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IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION,

Petitioner,

vs.

LEE LOYD COPELAND, et al.,

Respondents.

CASE NO. 65,124

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OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

vs.

LEE LOYD COPELAND, et al.,

Respondents.

CASE NO. 65,154

ON CERTIFICATION BY THE THIRD DISTRICT COURT
OF APPEAL OF A QUESTION OF GREAT PUBLIC IMPORTANCE

PETITIONER THE CELOTEX CORPORATION'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, The Celotex Corporation, a defendant in the trial court below and the appellee in the Third District Court of Appeal, is referred to as "Celotex".

Respondent, Lee Loyd Copeland, a plaintiff below and appellant in the Third District is referred to as "Plaintiff". Since Mr. Copeland's wife's claim is derivative her position is not distinguished from his in this brief.

References to the record on appeal in the Third District are designated by the prefix "R", except for the Plaintiff's deposition (found at R 748-1208), designated by the prefix "Depo." References to the appendix to this brief are designated by the prefix "A".

STATEMENT OF THE CASE

Plaintiff commenced his action against Celotex and numerous other defendants on May 11, 1979 (R 1). Therein and in amended complaints Plaintiff alleged that he had been injured while employed in installation and ripping out of asbestos insulation products manufactured by the defendants or their predecessors (e.g., R 1312-1331).

Plaintiff ultimately requested leave to file a third amended complaint which was granted by the trial court (R 1312, 1380). Therein Plaintiff pled:

> 20. Plaintiff alleges that he was exposed to asbestos insulation products in his occupation for many years, both as an installer and during rip-out operations. Although Plaintiff can identify several of the products he utilized, he is unable to identify each and every hazardous exposure to insulation products that he sustained. Moreover Plaintiff would show that the asbestos insulation products that he was injuriously exposed to during his work like were virtually unidentifiable as to brand name after they were removed from their original containers. In that each exposure to such products caused or contributed to Plaintiff's injuries, Plaintiff says that the doctrine of joint and several liability should be extended to apply to each Defendant herein.
>
> 21. 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 (Calif. 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 1326-7).

In 1980 Plaintiff answered interrogatories asking him to identify asbestos products to which he was exposed by stating for the most part that they were "unknown" or "undetermined as of this date". (R 328-9, 480-546). When his deposition was taken subsequently in February 1981, Copeland identified products manufactured by a predecessor of Celotex, The Philip Carey Manufacturing Company and several co-defendants (Johns-Manville, Owens Corning, Forty-Eight Insulation, Pittsburgh Corning, Combustion Engineering, H.K. Porter, Keene, Nicolet and Unarco) (Depo. 59, 66, 259-260, 265-266, 272, 288, 297, 298, 300, 337-338, 347).

Celotex had previously moved to dismiss Plaintiff's complaints and in November 1980 had filed a supplemental motion to strike and dismiss (R 672-677). The trial court specifically allowed Plaintiff's third amended complaint to be filed and stand against Celotex and accepted Celotex's supplemental motion to strike and dismiss as addressed to that complaint (R 1906). Despite the fact that Plaintiff's deposition had been taken and filed by the time Celotex's motion was considered, Plaintiff did not request leave to file a complaint specifically identifying Celotex's products, but rather advanced his version of a Sindell theory. The trial court ordered the third amended complaint dismissed with prejudice (R 1906-1907). Plaintiff did not seek a rehearing or leave to amend to specifically allege identification of Celotex's

products, but instead appealed to the Third District Court of Appeal.

Plaintiff's initial and reply briefs before the Third District Court of Appeal did not argue his Sindell theory or even cite that case, but rather, contrary to the position he had taken in the trial court, emphasized that Plaintiff had identified Philip Carey products in his deposition (see Plaintiff's initial Third District brief at p. 3, 7; reply brief at p. 1, 2, 5).

Although, as Judge Nesbitt noted in his dissent, neither side briefed the Sindell issue in the Third District, the majority authored an opinion adopting a version of market share liability for asbestos cases. Copeland v. The Celotex Corporation, ____ So. 2d ____, (Fla. 3d DCA 1984) (9 FLW 537, 543) (A 7). By its order of March 6, 1984 the Third District certified its opinion of that date as passing upon a question of great public importance. Celotex filed its petition requesting this Court to accept jurisdiction, which it did.

