IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION, Petitioner, v. LEE LOYD COPELAND, et al., Respondents.	Case No. 65,124
OWENS-CORNING FIBERGLAS CORP., Petitioner, v. LEE LOYD COPELAND, et al., Respondents.	Case No. 65,154

DISCRETIONARY PROCEEDING TO REVIEW A DECISION CERTIFIED BY THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, AS INVOLVING A QUESTION OF GREAT PUBLIC IMPORTANCE

REPLY BRIEF OF PETITIONER, OWENS-CORNING FIBERGLAS CORP.

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INTRODUCTION

Petitioner, OWENS-CORNING FIBERGLAS CORP. ("Owens-Corning"), replies to the respondents' answer brief and the amicus curiae brief of the Academy of Florida Trial Lawyers. Those briefs will be referred to herein, respectively, as "R.B." and "AFTL B.".

ARGUMENT

I.

THE DISTRICT COURT ERRED IN ADOPTING MARKET SHARE LIABILITY IN A CASE IN WHICH THE THEORY WAS NEITHER ASSERTED IN THE TRIAL COURT NOR ARGUED ON APPEAL.

The Copelands ignore the fact that market share liability or, indeed, any theory of enterprise or collective

liability, was not briefed in the Third District Court of Appeal. A majority of the Third District panel apparently believed that it was appropriate, through the vehicle of this case, to adopt market share liability in Florida. In doing so, the majority passed on an issue that was not before it and thus violated the rules of appellate law set forth in Owens-Corning's main brief.

II.

THE MAJORITY ALSO VIOLATED THE HOFFMAN v. JONES ADMONITION AGAINST DISTRICT COURTS RENDERING DECISIONS CONTRARY TO ESTABLISHED SUPREME COURT PRECEDENTS.

In response to this argument, the Copelands state that the Third District's majority opinion "squares fully with the related precedent." (R.B. p. 8). The Copelands totally ignore the fact that the majority opinion below, on its face, demonstrates that the court went beyond and departed from established tort law. The majority opinion included the following comment:

> Just as the California Supreme Court recognized in Sindell, however, we now acknowledge that traditional theories of causation may not be realistic in light of contemporary advances in science and technology and the complexity of an industrialized society, such as ours, which creates harmful products that cannot be traced to a specific producer.

Copeland v. Celotex Corp., 447 So.2d 908, 913 (Fla. 3d DCA 1984). The majority concluded that the Florida courts should fashion remedies to meet the changing needs of society, as opposed to rigidly adhering to prior doctrine. Id.

III.

EVEN IF PROPERLY CONSIDERED BY THE DISTRICT COURT, THE NOVEL THEORY OF MARKET SHARE LIABILITY SHOULD NOT BE ADOPTED IN FLORIDA, AND THUS, THE DISTRICT COURT OPINION SHOULD BE QUASHED.

The Copelands discuss what they perceive as the "inherent flexibility of the tort system to embrace the novel questions raised in asbestos litigation." (R.B. p. 9). They also assert that Florida courts have recently resolved several important issues arising in the context of asbestos and other occupational disease litigation. In making these arguments, the Copelands attempt to give the impression that the cases they cite relate to issues relevant in this case. In fact, in none of the cited cases have the courts discussed, much less adopted, market share liability or any other enterprise or collective liability theory in an asbestos case. Most of the cited cases simply deal with statutes of limitations questions. See, 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); Universal Engineering Corp. v. Perez, ____ So.2d ____ (Fla., May 17, 1984, Case No. 66,152), 9 F.L.W. 189; Brown v. Armstrong World Industries, 441 So.2d 1098 (Fla. 3d DCA 1983); and Villardebo v. Keene Corp., 431 So.2d 620 (Fla. 3d DCA 1983). The case of Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975) similarly did not discuss any theories of collective liability. In that case, the plaintiff went to

trial against Johns-Manville only, and the case does not discuss whether that company produced the asbestos to which the plaintiff was exposed. Finally, Dombroff v. Eagle-Picher Industries, Inc., ____ So.2d ____ (Fla. 3d DCA, June 12, 1984, Case No. 83-2276), 9 F.L.W. 1319, involved the question of personal jurisdiction over a foreign corporation.

