift the burden to each

defendant to explain his conduct in the operating room.

Clearly, the Ybarra-Demet-Holman line of cases go much further than the theory of collective liability currently before this Court for consideration. Under these multiple defendant res ipsa loquitor cases, inferences of both tortious conduct and legal causation are applied affecting a form of liability without fault. Respondant does not ask the Court to go as far as this precedent would allow. Under a theory of collective liability, plaintiff continues to bear the burden of proving tortious conduct on the part of each defendant manufacturer. Only when wrongful conduct is established does the burden shift to the defendants to prove that they did not cause plaintiff's injury. Instead of bearing the weight of a double presumption, defendants need only contend with the inference of causation when the precise causative agent cannot be identified.

A discussion of the broad reach of Florida precendent under both concert of action and alternative liability is important, however, because it forms the basis of any theory establishing collective industry-wide liability. See, e.g., Note, Proving Causation in Toxic Torts Litigation, 11 HOFSTRA L.REV. 1299 (1983); Annot, 22 A.L.R. 4th 183 (1983); Comment, DES and a Proposed Theory of Enterprise Liability, 46 FORDHAM L.REV. 963 (1978). Clearly, Florida law encompasses both concert of action and alternative liability as viable precepts of tort law. Thus, the doctrinal foundation exists in Florida for the adoption of collective liability where the precise manufacturers of the harmful products at issue cannot be identified by the plaintiff.

C. The Application of Collective Liability in Cases Involving Chemical Injury.

In Dombroff v. Armstrong Cork Company, Case No. 79-14048(12), Judge Charles D. Edelstein, Acting Circuit Court Judge for the Eleventh Judicial District in and for Dade County, Florida, adopted a form of collective liability based on market share in an asbestos death case pending before him. See Dombroff v. Armstrong Cork Company, Order on Motion for Summary Judgment, August 3, 1981. (A.3-15).[5]

> The manufacturers, having unleashed a dangerous product, may be liable to those likely injured by its products in proportion to its share of the relevant market in which plaintiff was injured, taking into consideration the unique nature of asbestos discussed above. Plaintiff must join those manufacturers of a substantial share of asbestos which plaintiff's decedent might have been exposed to during 1941-1945 at similar facilities. Sindell, supra at 937. The defendant must exonerate itself or contest apportionment with its co-defendants. Of course each defendant has the opportunity to interplead other, possibly responsible manufacturers.
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> . . . .
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> Plaintiff need not prove that the precise product of each defendant actually caused the injuries nor must she prove that exposure to asbestos can cause them. (See C.A. HARDY, supra III.) Once plaintiff meets her burden, the defendant must come forward with sufficient evidence to demonstrate it did not cause the injury.
>
> . . . .
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> The burden of apportionment among defendant is theirs.

Dombroff, Order at pp. 10-11, (A.12-13).

5. The Order adopting market share liability was later vacated by Judge Harold Vann when the case was transferred to his court. See Dombroff v. Armstrong Cork Company, Order dated May 29, 1982. (A.2). Judge Edelstein, however, proceeded on the theory of market share the entire time the case was in his court.

In so holding, Judge Edelstein relied on three important cases applying various forms of collective liability in the context of chemical injury --- to wit: Hall v. E.I. DuPont de Nemours, 345 F.Supp. 353 (C.D.C. N.Y. 1972) (blasting caps); Hardy v. Johns-Manville Sales Corporation, supra (asbestos); and Sindell v. Abbott Laboratories, supra (DES). By combining the rationale of Hall, Hardy and Sindell, Judge Edelstein refined a theory of market share/collective liability specifically tailored to asbestos litigation. Significantly, and quite fortuitously, he also astutely addressed important issues raised by Judge Nesbitt in his dissent in the present case. The precedent relied on in Dombroff and the issues raised in Judge Nesbitt's dissent are addressed in turn.

(i) Hall v. E.I. DuPont de Nemours

A form of collective liability termed "enterprise liability" was adopted by a New York court in Hall. In that case, plaintiffs were thirteen (13) children injured by the explosion of blasting caps in twelve (12) separate incidents which occurred in ten (10) different states between 1955 and 1959. The defendants were six blasting cap manufacturers and their trade association. Plaintiffs could not identify the particular manufacturer causing injury in each case. Thus, they joined virtually the entire blasting cap industry in the United States alledging that the established industry practice of omitting a warning on blasting caps and of failing to take other safety measures created an unreasonable risk of harm, resulting in injuries to the plaintiffs.