Although not an active party in the Celotex Third District Appeal, pursuant to Fla. R. App. P. 9.020(f) co-defendant Owens-Corning Fiberglas Corporation also petitioned this Court to review the Third District's opinion adopting market share liability, which petition was joined by Eagle-Picher Industries, Inc. Pursuant to Plaintiff's motion to consolidate, this Court in its order of April 25, 1984 consolidated

the Celotex petition (Case No. 65,124) with the Owens-Corning petition (Case No. 65,154) for all appellate purposes.

STATEMENT OF THE FACTS

In addition to the facts set forth in the statement of the case, Plaintiff's deposition testimony established that there were different types of asbestos products used for different purposes: "wet ones", "thermal cement", "insulation around refrigeration", cork that went into certain floors, a type of brown asbestos used around boilers and pipe covers, cloth containing asbestos which was placed around pipes, and different types of "white" asbestos - some that were powdery and others that were flaky white (Depo. 22, 23, 38-39, 42, 47, 113, 324-325). In the course of Plaintiff's identification of various products he had used, the descriptions themselves indicate that there were different types of asbestos products - for example, cements, block, and pipe cover (Depo. 288, 298, 300, 337-338).

Through interrogatories propounded by Plaintiff, the co-defendants' answers confirm that there were a number of different types of products containing asbestos in different amounts and that they were packaged with labels identifying the products (see answers to Plaintiff's interrogatories No. 7 and No. 58, e.g. R 1381-1422, 1449-1458).

ISSUE PRESENTED

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

ARGUMENT

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

A. Introduction

The majority opinion adopts a version of market share liability for asbestos cases, suggesting it is a novel concept whose time has come. In fact, its time has passed: market share liability for asbestos-related injuries has been considered and rejected by numerous courts.

Celotex argues herein that the concept of market share liability conflicts with fundamental principles of Florida tort law and should not be adopted as to any product. Second, the market share liability theory of Sindell was applied to the manufacturers of DES. Even if this Court were to agree that the concept of market share liability would be appropriate for some products, it should be inapplicable to asbestos, where there are different products, containing different amounts of asbestos, and presenting different degrees of danger upon exposure. Finally, even if this Court were to determine that market share liability should be adopted as to asbestos products, it should not apply in any case where the plaintiff can specifically identify at least some of the products to which he was exposed. Plaintiff's testimony in the instant case establishes that he can indeed identify numerous products to which he was exposed.

B. Market Share Liability Conflicts with the Fundamental Principles of Florida Tort Law

In adopting comparative negligence over ten years ago, this Court observed:

> "A primary function of a court is to see that legal conflicts are equitably resolved. In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault."

Hoffman v. Jones, 280 So. 2d 431, 438 (Fla. 1973). This Court recently reemphasized the principle of equating liability with fault in Insurance Company of North America v. Pasakarnis _____ So. 2d ____, (Fla. 1984) (9 FLW 128, 129). The Copeland majority opinion ignores this principle, conflicts with Florida cases requiring product identification in product liability actions, conflicts with numerous decisions nationwide rejecting market share liability in asbestos cases, and commits a fundamental error by attempting to apply a rule for apportionment of damages among joint tortfeasors to a situation where Plaintiff's problem is not an inability to allocate damages, but rather an inability to prove liability.

The development of the market share liability theory of Sindell is detailed in both the majority and dissenting opinions and will not be discussed extensively. In essence, the court in Sindell reached its conclusion initially by rejecting an argument that a theory of alternative liability first adopted in Summers v. Tice, 33 Cal. 2d 80, 199 P. 2d 1

(1948), and later incorporated into Sec. 433B(3) of the Restatement (2d) of Torts (1965), should be applied in DES cases. The Summers rule held that when independent acts of negligence are committed against a plaintiff by more than one defendant but it was proven that harm resulted from only one of them, the plaintiff would be relieved of proving causation and the burden would be on the defendants to establish their inno- cence. The Sindell Court held that Summers could not be applied to DES cases since there was no guarantee that the actual tortfeasor would be before the court.

