IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION, Petitioner,	:	
vs.	:	CASE NO. 65,124
LEE LOYD COPELAND, et al., Respondents.	:	
OWENS-CORNING FIBERGLAS CORPORATION, Petitioner,	:	
vs.	:	CASE NO. 65,154
LEE LOYD COPELAND, et al., Respondents.	:	

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

PETITIONER THE CELOTEX CORPORATION'S REPLY BRIEF ON THE MERITS

Of Counsel:

JAMES W. KYNES
JIM WALTER CORPORATION
Post Office Box 22601
Tampa, Florida 33622

THOMAS C. MacDONALD, JR.
CLARK JORDAN-HOLMES
CHARLES P. SCHROPP
RAYMOND T. ELLIGETT, JR.
SHACKLEFORD, FARRIOR,
STALLINGS & EVANS, P.A.
Post Office Box 3324
Tampa, Florida 33601
(813) 273-5000
Attorneys for the Celotex
Corporation

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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. Plaintiff has failed to address Celotex's initial brief.

After reading Plaintiff's "Answer Brief", one must question how closely the Plaintiff has read Celotex's initial brief discussing Copeland v. Celotex Corporation, 447 So. 2d 908 (Fla. 3d DCA 1984), since he responds to virtually none of the points raised in it. 1/ Plaintiff is apparently following a variation of President Lincoln's advice: that is better to remain silent and be thought to have no response than to speak out and remove all doubt. 2/

Plaintiff ignores the ramifications of the fundamental departure from Florida tort law which the Copeland panel proposes. As Judge Nesbitt noted in his dissent, the majority opinion applied a rule for apportioning damages as a means of imposing liability. This elimination of Florida's causation-in-fact requirement for tort liability is unprece-

1/ Celotex uses the same designations as set forth at page 1 of its initial brief with the additions that its initial brief is designated "CB" and Plaintiff's brief is designated "PB".

2/ "Better to remain silent and be thought a fool than to speak out and remove all doubt." Abraham Lincoln, Epigram (c. 1862).

dented and in conflict with the decisions of this Court and the other appellate courts of Florida (CB 10-12).

Plaintiff mischaracterizes the current state of the law by indicating there is a trend toward market share (or what he calls "collective liability") in "chemical injury cases" (PB 37). In fact, most courts considering market share liability have rejected it even for DES and no court other than the Copeland panel has adopted market share liability for asbestos related injuries (CB 13-16). Consequently, Plaintiff's sole support for applying market share liability to asbestos cases is to cite two trial court decisions which not only never saw the light of appellate review on their market share holdings, but were subsequently vacated at the trial court level. Plaintiff's refusal to recognize the different ways in which courts have dealt with asbestos and DES is matched by his disregard for the differences between those products and the respective plaintiffs who were exposed to them. These differences and the practical problems in applying market share liability, coupled with the lack of uniformity that would result because all courts which have considered the theory have rejected it for asbestos, should preclude its application, as Judge Nesbitt observed (CB 17-20).

Plaintiff ignores these problems and instead criticizes the Copeland panel decision and advocates his own theory

which he calls "collective liability", 3/ picking and choosing from various theories while ignoring the prerequisites and limitations set forth in those theories - none of which theories have ever been applied to asbestos and all of which would conflict with the basic principles of Florida tort law if applied in this situation.

B. Market share liability conflicts with the fundamental principles of Florida tort law.

As detailed in Celotex's initial brief there is simply no support under Florida law for market share liability which eliminates proof of causation in tort law strictly for public policy reasons (CB 9). The concerns which led a handful of courts to adopt market share liability for DES cases are manifestly distinguishable from the circumstances of asbestos exposures. Market share liability would conflict with this Court's emphasis of tort law equating liability with fault, since it would necessarily mean that defendants who in no way contributed to plaintiffs' injuries would be held liable time and time again (CB 8-9). The theory urged by Plaintiff - an approach never adopted in any jurisdiction for any product - has no support in Florida law.