The Hall court found that all of the defendants could be held liable under a joint liability hybrid, which contained strains of both concert of action and alternative liability. It held that a showing of the collective conduct of the explosives industry as a whole in failing to warn users of forseeable risks involved in the use of blasting caps was sufficient to raise a rebuttable presumption of causation against each defendant. Thus, as in the Florida precedent discussed above, it shifted the burden of proof to each defendant to exonerate itself, or else be held joint and severally liable for plaintiffs' injuries. Recognizing that "[j]oint tort liability is not limited to a narrow set of relationships and circumstances," Id. at 371, the court held:

> Plainitffs do not have to identify which one of the defendant-manufacturers made each injury-causing cap. To impose such a requirement would obviate the entire rule of shifting the burden of proving causation to the defendants.
>
> . . . .
>
> If plaintiffs can establish by a preponderance of the evidence that the injury-causing caps were the product of some unknown one of the named defendants, that each named defendant breached a duty to care owed to plaintiffs and that the breaches were substantially concurrent in time and of a similar nature, they will be entitled to a shift of the burden of proof on the issue of causation.

Hall, 343 F.Supp. at 379-80.

In this way, the Hall court combined the concert of action theory of parallel tortious conduct with the alternative liability presumption of causation.

(ii) Sindell v. Abbott Laboratories

While the Hall theory of collective liability stressed concert of action as its primary justification, the California Supreme Court in Sindell formulated the doctrine of "market share liability" on the alternative liability line of cases. In Sindell, plaintiff alleged that she had been exposed in utero to DES and that such exposure had caused her injury. Since she could not identify the manufacturer (or manufacturers) of the drug responsible for her injury, plaintiff joined a group of DES manufacturers and urged that each should be held jointly and severally liable for her damages.

The Supreme Court of California refused to apply the doctrine of concert of action or the Hall theory of enterprise liability. Instead, it modified the rule of alternative liability and utilized it to shift the burden of proof on the issue of causation from the plaintiff to those manufacturers that represented a "substantial share" of the DES market at the time and place that the plaintiff was exposed to the drug. Sindell at 931, 937. It further ruled, as a corollary, that damages be apportioned among the defendants on the basis of each defendant's share of the relevant DES market. Id. at 938.

As a matter of policy, the Sindell court found that the manufacturers were in a superior position to the injured plaintiff in bearing the cost of damages which were caused by their products. More importantly, it reasoned that because the manufacturers are better able to warn of a product's harmful effects - and have a legal obligation to do so - holding them liable for

failure to warn creates a powerful incentive for product safety. Sindell at 936. In the court's view, a theory of market share liability best advanced justice in the situation where a plaintiff, through no fault of her own, could not identify the manufacturers of the product that harmed her. "As between an innocent plaintiff and negligent defendants, the latter should bear the cost of injury." Sindell at 936.

Since the California Supreme Court's holding in Sindell, other courts have applied alternative liability and the market share theory to further refine the concept of collective liability in the context of chemical injury.

The most recent adaptation of the collective liaiblity theory was announced by the Supreme Court of Michigan in Abel v. Eli Lilly and Co., ___Mich.___, 343 N.W.2d 164 (1984). In that case a group of 180 plaintiffs exposed to synthetic estrogen in utero brought suit collectively against the manufacturers of the product. Some of the plaintiffs were able to identify the precise product which harmed them and others were not. On these facts, the Supreme Court of Michigan held that the plaintiffs could properly proceed on complaint pleading theories of both alternative liability and concert of action. The Michigan court's ruling on alternative liability is an important variation of the Sindell-type analysis and especially instructive in the case before this Court today because it (1) discusses the availability of alternative liability specifically in the context of negligence theory, and (2) addresses the issue of pleading a case based on alternative liability where product identification may actually

be established upon discovery.

In addressing the issue of negligence, the Abel court carefully reviewed the development of alternative liability from the seminal case of Summers v. Tice to its modern day applicability in indivisible injury cases. It recognized that Michigan's law (like that of Florida's), applied a form of alternative liability in holding multiple tortfeasors joint and severally liable in cases involving indivisible injury to the plaintiff. Abel at 172. Moreover, the court carefully distinguished the facts of Summers from those of the case before it. Nevertheless, it extended the policy of alternative liability and modified it to fit the reality of modern day multiple party litigation.