Then, a four to three decision, Sindell eliminated any requirement that a plaintiff prove that each defendant committed a negligent act that may have harmed him, and allowed a plaintiff to sue those defendants he selected which manufactured a type of product which injured him. Thus, while Summers maintained the causation-in-fact requirement for a negligence action, Sindell "modified" that requirement by eliminating the necessity that the actual wrongdoer be before the court. Market share liability "eliminates proof of causation strictly for public policy reasons." Starling v. Seaboard Coast Line Railroad, 533 F. Supp. 183, 187 (S.D. Ga. 1982); see also Martin v. Johns-Manville Sales Corporation, No. 81-88, Civ. T-GC (M.D. Fla. August 28, 1981), at A. 16. While potentially subjecting to liability all DES manufacturers that a particular plaintiff alleging injury from DES choose to name as a defendant, the Sindell opinion limited

each defendant manufacturer's liability for damages to its market share of the product, rather than imposing joint and several liability. "Thus, if 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 plain- tiff." Copeland, 9 FLW at 539 (A. 3).

The Third District majority panel reasoned that the alternative liability of §433B(3) was satisfactory in asbestos-related cancer cases, where only one exposure to the defective product may result in the injury, but felt that market share liability in asbestosis cases (which result from cumulative exposures) "would more logically be reached via Section 433B(2) of the Restatement Second of Torts" which states:

> 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.

9 FLW at 540 (A. 4).

As Judge Nesbitt observed in his dissent, however, no matter which section of the Restatement is relied as the basis for market share liability, the analysis is inappropriate since the majority has effectively applied a rule for apportioning damages as a means for imposing liability. Thus, Judge Nesbitt concluded as to §433(2):

> This section, however, contemplates the situation where two or more tortfeasors actually harm the plaintiff, and the only difficult question is how much harm each has caused; ...

> In the present case, it is not clear that each of the defendants has injured the plaintiff. Thus, unlike the cases considered under Section 433B(2), the basic issue here is liability and not apportionment of damages. By using this section, the majority has confused plaintiff's inability to allocate damages with his inability to prove liability.
>
> In light of the foregoing, I find that the market share theory (whether based on Section 433B(2) or B(3)) would eliminate one of the fundamental bases of tort liability.

9 FLW at 542 (A. 6).

The United States District Court for the Middle District of Florida, after reviewing Florida law and the "novel" concept presented by Sindell, concluded that "it does not appear that the Florida Supreme Court would adopt the Sindell theory of enterprise liability." and dismissed that portion of the plaintiff's complaint in Martin v. Johns-Manville Sales Corporation, No. 81-88, Civ. T-GC (M.D. Fla. Aug. 28, 1981). (A copy of this order is included at A. 10-22).

The Asbestos Litigation Reporter has observed that Judge Carr's ruling in Martin "is in line with similar rulings in Florida against Sindell market share motions by about 30 other judges." Asbestos Lit. Rep. p. 3,884 (Sept. 25, 1981). It went on to note that only one Florida county court judge sitting as a circuit judge had approved the theory. That decision was later overriden by Circuit Judge Harold Vann. Asbestos Lit. Rep. p. 4,987 (May 28, 1982).

These decisions and Judge Carr's forecast of the rejection of market share liability are not surprising in light of

Florida's long standing recognition of the causation-in-fact requirement for tort liability - which is repeatedly reflected in its products liability cases. This Court observed in adopting strict liability in tort, that the plaintiff "must establish the manufacturer's relationship to the product in question." West v. Caterpillar Tractor Company, Inc., 336 So. 2d 80, 87 (Fla. 1976). This requirement has been reiterated and followed in numerous products liability Florida cases, e.g., Clark v. Boeing Company, 395 So. 2d 1226, 1229 (Fla. 3d DCA 1981); Mathews v. GSP Corporation, 368 So. 2d 391, 392 (Fla. 1st DCA 1979) (directed verdict proper where "appellant failed to present evidence showing the identity of the manufacturer of the cable which broke.") Watson v. Lucerne Machinery & Equipment, Inc., 347 So. 2d 459, 461 (Fla. 2d DCA 1977); cert. denied, 352 So. 2d 176 (Fla. 1977); as well as general tort law requiring proof of causation in fact, e.g., Vance v. Miller, 360 So. 2d 1150, 1152 (Fla. 3d DCA 1978), cert. denied, 368 So. 2d 1375 (Fla. 1975) ("the law plainly requires that the defendant or defendant's vehicle be properly identified on the record as the person or vehicle causing damage to the plaintiff, in order to prove a prima facie case of negligence.)"

Market share liability thus conflicts with Florida tort law principles and should not be adopted - just as it has not been adopted in the overwhelming majority of jurisdictions.

C. Market Share Liability has been Rejected by most Courts Considering DES Cases and Almost Uniformly by Courts Considering Asbestos Cases.