All of the Copelands' arguments concerning the general problems of identification in asbestos cases are absolutely irrelevant here. As the Copelands themselves pointed out in the Third District, Mr. Copeland identified several products, by manufacturer name, at his deposition. Therefore, this is not a case in which the plaintiff is unable to prove the identity of any of the manufacturers of the products to which he was exposed. Consequently, this is not a proper case for this Court to decide whether some form of collective liability ought to be imposed against manufacturers when a plaintiff is unable to identify which of them caused his or her injuries.

In a similar vein, the Copelands' amicus argues that the alternative to the adoption of market share liability (or some other form of collective liability) is to foreclose the possibility of redress for injury where the plaintiff cannot identify the specific product (AFTL B. p. 7). That argument overlooks the fact that in this case Mr. Copeland identified several products. The argument further ignores the distinction between a relaxation of pleading requirements and the outright adoption of a theory which relieves plaintiffs of their obli-

gations to prove causation. In other words, it may be appropriate in an asbestos case to determine that a pleading is sufficient if it alleges that the plaintiff was exposed to products manufactured by each defendant (which exposure caused plaintiff's injuries), without actually having to name each and every product in the complaint. Such a rule would be appropriate in a case such as this where the plaintiff has already identified some of the products to which he was exposed, so that it is unnecessary to go further and adopt a novel theory of liability which eliminates the requirement of proving causation.

In addition to urging this Court to uphold the Third District's adoption of market share liability (with some alteration), the Copelands discuss several other theories of collective liability in their brief, which were not addressed by the District Court. Nevertheless, Owens-Corning will respond briefly to each of the alternative theories.

The concert of action cases cited by plaintiffs are not relevant in asbestos cases. Skroh v. Newby, 237 So.2d 548 (Fla. 1st DCA 1970) involved a situation where two drivers were racing, and thus acting in a negligent manner, and only one of the automobiles struck and killed the plaintiff's decedent. Both drivers, however, were negligent and both were acting in an unlawful manner. Perhaps most importantly in the context of asbestos cases, in Skroh both of the negligent drivers were defendants. There were no additional negligent parties who were not joined.

In both Symmes v. Prairie Pebble Phosphate Co., 66 Fla. 27, 63 So. 1 (1913) and Standard Phosphate Co. v. Lunn, 66 Fla. 220, 63 So. 429 (1913), the court held that there was no concerted action on the part of the defendants, and that their independent actions did not subject them to joint liability. As the court in the Lunn case stated:

> Torts that are several, separate, and independent acts when committed do not become joint by the subsequent union or intermingling of their consequences where no concert of tortious action or consequence is intended by the parties or implied by law. [63 So. at 432].

The concert of action theory is urged by the Copelands as a means of obviating the need to identify the manufacturers of the asbestos products to which Mr. Copeland was exposed. The concert of action theory derives from the criminal law concepts of conspiracy and aiding and abetting and renders liable all who intentionally participate in an unlawful activity that proximately causes injury. The concert of action theory has not been utilized in Florida to relieve the plaintiff of the burden of identifying the party directly responsible for the harm alleged.

The Copelands also urge consideration of the theory of alternative liability. The very language describing this theory makes it clear that the theory of alternative liability is not applicable to the instant case:

> 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 has caused it, the burden

> is upon each such actor to prove that he has not caused the harm.

Restatement 2d of Torts, §433 (B)(3) (emphasis added). This rule was first announced in Summers v. Tice, 199 P.2d 1 (Cal. 1948). As the language emphasized above indicates, the rule of alternative liability applies when it is certain that one of the named defendants caused the plaintiff's injuries. The rule relaxes the requirement that the plaintiff prove causation where, as in Summers v. Tice, all named defendants (and only such defendants) were negligent toward the plaintiff; that is, there must be a showing that all defendants were negligent toward the plaintiff before the burden of proof shifts to the defendants.