> Although the rationale of the alternative liability theory in Summers is not squarely applicable to this DES litigation, partly because the facts of the two cases are so distinctly different, the theory as first detailed in Summers can nevertheless be tailored to accomodate the unique facts of this case, and in fairness ought to be.
>
> . . . .
>
> We also restrict, for the time being, the use of this theory of recovery to those allegations sounding in negligence.

Abel, 343 N.W.2d at 173.

The Abel court directly addressed the issue of pleading a cause of action based on alternative liability where the plaintiff has actually identified the manufacturer of the product that injured her. On this point, the court was emphatic in protecting the plaintiff's priviledge of asserting inconsistant claims in the alternative. It held that the plaintiff need not opt for one theory or the other, but may plead both alternative liability and

liability against the identified manufacturer of the injurous product. In this regard, the court explained:

> As we have seen, the raison d'etre of alternative liability is to shift on onerous proof requirement where to do otherwise would leave an innocent plaintiff remediless. Where plaintiffs are able to identify the causation in fact of their injury, traditional tort remedies must be used to secure relief [citation omitted].
>
> Of course, pleading practices in Michigan permit the assertion of inconsistant claims [citation omitted]. Even in this situation, where proof of one claim must defeat the existence of another, the plaintiff is allowed to present both claims. The winnowing of issues and scrutiny of claims is accomplished by discovery procedures, pretrial conferences, and summary judgment motions, not through pleading technicalities. Therefore, plaintiffs' antithetical pleadings above do not warrant summary judgment relief.

Abel at 175 (emphasis added).

After clarifying these two important issues, the Michigan Supreme Court held that alternative liability would be applied where DES plaintiffs were unable to identify the manufacturer of the product that harmed them. Plaintiffs, of course, must establish every other element of their underlying cause of action. The court, however, shifts the burden of proof on causation to the defendants that have been proven to have acted tortiously. Then, "if the defendants are unable to exonerate themselves, joint and several liability results." Abel at 174.

(iii) Hardy v. Johns-Manville Sales Corporation

Hardy provides the closest factual parallel to the case at bar. In Hardy, a federal judge in the Eastern District of Texas applied the holdings of Hall and Sindell to the problem of product identification in asbestos litigation.

> The key in Hall and Sindell is a problem of proof -- the inability of the plaintiff to identify the precise causative agent. Because both courts perceive the inability to be a circumstance not of the plaintiff's making, the courts fashion a way around product identification, long recognized as part of the plaintiff's burden in proving causation in the traditional products liability action. . . . The asbestos-related cases present a similar problem; it is impossible for the plaintiff to isolate the precise exposure or identify the manufacturer's product which caused his disease. In mesothelioma, the problem of identification is largely due to its long latant period. The cumulative nature of asbestosis is basically inconsistent with the legal concept of proof of a precise causative agent.

Hardy, 509 F.Supp. at 1358 (emphasis added).

Thus, the court adopted a form of market share liability specifically engineered to relieve plaintiffs of the onerous burden of supplying proof of product identification that eludes verification. It is true that the Hardy order on market share liability was vacated by the court that authored it. See Petitioner the Celotex Corporation's Initial Brief on the Merits, p. 15. Interestingly, however, the order was not vacated because of the court's reconsideration of the merits. As the court explained, market share theory was abandoned because it "departs from traditional tort theories of recovery in Texas to an extent that the prospect of its being approved by the Fifth Circuit is not great enough to justify the expense to the litigants and the time that of necessity would be involved by the Court." Id.

The order vacating market share liability in Hardy underlines the importance of state court guidance on the issue of collective liability. Federal courts sitting in diversity cases are, of course, confined to the holdings of the highest state court in deciding new issues. Erie Railroad Company v. Tompkins,