Most courts considering the issue after Sindell have rejected market share liability even for DES cases. See McElhaney v. Eli Lilly & Co., 564 F. Supp. 265 (D.S.D. 1983)(following Sindell); Morton v. Abbott Laboratories, 538 F. Supp. 593, 599 (M.D. Fla. 1982)(forecasting that Florida law would not abandon the causation requirement and adopt market share liability. Tidler v. Eli Lilly & Co., 95 F.R.D. 332 (D. D.C. 1982)(rejecting market share liability); Mizell v. Eli Lilly & Co., 526 F. Supp. 589 (D. S.C. 1981)(although case arose in California Court would not follow Sindell because market share liability is contrary to public policy of South Carolina); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D. S.C. 1981)(rejecting market share liability); Payton v. Abbott Labs, 386 Mass. 540, 437 N.E. 2d 171, 188 (1982) ("the plaintiffs' market share theory fails adequately to protect either of the interests served by the identification requirement": separating wrongdoers from innocent actors and ensuring wrongdoers are held liable only for the harm that they have caused); see also, Collins v. Eli Lilly Co., 342 N.W. 2d, 37 (Wis. 1984) (rejecting market share and adopting "risk contribution" theory); Abel v. Eli Lilly & Company, 94

Mich. App. 59,289 N.W. 2d 20 (1980) (adopting alternative liability), affirmed as modified, _____ Mich. _____, 343 N.W. 2d 164 (1984); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A. 2d 1305 (Law Div. 1980)(adopting variation of market share liability); but see Namm v. Charles E. Frost & Co., 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981) (rejecting Sindell); and Pipon v. Burroughs-Wellcome Company, 532 F. Supp. 637 (D.N.J. 1982), aff'd 696 F.2d 984 (3d Cir. 1982) (forecasting that New Jersey Supreme Court would require DES plaintiff to identify manufacturer).

In addition to the majority of courts rejecting market share liability for DES cases, nearly every court which has considered market share liability for asbestos defendants has rejected the theory. The Copeland majority cited one federal district court decision from Texas for the proposition that market share liability had previously been applied in an asbestos case. Hardy v. Johns-Manville Sales Corporation, 509 F. Supp. 1353, 1354-55 (E.D. Texas 1981), reversed on other grounds, 681 F. 2d 334 (5th Cir. 1982). In that opinion the district court judge found that "the Erie indicators support a conclusion that the Texas courts would adopt some form of Sindell liability in the asbestos-related cases", and thus permitted discovery on percentage share of a relevant market. 509 F. Supp. at 1359.

The Copeland majority was apparently unaware that the judge who authored the Hardy opinion upon which it relied

subsequently reversed himself, finding that market share liability would not be adopted in Texas in an opinion which read:

> "In light of the Fifth Circuit's opinions in Hardy v. Johns-Manville Sales Corp., 681 F. 2d 334 (5th Cir. 1982) and Migues v. Fibreboard Corp., 662 F. 2d 1183 (5th Cir. 1981), the Court is of the opinion that the ORDER OF MARCH 17, 1981, granting the motion of certain Defendants to proceed with discovery on a "market share" liability theory, should be VACATED and SET ASIDE. The "market share" theory 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."

Hardy v. Johns-Manville Sales Corporation, No. M-79-145-CA (E.D. Tex. Sept. 24, 1982). A certified copy of this order is included in the appendix hereto at A. 9. 1/

The other courts considering the issue have similarly rejected market share liability for asbestos cases, including a district court sitting in the state which authored Sindell. In re Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982); Thompson v. Johns-Manville Sales Corp., 714 F. 2d 581 (5th Cir. 1983)(holding Louisiana law would not

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1/ The Copeland majority opinion illustrates why appellate courts generally refrain from deciding issues not raised or briefed by the parties. Not only did that opinion fail to note that the judge in Hardy - on which the majority had principally relied in adopting market share liability for asbestos injuries - subsequently reversed his position, but the majority overlooked such matters as the serrious constitutional due process problems inherent in the theory, as noted by the court in Starling, supra at 186. Of course, the Starling court did not need to reach those questions in light of its rejection of market share liability.

permit market share liability to permit plaintiff to dispense with particular proof of causation); Hannon v. Waterman Steamship Corporation, 567 F. Supp. 90 (E.D. La. 1983), ("asbestosis litigation is an inappropriate context in which to extend the market share theory of liability"); Starling v. Seaboard Coastline Railroad Company, 533 F. Supp. 183, 186 (S.D. Ga. 1982) (rejecting market share liability as an "unprecedented departure from traditional Georgia tort law"); Prelick v. Johns-Manville Corporation, 531 F. Supp. 96 (W.D. Pa. 1982); see also Tidler, supra at 335, in which the opinion notes two federal decisions from Maryland rejecting Sindell in asbestos cases.

