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SUPREME COURT OF FLORIDA

CASE NO.: 65,124

DCA NO.: 81-997

THE CELOTEX CORPORATION,

Petitioner,

vs.

LEE LOYD COPELAND and
VAUDEEN COPELAND,

Respondents.

KEENE CORPORATION'S INITIAL BRIEF AS AMICUS CURIAE

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A. Introduction

This is a discretionary appeal from a decision of the District Court of Appeal, First District of Florida, rendered March 6, 1984, which reversed a lower court ruling by adopting, for the first time in Florida, a new theory of action known as "market share liability".

B. Interest Of This Party

Keene Corporation was originally a Defendant in the companion case of Copeland v. Armstrong Cork Co., Case No. 81-1369, _____ So.2d _____ (Fla. 3rd DCA 1984). Keene settled this matter but remains a Defendant in almost three hundred asbestos injury claims in Florida. The adoption of any new cause of action in claims of this type will have great impact on Keene Corporation.

C. The Case

Plaintiffs' Third Amended Complaint alleged that the Plaintiff was exposed to asbestos containing products and injured. The Complaint identified certain thermal insulation products but went on to say that Plaintiff is "unable to identify each and every hazardous exposure to insulation products that he sustained". Plaintiff thus sought recovery against the named

Defendants by virtue of their manufacture or sale of thermal insulation products alone, without regard for whether the products of a given Defendant could be shown to have caused the injury to the Plaintiff.

The trial court struck this novel cause of action, but the District Court of Appeal reversed and sanctioned a new cause of action termed the "market share theory of liability". A well-reasoned dissent by Judge Nesbitt followed the opinion.

From the decision and the accompanying certification under Article IV, §3(b)(4), this appeal followed.

ARGUMENT

I. "MARKET SHARE THEORY OF LIABILITY" SHOULD NOT BE ADOPTED.

A. The Market Share Theory Would Destroy The Concept Of Proximate Cause

> An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered. This connection usually is dealt with by the courts in terms of what is called 'proximate cause'. . . W. Prosser Law of Torts §41

So begins Prosser's discussion of proximate cause, one of the oldest and most venerable concepts in the law.

The market share theory does violence to the concept of proximate cause by permitting a plaintiff to recover from a defendant, even though there is no showing that its conduct harmed that particular plaintiff.

When proximate cause is gone, fault and moral blame disappear. As stated by Judge Nesbitt in the dissent in the case below:

> [T]he Sindell Theory dissipated the moral blame element of the causation requirement by dispensing with a notion that the actual wrongdoer be before the

> court and demanding only that the defendants be tortfeasors. The fallacy of such a theory [is that] proof of damage becomes a substitute for proof of liability. Slip Opinion at 18-19.

When fault and moral blame are gone, a defendant becomes not a potential tortfeasor but a mere insurer. A Plaintiff need not prove liability, only damages. Without agreement of the parties or the payment of insurance premiums, the defendants have under written all possible claims of all possible plaintiffs.

II. MARKET SHARE LIABILITY IS AN IMPROPER EXCURSION INTO LEGISLATION.

The majority below has felt compelled to ignore traditional tort law in the interest of fashioning social policy. This goal, while perhaps laudable, is properly a goal for the legislature. Social policymaking of this scope requires the delicate balance of competing interests. For example, policy making decisions of this sort affect the immediate interest of industrial and construction workers; industrial employers such as shipyards, power plants, and the like; manufacturers and past manufacturers of thermal insulation materials; virtually the entire insurance industry in the state and the nation; manufacturers and past manufacturers of potentially or conceivably toxic materials, to which this theory will undoubtedly apply; and probably other groups. Only a small

fraction of these interests can be represented in the adversary process.

Furthermore, parties who should be included in any equitable solution are ignored. For example, the Federal Government's role in the use and misuse of asbestos products is enormous. Any policymaking must include the United States. See E. R. Anderson, I. C. Warshauer, A. M. Coffin, The Asbestos Health Hazards Compensation Act, A Legislative Solution to a Litigation Crisis. 10 J. Legis. 25 (1983).

In contrast, the legislative process traditionally provides representation to diverse groups, and is uniquely able to engage is social policymaking.

For example, the worker's compensation system was enacted as a departure from the focus of traditional tort law on fault and negligence in the workplace. As a compromise measure, §440, Florida Statutes, provided certain but limited worker's compensation benefits in place of unlimited but speculative tort law recoveries. However well this system comports with social justice, the drafting of §440, and the trade-offs and compromises inherent therein, were tasks of the legislature and not the courts.

Would it have been proper for this Court to "adopt" a worker's compensation system as a matter of decisional law? If

not, it is equally improper for this Court to adopt a market share occupational disease system as a matter of decisional law.