304 U.S. 64 (1938). Thus, federal courts are restricted in their ability to modify and adopt existing state law. This fact of jurisprudence alone may well explain the apparent split of authority in adopting collective liability in chemical injury litigation. Compare, Abel v. Eli Lilly, supra (highest state court of Michigan adopts form of collective liability); Collins v. Eli Lilly, supra, (highest state court of Wisconsin adopts form of collective liability); Bichler v. Eli Lilly, supra, (highest state court of New York adopts form of collective liability); Sindell v. Abbott Labs, supra, (highest state court in California adopts form of collective liability); Ferrigno v. Eli Lilly, supra, (intermediate state court adopts a form of collective liability); Payton v. Abbott Labs, 437 N.E. 2d 171 (Mass. 1982)(highest court of Massachusetts reserves judgment on issue of collective liability) with Pipon v. Burroughs-Well come Company, 532 F.Supp. 637, 696 F.2d 984 (3rd Cir. 1982) (federal court rejects collective liability); Morton v. Abbott Labs, F.Supp. 593 (M.D. Fla. 1982) (federal court rejects collective liability); Mizell v. Eli Lilly, 526 F.Supp. 589 (D.S.C. 1981) (federal court rejects collective liability); (D.N.J.aff'd 1982).

(iv) Judge Nesbitt's Dissent

In his dissent in the instant case, Judge Nesbitt raised four points of contention with the majority opinion: (a) product identification; (b) abandonment of the causation-in-fact requirement; (c) practical consideration; and (d) policy considerations. When these issues are analyzed carefully, it becomes clear that Judge Nesbitt's concerns may be addressed and

accomodated within the context of collective liability.

(a) Product Identification

It was Judge Nesbitt's initial concern that the present case is an inappropriate one in which to address the issue of market share liability because Copeland alledged in his complaint that he could identify some of the asbestos products to which he was exposed. 9 F.L.W. 541. While it is understood that a plaintiff may not proceed to trial against unidentified manufacturers on a theory of alternative liability after having successfully proceeded against an identified product manufacturer, e.g. Lyons v. Premo Pharmaceutical Labs, Inc., 170 N.J. Super. 183, 406 A.2d 185, 190 (App. Div. 1979), that is not the issue before this Court. Judge Nesbitt failed to appreciate that the issue for consideration today is the sufficiency of plaintiff's pleadings. See 9 F.L.W. 539.

Clearly, under the Florida rules of procedure, a plaintiff may plead, in the alternative, conflicting and inconsistent claims. Rule 1.110 Fla.R.Civ.Pro. See, e.g., Bryant v. Stevens, 313 So.2d 124 (Fla. 2nd DCA 1975). Thus, the question before this court is identical to that before the Supreme Court of Michigan in Abel. The Michigan Supreme Court concluded that because Michigan's pleading practices (like Florida's) allow the assertion of inconsistent claims, plaintiffs may properly plead a cause of action based on a collective form of alternative liability and in the same complaint plead a cause against an identified manufacturer. Abel, 343 N.W.2d at 175. At the same time,

the Michigan Supreme Court cautioned:

> On the other hand, once plaintiffs prove the identity of the manufacturer of the DES product ingested, the option of alternative liability is no longer available to them.

Id. (emphasis added).

This Court too must make the important distinction between pleading, in the alternative, a cause of action based on collective liability and one against identified manufacturers, and proving a case on one or the other theory. Clearly, in the present case Copeland attempted to identify The Celotex Corporation as the manufacturer of a product to which he was exposed. See Initial Brief of Appellants, pp. 5-7, attached as Appendix to Initial Brief of Petitioner, Owens-Corning Fiberglas Corp. This identification, however, has not withstood the test of summary judgment. If the plaintiff is unable to actually prove product identification, the issue before this Court is whether he can rely on an alternative theory of collective liability. Thus this Court, like the Supreme Court of Michigan, must directly address the issue of collective liability.

(b) Abandonment of the causation-in-fact requirement.

Judge Nesbitt's second concern was that the imposition of collective liability "stretches the causation-in-fact requirement to its breaking point." 9 F.L.W. 542. Here, his concern was that the majority opinion did not properly limit the scope of potential, or assess the moral blame of the defendant. Further, he felt that the version of market share liability advanced by the majority worked to obliterate the legal distinction between liability and damages. Each of these issues may be

justly addressed within the context of a well reasoned theory of collective liability.