As in Hardy, a federal district judge, forecasting Ohio law, initially allowed an asbestos plaintiff to proceed with a Sindell theory in Burke v. Johns-Manville Corporation, No. C-1-81-289 (S.D. Ohio Oct. 27, 1981). However, that opinion rested on the judge's erroneous belief that asbestos products were "generic" and that "not one defendant has a product that is better or worse than the other." Asbestos Lit. Rep. p. 4,139 (Nov. 13, 1981). Furthermore, the judge in Burke in effect subsequently reversed his position, observing asbestos products were not fungible and holding market share inapplicable where an asbestos plaintiff can identify any manufacturers. Burke v. Johns-Manville Corporation, No. C-1-289 (S.D. Ohio Aug. 2, 1983). See A. 23-28.

As noted by Judge Nesbitt's dissent and the numerous decisions rejecting market share liability, that theory would ultimately have the effect of making every manufacturer an insurer, not only of its own product, but of all generically similar products made by others. This would obviously discourage manufacturers from placing new products on the market and "certainly such a result is contrary to the best interests of the country." 9 FLW at 543 (A. 7).

D. The Rationale for Applying Market Share Liability to DES Cases does not Apply to Asbestos.

For the reasons stated herein, Florida should not abandon the traditional causation-in-fact requirement in tort suits and adopt market share liability. However, even if Florida were ready to entertain such a radical departure from traditional tort law, it would be inappropriate to do so in asbestos cases, particularly where a plaintiff could identify some of the products to which he had been exposed.

DES was a fungible commodity marketed generically and sold over the counter so that plaintiffs are generally unable to determine the original manufacturer. Judge Nesbitt noted that asbestos products differ significantly and that there are several varieties of asbestos fibers which were used in different quantities in different types of products which allegedly differed in their harmful effects. This is confirmed by the record in the instant case, and as well as by other courts. E.g., Martin v. Johns-Manville, supra at A. 17; Starling,

supra at 191, citing Martin supra (as Garcia v. Johns-Manville, a companion case); In re Related Asbestos Cases, supra at 1158; see also, I. Selikoff and D. Lee, Asbestos and Disease, p. 33-69, 410-412 (1978). Additionally, "the injuries caused by asbestos exposure are not restricted to asbestos products - other products, such as cigarettes, may have caused or contributed to the injury." Starling, supra at 191.

The fundamental distinction in the manner in which DES and asbestos were marketed is important in that there is another reason why market share liability should not be applied to asbestos, even if it were to be applied to DES. The asbestos products were marketed in packages which bore the names of the manufacturers and which Plaintiff in the instant case was in numerous instances able to identify. To hold, as the majority suggests, that the fact that a product is no longer identifiable once removed from its original container is a basis for subjecting all manufacturers and distributors of a product to market share liability, would expand this theory of liability to innumerable products from motor oil to cornflakes.

Judge Nesbitt cited from the Starling case in noting that asbestos manufacturers are not as difficult to identify as DES producers:

> Asbestos products, unlike DES, are not generically marked but have brand names. (citation omitted) The plaintiffs or their decedents were not exposed in utero but at their places of employment. The employers who purchased the pro-

> ducts, as opposed to corner pharmacies, were generally large scale institutions. Therefore, the liklihood that either the asbestos manufacturers or the purchasers have maintained invoice records denoting whose products were used at a specific work site is much greater.

Starling, supra at 191; 9 FLW at 543 (A. 7).

Judge Nesbitt also recognized that the lack of uniformity in accepting the market share liability theory itself cuts against its adoption. Since it appears that all previous cases considering market share liabijlity in asbestos cases have rejected it, liability would fall unevenly upon manufacturers amenable to suit in those states adopting it. 9 FLW at 543 (A. 7).