Plaintiff's discussion of the "concert of action" theory in Florida is an exercise in wishful thinking. Two of the three Florida cases Plaintiff cited refused to apply concert

3/ Plaintiff did not file a petition or cross-petition to this Court to review the Copeland panel decision.

of action to multiple parties polluting the same stream. Symmes v. Prairie Pebble Phosphate Company, 66 Fla. 27, 63 So. 1 (1913); Standard Phosphate Co. v. Lunn, 66 Fla. 220, 63 So. 429 (1913). The one Florida case cited which applied a variation of concert of action did so where there was an express agreement to conduct a race. Skroh v. Newby, 237 So. 2d 548 (Fla. 1st DCA 1970). The court in Morton v. Abbott Laboratories, 538 F. Supp. 593, 596 (M.D. Fla. 1982) in rejecting concert of action for DES, found there would be no basis under Florida law for a concert of action theory on the grounds of consciously parallel conduct, as Plaintiff urges (PB 16). The Florida authority indicates that parallel conduct (as with pollution) is inadequate to establish concert of action in the absence of an express agreement (as in the racing situation). As the court noted in Morton, it appears that only one jurisdiction has even adopted a concert of action theory for DES cases, and no court has applied such a theory to asbestos cases. Cf. Starling v. Seaboard Coast Line Railroad, 533 F. Supp. 183, 189-190 (S.D. Ga. 198) (thoroughly discrediting theory as applicable to asbestos).

Plaintiff's reliance on the "alternative liability" theory of Summers v. Tice, 33 Cal. 2d 80, 199 P. 2d 1 (Cal. 1948) is also misplaced. As the California Supreme Court itself noted in Sindell, Summers could not be applied to those DES cases since the plaintiff could not be permitted to

fix the whole liability for her injuries upon defendants when there was no certainty that the responsible party was present as a defendant. 607 P.2d at 930-931. In Summers there were two hunters who negligently shot toward the plaintiff so that by suing both the plaintiff was sure to have the negligent party as a defendant. This is simply not the case where, as with DES, there were hundreds of manufacturers of asbestos containing products. Consequently, Plaintiff's citation of Florida cases allowing actions against two negligent tortfeasors acting independently simply misses the point since in each of those situations it is certain that the negligent party who caused the injury is before the court. (PB 18-19)

Plaintiff's reliance on the "enterprise liability" theory of Hall v. E.I. DuPont de Nemours, 345 F. Supp. 353 (E.D. N.Y. 1972) is erroneous. (PB 23-24). That situation is readily distinguishable from the asbestos cases since, as that court and many subsequent courts discussing the decision have noted, the six blasting cap manufacturers comprised virtually the entire blasting cap industry of the United States. 345 F. Supp. 358. Even the court in Sindell, which adopted market share liability for DES cases, observed that the Hall enterprise theory which might be reasonable for an industry with five or ten producers, would be manifestly unreasonable if applied to an industry composed of numerous

producers. See also, Hall, supra, at 378; Morton, supra. at 598.

Plaintiff's reliance on Abel v. Eli Lilly & Company, 418 Mich. 311, 343 N.W. 2d 164 (1984) cannot comfort him since there the court said that alternative liability could be applied "if a plaintiff brings all of the possible defendants into court." 343 N.W. 2d at 174 (also noting that plaintiffs alleged that they had sued all manufacturers who promoted the drugs for use during pregnancy in Michigan during the relevant time period). As numerous decisions have noted, it would simply be impossible for a plaintiff to sue all potentially responsible asbestos manufacturers and thus, this theory of liability is consistently rejected with respect to them. Many potential defendants are no longer in business or are not subject to suit for various reasons (for example, jurisdiction or bankruptcy stays).

C. Courts have consistently rejected market share liability for asbestos cases.

The uniform rejection of market share liability for asbestos cases is detailed at CB 14-16 and, as Judge Nesbitt noted, is an additional reason why it should not be adopted in Florida since this lack of uniformity would exacerbate the inequity of such a theory.