III. THE MARKET SHARE THEORY REMOVES THE QUESTION OF LIABILITY.

The market share theory steals a base and equates damages with liability. What would be left to try in a market share case?

In ordinary tort cases, including asbestos injury cases, the focus in liability is on the Defendant's conduct or upon the defect in the product. A Defendant may be negligent for failure to warn, or for negligent manufacture or design. A product is defective if it is unreasonably dangerous to users or consumers.

In the asbestos injury context, the usual thrust of plaintiff's complaint is that a defendant failed to warn of the dangerous propensities of asbestos, after it knew or should have known of the danger. In the Complaint in the instant case, this is clearly the central allegation.

But not all defendant asbestos suppliers and manufacturers issued the same type of warnings, manufactured the same type of products, or even had access to the same type of knowledge. Furthermore the dates of warning and the dates at which medical information was received varied among defendants.

Assume for the purposes of argument that in a given case a manufacturer conclusively establishes that it issued a warning on all products before a given plaintiff could have come into contact with any of its asbestos products. In an ordinary asbestos injury case, this contention, if believed by the jury, would exonerate the defendant. However, does it have any application whatever to a market share case? Under the theory the majority adopts, both liability and damages hinge on market share:

> [I]n an asbestos case, each tortfeasor's liability would, just as under the §433B(3) approach, be apportioned according to his percentage share of the total market. (Slip Opinion at 13).

This eliminates wholly the question of conduct. Under this reasoning, the question of when or how a warning was affixed is simply irrelevant.

To reduce this to the absurd, assume for a moment a "perfect" defendant who proves to a jury that adequate warnings were affixed immediately upon the acquisition of the first shred of knowledge concerning the danger to field users of the product. Let us assume that a jury has answered a special interrogatory that this defendant has been guilty of no negligence and that its products are not defective. Again, this would be irrelevant as well.

When such "irrelevant" concerns as negligence, defect and causation are eliminated, a products liability trial becomes an administrative claims-adjustment procedure against unwilling, noncontractual insurers.

IV. MARKET SHARE LIABILITY IS NOT AN EXTENSION OF EXISTING TORT LAW.

Market share liability is a quantum leap from existing tort law. It cannot be explained through traditional concepts of alternative liability, concert of action, apportionment of damages between known tortfeasors, or "enterprise liability".

A. The Alternative Liability Theory Does Not Permit Courts To Shift The Burden Of Proof To A Large Number of Defendants, None Of Whom May Have Been Responsible For The Injury.

The principal progenitor of the market share theory is the concept of alternative liability as expressed in Summers v. Tice, 33 Cal.2d 80 (1948). In Summers v. Tice, plaintiff was shot while hunting with two companions, both of whom shot in plaintiff's direction while firing at quail. The evidence established that both of the hunters were negligent since they discharged their shotguns at the same time in plaintiff's presence and direction without looking to see what might be in the line of fire. The culpable hunter, though unknown, was necessarily one of the two companions. Under the limited factors

of the case, where the only possible wrongdoers were unquestionably before the court, the California Supreme Court concluded that the burden of pinpointing the source of the injury-causing shot could be shifted to the defendants.

The principle has been adopted in Restatement (Second) of Torts, §433B(3):

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one caused it, the burden is upon each such actor to prove that he has not caused the harm.

For alternative liability to be consistent with the requirements of proximate cause, it is necessary that the harm be caused by one or more of the Defendants who are before the Court. Thus, alternative liability following Summers v. Tice is applicable only when all of small number of wrongdoers are before the court. See e.g. Restatement (Second) of Torts §433B, Comment (h): "the cases thus far decided in which the rule stated in subsection (3) have been applied all have been cases in which all of the actors involved have been joined as defendants."

In fact, in another hunting case, where all of the hunters were not before the court, the alternative liability theory has been held inapplicable. In Shunk v. Bosworth, 334

F.2d 309 (6th Cir. 1964), plaintiff, a hunter, was struck by buckshot; four shots had been fired. The identity of the hunters firing the first three shots was known, but not the identity of the hunter firing the fourth shot. Plaintiff, admitting there were other hunters in the area, sued all the members of his hunting party. In affirming a directed verdict in favor of the defendants, the court held:

> In order for the jury to find that one or both of the defendants were guilty of negligence. . . they would be obliged to disregard all of the testimony. . . reconstruct an imaginary case of unproved facts, and, as a result of a guess, conclude that, because there was an injury to the plaintiff, one of the defendants inflicted. . . 334 F.2d at 312.

The instant case is more aligned with Shunk v. Bosworth than with Summers v. Tice, because it cannot be said that all of the tortfeasors are before the Court. A 1981 survey by The Asbestos Litigation Reporter reveals over three hundred and fifty defendants in asbestos litigation nationwide, of which only a small fraction are represented in this case (see Exhibit "A" attached).