E. The Practical Problems in Applying Market Share Liability to Asbestos Bolster the Policy Reasons for Rejecting It.

Judge Nesbitt effectively categorizes the overwhelming practical problems inherent in applying the majority's market share rationale to asbestos. Judge Nesbitt observed that Sindell and the Copeland majority "brush aside the practical problems involved in determining the market and market share." 9 FLW at 542 (A. 6). He went on to note that "there are so many difficulties with the allocation that it cannot be said that any manufacturer's liability would approximate the damages he had caused. Since this was one of the justifications for the theory, its failure negates the entire theory." 9 FLW at 542 (A. 6).

Sindell and the Copeland majority recognized that a "substantial share of the market" would be required for applica-

tion of a market share liability theory. However, as Judge Nesbitt observes, there is no indication as to what percentage of the market would constitute a substantial share. And as he further notes "the lower the percentage required, the less chance there is that the actual guilty party will be joined." 2/ 9 FLW at 542 (A. 6).

Second, there would be enormous problems in defining the market geographically and by time period. Would plaintiffs consider a national market, a statewide market, or only a local market for those places in which the particular plaintiff worked? Similarly, appropriate defendants would differ depending on the time frame during which a plaintiff worked. Many asbestos plaintiffs moved about working in several different locations over varying and intermittent time frames (as with Plaintiff in the instant case), while others had only one jobsite during a specific time period at which they were exposed.

Third, as Judge Nesbitt notes, there is no suggestion as to how a particular defendant's market share risk would be

2/ Judge Nesbitt expressed concern over how the percentage liability would be calculated based on what percentage of the market a plaintiff elected to sue. Celotex believes the proper interpretation is clear from the majority opinion, which indicates that a defendant would be liable for only his market share in each case regardless of how many other defendants were joined and that by joining less than 100% of the market, a plaintiff would limit his recovery to less than 100% of the total damages. Thus, a defendant with a 20% market share (once that was determined) would be liable for 20% of the judgment (and not one-third) even if plaintiff had elected only to sue defendants representing only 60% of the market. See also, Copeland v. Armstrong Cork Company, _____ So. 2d _____ (Fla. 3d DCA 1984) (9 FLW 544, 545).

adjusted based on the relative harmfulness of its products 9 FLW at 543 (A. 7); see also Starling at 191.

F. Any Basis for Applying Market Share Liability Disappears when a Plaintiff can Identiy one or more Product Manufacturers.

In addition to the concerns recognized by Judge Nesbitt, the Copeland majority left a major question as to the applicability of market share liability unanswered, namely, when market share liability will apply if adopted. The Copeland majority did not state whether an asbestos plaintiff must always proceed on a market share theory, 3/ whether he may only do so when he cannot identify any manufacturers, or whether he may elect. Since Plaintiff specifically pled in his complaint that he could identify some of the products to which he was exposed and the majority recognized this before authoring its opinion on market share liability, it must be assumed that they did not view a plaintiff's ability to identify one or more defendants as precluding a market share theory. The majority opinion is not clear as to whether under the Third District decision a plaintiff may elect between a market share or joint and several liability where he can identify manufacturers.

If a plaintiff - such as Plaintiff in the instant case - can identify one or more manufacturers of asbestos products

3/ While Celotex perceives no explicit direction in the majority's opinion that all asbestos cases must proceed on a market share theory, there is similarly no express statement that a plaintiff may elect.

to which he was exposed, then the need for a market share theory is eliminated as those defendants will be jointly and severally liable under traditional tort law concepts for any damages a plaintiff proves their products caused him. Accordingly, numerous courts have observed that any rationale for adopting market share liability simply disappears where a plaintiff can identify one or more manufacturers of products to which he was exposed. E.g., Starling, supra at 191; In re Related Asbestos Cases, supra at 1158; Prelick, supra at 98; Burke, supra at A. 27.

CONCLUSION

This Court should reject the concept of market share liability because it conflicts with the fundamental tort law requirement of causation-in-fact. Asbestos products were not marketed generically and thus are fundamentally different from DES. The practical problems of defining a market and market share preclude any equitable application of the theory to asbestos products. It would be particularly inequitable to apply market share liability where a plaintiff can identify some manufacturer's products. For these reasons, Celotex respectfully requests that this Court reverse the majority opinion in this case, and remand with instructions to allow Plaintiff to proceed against those defendants whose products he can identify.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing brief and appendix hereto has been served by U.S. Mail to counsel on the attached schedule this 18th day of May, 1984.

Attorney

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