Plaintiff's statement that there is a trend toward what he calls "collective liability" in "chemical injury cases" is misleading. (PB 37). All cases Plaintiff cites are DES

cases, with the exception of the Hardy 4/ case from Texas, which was subsequently vacated. Thus, Plaintiff's assertion that Texas has adopted some form of collective liability is also inaccurate. Plaintiff also ignores the fact that the federal court handling asbestos cases in California - the state authoring Sindell for DES cases - rejected its application to asbestos cases. In Re Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Calif. 1982). 5/

The lengths to which Plaintiff strains are demonstrated by his continued citation of Hardy and the opinion of the county court judge in Dombroff, which were both vacated by their respective courts. Plaintiff purports to take some comfort from the language of the vacation in Hardy, yet it is hard to imagine any more stinging rejection of market share

4/ Hardy v. Johns-Manville Sales Corporation, 509 F. Supp. 1353 (E.D. Texas 1981), reversed, 681 F.2d 334 (5th Cir. 1982); order vacating market share ruling (E.D. Tex. Sept. 24, 1982).

5/ The lack of authority supporting Plaintiff's position is demonstrated not only by the fact that he can cite only two trial court opinions imposing market share liability for asbestos, both of which have been vacated, but by his highly improper inclusion of a proposed method of handling asbestos claims by some asbestos manufacturers and their insurers. Plaintiff's statement that major asbestos manufacturers have reached an agreement which Plaintiff then purports to include in his appendix is inaccurate since the appended agreement is a proposed agreement which is not executed and has not been executed. (PB 36, n. 6) Even if it were, it is not contemplated to include even all major asbestos manufacturers or their insurers. Most importantly, any agreement for defending or processing asbestos claims considered or reached voluntarily by some of the manufacturers is completely immaterial and cannot form the basis for the imposition of market share liability by a court.

liability for asbestos than to say the possibility that Texas would adopt it was so remote that that possibility would not even justify the cost of conducting discovery on the issue (PB 29, CB 15).

D. The rationale for applying market share liability to DES cases does not apply to asbestos.

Plaintiff's attempt to analogize the physical characteristics of asbestos to DES must fail because of the vast differences in the nature of the products, the ways they were marketed, and the status of plaintiffs. As many courts have noted, there is obviously a major difference in the plaintiffs since in DES cases plaintiffs were not even born at the time they were exposed, whereas asbestos plaintiffs are adults who can rely on their memory or that of their co-workers, and may obtain their employers' purchase records and defendants' sales records, (CB 18-19). Asbestos products were manufactured by different manufacturers under their respective indentifying labels.

Furthermore, even Plaintiff is forced to admit there are different types of asbestos fibers, as well as products. (PB 39). It is apparent the Plaintiff simply has no response to the argument that the different products contained different varieties of asbestos and those products differ in their harmful effects (CB 17-18). 6/

6/ Even Plaintiff's Amicus brief implicitly recognizes that there are even stronger arguments for rejecting market share liability for asbestos than for DES (Amicus at p. 14, n. 1).

E. Plaintiff has not addressed the problems of applying market share liability to asbestos voiced by Judge Nesbitt.

Plaintiff's "rebuttal" to Judge Nesbitt's concern that a plaintiff would simply sue one or a few defendants is no rebuttal at all. (PB 38). Plaintiff's own proposal is that a plaintiff file suit only against what "he believes" to be a substantial share of the manufacturers. (PB 40). There would be no assurance that any responsible manufacturer were before the court, and no way to reasonably determine market shares.

Plaintiff suggests he is psychic by stating that Judge Nesbitt would "certainly" accept a restriction of market share to manufacturers active at a particular time and type of facility, relying on the subsequently vacated Florida county court judge opinion. (PB 33) Judge Nesbitt's fundamental concerns about stretching causation-in-fact beyond its breaking point are buttressed by the numerous practical problems he enumerated. The differences in types of asbestos previously noted contribute to the impossibility of fairly defining a relevant market, much less what constitutes a "substantial share" of that market. Plaintiff's

6/ (continued) Beyond that, it adds little to the discussion since it ignores the differences between asbestos and DES, and quotes this Court's use of the words "enterprise liability" in an entirely different context in West to make a completely untenable argument that this Court has already addressed the issues presented herein. (Amicus at p. 9) As noted, in that opinion this Court stated that a plaintiff had to establish the manufacturer's relationship to the product in question. (CB 12)

suggestion is that he sue the one or two potentially culpable defendants "he believes" constitute a substantial share and then leave those defendants to do the work of joining and proving that others might have been liable (PB 37, 40).