The scope of potential liability is properly limited under a theory of collective liability when the theory is confined to its proper function - shifting the burden of proof of causation-in-fact from the plaintiff to the negligent defendants who represent a substantial share of the market in which plaintiff was injured. Judge Edelstein addressed this problem in the Dombroff order of August 3, 1981: "Plaintiff must join those manufacturers of a substantial share of asbestos which plaintiff's decedent might have been exposed to during 1941-1945 at similar facilities. See Sindell, supra at 937." (A.12). In fact, Judge Nesbitt himself admitted that the scope of liability could be limited and "market share liability might be a bit more palatable if the plaintiffs had the burden of establishing at least some proximity to the defendants products." 9 F.L.W. 544 n.3. Certainly Judge Nesbitt would accept a limit such as that imposed by Judge Edelstein as a reasonable restriction on the scope of liability of asbestos product manufacturers.

Similarly, the requirement suggested by Judge Edelstein provides a reasonable ground for assessing moral blame. It is significant that Judge Nesbitt relies on the dissenting opinion of an intermediate appellate judge in Abel to bolster his argument that moral blame is dissipated under application of alternative liability. That dissenting argument was specifically rejected by a unanimous decision when the Abel case reached the Supreme Court of Michigan. In adopting the rule of Summers v.

Tice to the context of DES litigation, the Michigan Supreme Court reasoned:

> [H]ere, each defendant was negligent toward a plaintiff, but each defendant was not negligent toward each plaintiff. Thus, all defendants were not negligent toward each plaintiff, and each defendant could not have caused each plaintiff's injury.
>
> Although the rationale of the alternative liability theory in Summers is not squarely applicable to this DES litigation, . . . The theory as first detailed in Summers can nevertheless be tailored to accomodate the unique facts of this case, and in fairness ought to be.

Abel, 343 N.W.2d at 172-73 (emphasis in original).

The Michigan Supreme Court thus concluded that moral blame was equitably accessed under a theory of alternative liability. Moral blame in the instant case is even more closely circumscribed than in Abel. Here, because the plaintiff was repeatedly exposed to more than one asbestos product, the likelihood that he was exposed to the products of each named defendant is greatly increased.

Finally, Judge Nesbitt voiced his fear that the "majority today further obliterates the distinction between liability and damages." 9 F.L.W. 542. In this regard, he correctly states that "the basic issue here is liability, not apportionment of damages." Id. Once again, however, Judge Nesbitt's criticism of the majority view has been recognized and properly accomodated within the context of collective liability. In both Abel and the Dombroff order of August 3, 1981, courts were cognizant of the potential problem of merging liability with apportionment of damages and devised a method for avoiding the difficulty.

In Dombroff, Judge Edelstein proposed the following:

> The burden of apportionment among defendants is theirs. Since plaintiff will be required to join those who have a substantial share of the relevant market, there are no due process problems in requiring each defendant to be responsible for it's proportionate share of all the plaintiff's injuries represented by each manufacturers share of the relevant market.

Dombroff Order, pp. 11-12, (A.13-14).

Thus, he concluded that if, for example, the plaintiff joins three manufacturers each of whom have 25 percent of the market (for a total of 75 percent), each defendant is responsible for 1/3 of the plaintiff's total damages. Id. at p.8. In this way, he clearly separated the liability and damages issue within the context of market share theory - leaving the problem of apportionment as an issue to be decided among the defendants out of the context of the general litigation.

The Michigan Supreme Court in Abel adopted a more straight forward view. It applied a more traditional alternative liability theory to overcome the causation problem in DES litigation. Thus, it addressed the liability issue by shifting the burden of proof on this issue of causation to the defendants. As for apportionment of damages, it held that if a defendant could not exonerate itself, it would be held joint and severally liable for plaintiff's injury.

> In sum, alternative liability will be applied in cases in which all defendants have acted tortiously, but only one unidentifiable defendant caused plaintiff's injury. If a plaintiff brings all possible defendants into court and establishes the other elements of the underlying cause of action, the court should equitably shift the onerous burden of causation in fact to the defendants. If the defendants are unable to exonerate themselves, joint and several liability results.

Abel, 343 N.W.2d at 174.

In both Dombroff and Abel theories of collective liability were adopted and applied without unnecessarily confusing the issue of liability with that of damages. Each court recognized that it is the issue of causation that is critical and that apportionment of damages is best left to the defendants for their own determination. A similar approach, as suggested by Judge Nesbitt, would alleviate confusion in the instant case, and should be adopted by this Court.[6]

(c) Practical considerations.

The "practical considerations" raised by Judge Nesbitt addressed what he considered to be lack of definition and uniformity and problems of proof surrounding the imposition of market share liability. In fact, however, his major concern was with the practicalities of apportioning damages.