The Summers v. Tice rule, like the Florida cases cited by plaintiffs in their argument under this theory, applies in a situation where all parties who were or could have been responsible for the plaintiff's injuries were joined as defendants. In a Summers v. Tice situation, where there are two defendants who represent the entire field of possible tortfeasors, there is a fifty percent chance that one of the two defendants was at fault. In cases involving asbestos, however, typically only a handful of the numerous companies which manufactured asbestos are joined as defendants. Thus, in a particular case, there may be a low probability that the actual manufacturer which produced the asbestos product to which the plaintiff was exposed will ultimately bear financial responsibility for the plaintiff's injuries. There exists the very real possibility that the manufacturer which was actually responsible in a particular case will not be one of the defendants.

In the absence of any allegation or proof that the named defendants acted negligently or wrongfully toward the plaintiff in a particular case, the Summers v. Tice theory of alternative liability does not apply. The following cases, cited by the Copelands or their amicus, all involve the concurrent or consecutive negligence of two or more separate persons: Jackson v. Florida Weathermakers, Inc., 55 So.2d 575 (Fla. 1951); Hernandez v. Pensacola Coach Corp., 141 Fla. 441, 193 So. 555 (1940); Feinstone v. Allison Hospital, Inc., 106 Fla. 302, 143 So. 251 (1932); Mack v. Garcia, 433 So.2d 17 (Fla. 4th DCA 1983); Schwab v. Tolley, 345 So.2d 747 (Fla. 4th DCA 1977); Randle-Eastern Ambulance Service, Inc. v. Millens, 294 So.2d 38 (Fla. 3d DCA 1974); and Booth v. Mary Carter Paint Co., 182 So.2d 292 (Fla. 2d DCA 1966). The issue in each of those cases was whether liability should be apportioned between the two separate causes of the plaintiff's injuries, or whether the second negligent party should be responsible for the entire damages. The cases are distinguishable from the present case for the additional reason that the defendants in each of the cited cases acted negligently towards the plaintiff. The same situation does not necessarily exist in this case.

The cases of C.F. Hamblen, Inc. v. Owens, 127 Fla. 91, 172 So. 694 (Fla. 1937); Washewich v. LeFave, 248 So.2d 670 (Fla. 4th DCA 1971); Hollie v. Radcliff, 200 So.2d 616 (Fla. 1st DCA 1967); and Wise v. Carter, 119 So.2d 40 (Fla. 1st DCA 1960) all involve a tortfeasor's liability for a pre-existing injury or condition of the plaintiff.

In none of the cases cited by the Copelands or their amicus do the courts squarely address the imposition of industry-wide liability. All the existing cases involve situations where each of the named defendants acted negligently toward the plaintiff. That is not necessarily the case in an asbestos or DES case.

In the Sindell case relied upon so heavily by plaintiffs and their amicus, the court recognized the difference between DES cases and the Summers v. Tice case. The court observed that in the Summers case:

> All the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately two hundred drug companies which made DES, any of which might have manufactured the injury-producing drug.

Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, 139 (1980). The court recognized that where the number of tortfeasors is so large, the possibility that one of the few defendants actually named supplied the DES to plaintiff's mother is so remote "that it would be unfair to require each defendant to exonerate itself. There may be a substantial likelihood that none of the five defendants joined in the action made the DES which caused the injury . . . ." Id.

Similarly, in the instant case, it would be unfair to expand the doctrine of alternative liability far beyond the scope of the doctrine as contemplated by the Summers v. Tice court and by the drafters of §433(B)(3) of the Restatement.

CONCLUSION

Based on the above arguments and authorities, the majority opinion of the District Court of Appeal, Third District, should be quashed.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner was mailed to all counsel on the service list this 2nd day of August, 1984.

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