Plaintiff has no effective response to Judge Nesbitt's arguments that such a fundamental departure is not justified or needed 7/ in asbestos cases. The purported goals are "not accomplished when defendants are selected at random from throughout the country. The connection between actual harm and the alleged wrongdoing is too tenuous to justify this policy concern." 447 So. 2d at 921.

As previously noted, if the fact that it is difficult to tell one product from another once it is removed from its package is sufficient to impose market share liability, then this theory may be applied against manufacturers of countless products and the proof of causation in products liability law in Florida will be an element of the past (CB 18).

Plaintiff asks this Court to abandon Florida's requirement of causation for a product for which no court has done so. Even those few courts adopting market share liability for DES cases and abandoning causation purely for public policy reasons have balanced this by limiting damages to the defendant's market share of all such products marketed. Plaintiff not only asks this Court to apply market share

7/ As in the instant case when Plaintiff identified numerous products to which he claimed exposure (CB 3).

liability to asbestos when other courts have consistently rejected it, but to impose joint and severely liability under it, which no court has done for any product.

Respectfully submitted,

Of Counsel:

JAMES W. KYNES
JIM WALTER CORPORATION
Post Office Box 22601
Tampa, Florida 33622

THOMAS C. MacDONALD, Jr.
CLARK JORDAN-HOLMES
CHARLES P. SCHROPP
RAYMOND T. ELLIGETT, JR.
SHACKLEFORD, FARRIOR, STALLINGS & EVANS, P.A.
Post Office Box 3324
Tampa, Florida 33601
(813) 273-5000
Attorneys for The Celotex Corporation

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 31st day of July, 1984.

Attorney

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SCHEDULE

James C. Blecke
and Diane Tutt
2400 First Federal Building
One Southeast Third Avenue
Miami, Florida 33131

Louis S. Robles
75 SW 8th Street
Miami, Florida 33130

Michael K. McLemore
799 Brickell Plaza
Suite 900
Miami, Florida 33131

James C. Rinaman, Jr.
Southeast Bank Building
Post Office Box 447
Jacksonville, Florida 32201

Susan J. Cole
2801 Ponce de Leon Boulevard
Suite 550
Coral Gables, Florida 33134

Jane N. Saginaw
8333 Douglas Avenue
Suite 1050
Dallas, Texas 75225

Steve R. Burger
8525 SW 92nd Street
Suite B-8
Miami, Florida 33156

Jack E. Thompson
25 SE 2nd Avenue, #516
Miami, Florida 33130

Robert L. Vessel
Post Office Box 345118
Coral Gables, Florida 33114

Richard A. Kupfer
P. O. Box 3466
West Palm Beach, Fl. 33402

Harold C. Knecht, Jr.
2600 Douglas Rd.,
Suite 810
Coral Gables, Florida 33130

Lyle and Skipper, P.A.
Fortune Federal Bldg.
2600 Ninth Street, North
St. Petersburg, Fl. 33704

Peter H. Murphy
800 Peninsula Federal Bldg.
200 SE First Street
MIami, Florida 33131

Steven Rudin
19 W. Flagler Street
10th Floor
Miami, Florida 33130

Lewis G. Gordon
1010 Concord Building
66 W. Flagler Street
Miami, Florida 33130

Arthur H. Taylor
1107 Biscayne Building
19 W. Flagler Street
Miami, Florida 33130

Robert M. Klein
1 Biscayne Tower
Suite 2400
Miami, Florida 33131

Kimberly A. Ashby and
Carol D. Motes
Maguire, Voorhis
& Wells, P.A.
Two South Orange Plaza
P.O. Box 633
Orlando, Florida 32802

Jon W. Zeder and
Douglas M. Halsey
1300 SE 1st National Bank
Bldg.
Miami, Florida 33131