The "lack of definition" cited by Judge Nesbitt is based largely on his perception that the majority opinion merges liability with damages in fashioning a theory of market share liability. However, as discussed above, the Dombroff and Abel courts provide helpful guidance in properly severing the issue of damages from liability. Moreover, the Dombroff order sets adaptable guidelines as to what constitutes a substantial share of the relevant market. See, Dombroff Order p. 10. (A.12).

6. Delegating apportionment of damages to the defendants in asbestos litigation is further bolstered by recent developments in asbestos settlement negotiations. Major asbestos manufacturers have recently banded together as an industry to defend claims filed against them. They have reached an "Agreement Concerning Asbestos-Related Claims," referred to as "CPR." (A.16-63). Allocation of damages can be easily undertaken at the claims handling facility established under this Agreement. In fact, it is issues such as apportionment of damages that form the very reason for establishing the asbestos claims facility.

Similarly, Judge Nesbitt's perceived "problems of proof" focus on the practicalities of apportioning damages. Once again, however, if the guidance of the Abel and Dombroff courts is heeded, the "practical" problems of apportionment need not be the concern of this court. As those two courts agreed, such issues are best left to the defendants to decide among themselves.

Judge Nesbitt's perception of the lack of uniformity among the courts is also misplaced. Market share liability is an evolving application of alternative liability. The California Supreme Court in Sindell was among the first to apply the theory. See, discussion supra, pp. _____. However, the growing trend in state courts is towards an adoption of some form of collective liability in chemical injury cases. Thus Michigan (Abel), Wisconsin (Collins), New Jersey (Ferrigno), New York (Biehler), California (Sindell), South Dakota (McElhaney) and Texas (Hardy) are among the states that have struggled with the issue of proving causation in chemical injury cases and adopted some form of collective liability. It is, by and large, the federal courts that have declined to go forward on the issue. For most federal courts consider themselves Erie-bound to await the guidance of state law. See discussion, p. _____ supra, note 4.

(d) Policy considerations.

From a policy point of view, the dissenting opinion is in its broadest sense, "at war with at least the last hundred years of judicial progress." Abel, 343 N.W.2d at 172. Clearly, it is the overriding policy of the Florida courts that "the user should be protected from unreasonably dangerous products..."

West v. Caterpillar Tractor Co., Inc., supra at 86. Nevertheless, in his dissenting opinion, Judge Nesbitt raises issues of policy that merit discussion.

It is his view, for example, that the adoption of collective liability "encourages the injured party to become lazy" and gives the plaintiff the freedom to select a defendant "at random from throughout the country." Such statements, however, simply mistate the facts. In order to hold a defendant liable under any theory of collective liability, the plaintiff must first show that the defendant has acted negligently and is part of the relevant market. E.g., Sindell; Hardy; Abel. Far from encouraging slothfulness, the plaintiff must fastidously undertake discovery in an effort to establish which manufacturers produced what products in certain parts of the country at a given time. No defendant is randomly brought to the courthouse.

Furthermore, far from the suggestion of Judge Nesbitt, asbestos products, like DES, are of a relatively fungible nature. In the case of DES, the formula for the active ingredient in each product was required by the Food and Drug Administration to be the same. Ferrigno at 1311. However, the active ingredient was the only aspect of the DES product which was standardized. Drug companies produced DES under a variety of trade names and in a variety of dosages and product forms.

Although there are four commercial forms of asbestos fiber, each is virtually indistinguishable from the other by the naked eye.[7] Additionally, each of these commercial forms of

7. Those fibers which cause the most harm are microscopic. New York Academy of Sciences, Cancer and the Worker, 37 (1977).

asbestos cause disease. Special Report: Asbestos and Cancer, 92 CAN. MED. ASSN. J. 1020 (1965); cited in Comment, Asbestos Litigation: The Dust Has Yet to Settle, 7 FORDHAM URBAN L.J. 55, 58 (1978). Thus, although the asbestos producers marketed a variety of products, the "active ingredient," asbestos fibers, contained therein are as indistinguishable in asbestos products as the standardized active ingredient is in the DES products. Further, the various types of asbestos products are unidentifiable as to brand once they were removed from their cartons. Many brands of asbestos products are substantially the same in appearance with no distinguishing markings. Also, most asbestos workers who perform "rip-out" work cannot possibly identify the producers of the old asbestos materials which they remove because the materials contain no distinctive markings. Thus, clearly, the relatively fungible nature of asbestos and asbestos products presents a problem of product identification almost identical to that found in DES cases. C.f., Starling v. Seaboard Coast Line Railroad, 533 F.Supp. 183 (S.D. Ga. 1982).