B. The Concerted Action Theory Does Not Permit Courts To Find Defendants Liable Who Have No Connection Whatsoever With The Injury Causing Event.

The "concerted action" theory is an extension of ordinary tort law which might at first glance provide theoretical

support for market share liability. However, the concerted action theory cannot support the market share principle.

The concerted action theory is referenced in §876 of Restatement (Second) of Torts:

> For harm resulting to a third person from the tortious conduct of another, a person is liable if he. . . (b) knows that the others conduct constitutes a breach of duty and gives substantial assistance or encouragement to the others so as to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

The official comment on clause (b) of §876 states in part that "although a person who encourages another to commit a tortious act, may be responsible for other acts by the other. . . ordinarily he is not liable for other acts which, although done in connection with the intended tortious act, were not foreseeable by him. . ."

The essence of the concert of action theory is that the Defendants must act "in pursuance of a common plan or design to commit a tortious act. . . ." See W. Prosser, Law of Torts (4th Ed. 1971) §46 at 292.

There is nothing before the Court to permit application of the concert of action theory in asbestos litigation. The

authors of the Restatement of Torts recognized that the standard of substantial assistance or encouragement was not appropriate to impose secondary liability under §876 in complex situations involving large groups of individuals. In the Official Comment to §876(c), the author stated:

> In a large undertaking to which the services of many people contribute, the contributions to the enterprise of one individual may be so small as not to constitute substantial assistance within the meaning of the rule stated in this section. Thus a workman who tortiously excavates for the foundation of one of a series of buildings to be used by a manufacturing plant is not necessarily a co-tortfeasor with other workmen simultaneously tortiously excavating for other buildings upon the same premises.

C. Apportionment Of Liability Is An Incorrect Theoretical Basis For Market Share Liability.

The majority based its analysis on an "apportionment of damages" section of the Restatement (Second) of Torts, §433B(2):

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

As Judge Nesbitt stated in the dissent, however, the section "contemplates the situation where two or more tortfeasors

actually harm the plaintiff, and the only difficult question is how much harm each has caused. . . ." (Slip Opinion at 19).

> In the present case, it is not clear that each of the defendants has injured the plaintiff. Thus, unlike the cases considered under §433B(2), the basic issue here is liability, not apportionment of damages. By using this section, the majority has confused plaintiff's inability to allocate damages with his inability to prove liability. (Id.)

D. "Enterprise Liability" Is Not A Satisfactory Basis For Market Share Liability.

Enterprise liability is a loosely-defined theory first seen in Hall v. E. I. DuPont Nemours Co., 345 F.Supp. 353 (E.D. N.Y. 1972).

The major factor in this theory centers on the activity of the Defendants as a group in the manufacture of an identical product. The similarity of the product in its production and the inability of the Plaintiff to identify the maker of that product leads to a shifting of the burden of proof to the Defendants to prove their product did not cause the injury. In Hall, the defendants were, through a trade association, engaged in a jointly controlled concerted activity in the promulgation of a clearly negligent, uniform, industrywide standard of producing

and labeling blasting caps. In Hall, the enterprise liability theory was applicable only to industries composed of a small number of units, manufacturing identical products. The asbestos products manufactured by the 350 manufacturers were not identical in type of product, content of asbestos fiber or use. This was a major reason asbestos injury claims were found inappropriate for multidistrict litigation. In Re: Asbestos & Asbestos Insulation Material, 431 F.Supp. 906 (J.P.M.L. 1977).

V. PRESCRIPTIONS FOR THE APPLICATION OF THE MARKET SHARE THEORY.

If this Court is predisposed to adopt the market share theory notwithstanding the arguments made above, then this Court should consider giving guidance to the lower courts who must struggle with the application of this new approach.

A. Scope Of Application: Market Share As A Sword AND A Shield.

As stated above, the market share theory unfairly deprives the Defendants of their right to contest proximate cause and makes them virtual insurers of the health of the Plaintiff. This unfairness is magnified, however, if Plaintiff can pick and choose among his legal theories. Plaintiff should not sue defendants under ordinary theories of negligence and then, if unsuccessful against some or all, fall back upon market share

liability against those who have successfully defended. This permits a plaintiff to have his cake and eat it too.

The majority in the case below clearly did not intend this result. In permitting the market share theory to go forward with only a "substantial percentage" of the industry, the court warned: "By joining less than 100% of the market, however, a plaintiff has already limited his recovery to less than 100% of the total damages." (Slip Opinion at 10). This is inconsistent with the proposition that the plaintiff could recover 100% of his damages from any one member of the asbestos industry under traditional theories of causation and attendant joint and several liability.