Finally, although Judge Nesbitt postures that the "deep pocket" theory discourages the development of new products and places the manufacturer in the position of an insurer, in fact, the opposite is true. A collective theory of liability allows the asbestos manufacturers to spread the cost of compensation throughout the industry in those cases where no specific causative product can be identified. The industry, in turn, can regain its loss by passing the cost back to the consumers of their products. Far from insuring their products, asbestos manu-

facturers are assured they will not be brought into any suit until they have been proven to have acted negligently, and they have not been able to exonerate themselves of liability. As the Sindell court observed, an incentive for product safety naturally results. Sindell at 936.

(d) The Elements of Collective Liability as Proposed by Plaintiffs/Respondents.

Based on the foregoing, Plaintiffs/Respondents propose that this Court adopt a theory of collective liability as follows:

(i) plaintiff files suit against what he believes to be a substantial share of the manufacturers of asbestos products to which he may have been exposed;

(ii) defendants be allowed to implead third parties if there is a likelihood that plaintiff was exposed to the asbestos insulation products of such third parties;

(iii) plaintiff proves by a preponderance that each defendant was negligent in the manufacture, marketing or distribution of asbestos insulation products;

(iv) plaintiff proves by a preponderance that the disease forming the basis of his lawsuit was caused by his exposure to asbestos insulation products;

(v) plaintiff proves by a prepondernace that the asbestos insulation products of each defendant are a competent producing cause of his injury;

(vi) plaintiff proves by a preponderance the extent of

damages he has suffered;

(vii) each defendant against who plaintiff previals on Issues (iii) through (v) above be allowed to prove by a preponderance that it did not manufacture, market or distribute any of the asbestos insulation products to which plaintiff was exposed. (This issue could easily be resolved on Summary Judgment - as with the defendant manufacturer that can produce an affidavit stating that it did not manufacture asbestos products until after plaintiff was exposed. See Sindell at 930.);

(viii) each defendant failing to prevail on Issue (vii) above is held jointly and severally liable for all of plaintiff's damages.

In this way, Florida law may be best adopted to shift the burden of proof on causation to the defendant asbestos manufacturer where the plaintiff is unable to satisfactorily prove the precise tortfeasors that have caused his indivisible asbestos-related injury. It is not proposed that damages be apportioned according to market share for three separate and distinct reasons: (i) no Florida precedent exists authorizing such a division of damages, (ii) it is proof of causation and not apportionment of damages that presents an unfair obstacle in asbestos litigation, and (iii) joint and several liability was pled by the plaintiffs throughout their complaint in this cause.

CONCLUSION

WHEREFORE, based on the arguments and citations of authority cited herein, Respondents urge that this Court adopt a theory of market share liability in Florida to the extent that the theory is invoked to shift the burden of proof of causation from the plaintiffs to the defendants when the plaintiff cannot, through no fault of his own, identify the manufacturers of the product(s) that harmed him. The foregoing analysis has revealed that such a rule is based on long standing principles of tort law: concert of action and alternative liability. Both of these doctrines have been long embraced by the Florida Courts.

Respondents do not urge that this Court apply market share analysis to apportionment of damages. No Florida precedent can be cited to support such apportionment, and such has not been pled or argued by the Respondents. Moreover, it is not damages, but issues of causation that present onerous problems of proof in asbestos litigation. There is no reason to abandon the long standing rule of joint and several liability among joint tortfeasors.

Respectfully submitted,

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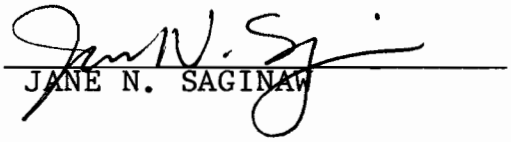
BY: 
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CERTIFICATE OF SERVICE

I hereby certify that and exact copy of the foregoing Respondents Answer Brief has been mailed or hand delivered to all counsel of record for the defense in compliance with Florida Rules of Procedure on this the 6 day of June, 1984.

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