In fact, the majority explained that adopting the market share approach would not result in any net increase in damages for a defendant, because its chance to escape liability in a particular case on product identification grounds would be lost but balanced against its right to have damages apportioned in all cases according to its market share. As the majority explained:

> [I]f a manufacturer supplied seven percent of the entire production of the defective product it would bear seven percent of the total liability to a given plaintiff. If identification could be made in all asbestos cases, of course, it follows that this manufacturer would be a defendant in approximately seven percent of all asbestos cases.

> Under market share liability this manufacturer would be joined in all cases in which identification could not be made, but liable for only seven percent of the total damages in each case. Although the correlation cannot be perfect, it is close enough to satisfy considerations of fairness to all parties.

If this Court adopts the market share theory and in addition permits Plaintiff to pick and choose among theories, then adoption of this theory can do nothing but increase the liability of a Defendant to intolerable levels. This Court must ensure that Defendants do not remain jointly and severally liable for potentially 100% of the damages in each case where identification could be proven (the status quo) and in addition for their market share of damages in all those cases where identification is not shown to their product. This result would be double recovery for the Plaintiff.

Consider the application of the worker's compensation system, another system designed to achieve social policy goals. Under worker's compensation, both workers and employers are given compromises. For workers, large, speculative verdicts against employers are traded for certain, scheduled benefits. For employers, open-ended tort liability is traded for limited liability without fault.

In the market share case, the plaintiff gives away nothing but gains a virtual certainty in his tort case, as no

defendant would be permitted to defend on causation ground. What is the trade-off for defendants? If the system is to work at all, it should offer defendants a limitation of their damages in exchange for an expansion of their liability. This is recognized by the majority in both Sindell and in the case below.

However, if plaintiffs can mix their theories of action against a given defendant, this limitation of damages to the defendant's market share is illusory. For the plaintiff, the situation is no-lose: prove product identification if possible, and recover 100% from a given defendant (based on joint and several liability) AND fail to prove product identification and still be assured of a market share damage contribution from each unidentified defendant. And for the defendants, the situation is no-win: suffer either joint and several (unlimited) damages or market share damages. The only fair situation, if the market share theory is adopted, is to permit a defendant to defend on the basis of market share as well, and to apportion his liability, (whether his products are identified or otherwise) to his market share of the applicable market. Market share liability, however ill-advised, must be a two-way street: a shield as well as a sword.

VI. ANALYSIS OF THE MARKET.

The asbestos market is quite complex, and guidelines should be suggested in computing the market. Central to any

understanding of the asbestos market is the "tier" concept. There is no single asbestos market, but really a chain of distribution of asbestos beginning at the mine and ending with the ultimate thermal insulation purchaser. Recently, commentators discussing the model Asbestos Health Hazards Compensation Act explained the three-tiered structure of the asbestos market:

> Each level in the chain of distribution of asbestos is a separate market: (1) the primary market comprises the miners and suppliers of raw asbestos; (2) the secondary market comprises the fabricators of thermal insulation products which contained asbestos as one component part; and (3) the tertiary market comprises the distributors or wholesalers of thermal insulation products which contained asbestos as the component part.

These three markets should be considered in the order listed in apportioning any market share. As the commentators state:

> Asbestos was placed in the stream of commerce by the members of the primary market, the miners and importers of raw asbestos, and was incorporated without change into various products. It is well accepted in tort law that a manufacturer of a component part should be liable for any harm caused by that component. The miners and importers of raw asbestos correspond to the manufacturer in products liability law to whom retailers can pass back their liability if the

> product furnished them for sale proves defective and unreasonably dangerous.

E. R. Anderson, I. C. Warshauer, A. M. Coffin, The Asbestos Health Hazards Compensation Act, A Legislative Solution to a Litigation Crisis. 10 J. Legis 25 (1983).

Thus if this Court adopts the market share theory, 100% of the liability should rest with those who put the allegedly defective asbestos fiber on the market: the miners. If at some point in time the miners are unable to provide compensation, then, and only then, should the Court look to the next tier in the chain of distribution: the fabricators of thermal insulation products. This would place the liability, if any, where it belongs, on the producers of the allegedly defective component part. Only if the fabricators assets are exhausted in turn would the tertiary market (distributors and wholesalers) be triggered.

CONCLUSION

This Court should reject the market share theory adopted below. If this Court does adopt the market share theory, it should guarantee, for fair application of this theory, the following:

(1) the theory should be a shield as well as a sword, and no Defendant should be held liable for more than its market share, regardless of the happenstance of product identification;

(2) furthermore, any liability should follow the structure of the market: that is, miners (defining the primary market) have primary liability and pay first; if and only if their assets (including insurance coverage) are exhausted are fabricators (the second tier of the market) liable; in turn, if and only if the fabricators' assets are exhausted would the tertiary market of distributors and wholesalers be liable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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