O/A 1-7-85

IN THE SUPREME COURT OF FLORIDA

Case No. 65,394

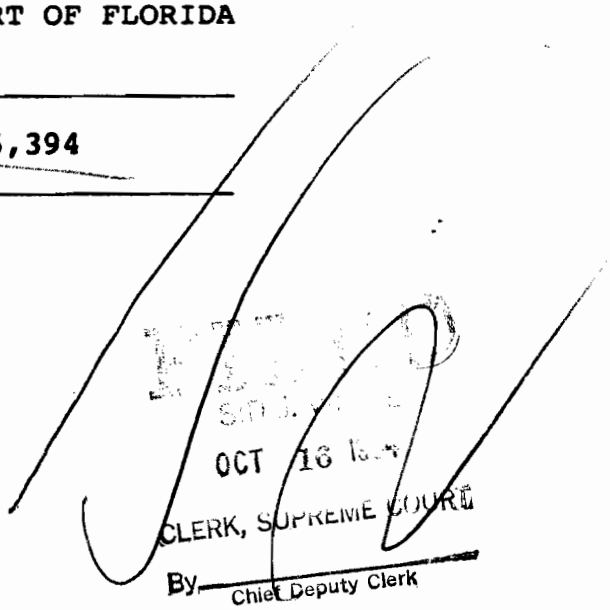
OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

v.

LEE LOYD COPELAND and VAUDEEN COPELAND,

Respondents.



DISCRETIONARY PROCEEDINGS TO REVIEW A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

PETITIONER'S MAIN BRIEF ON THE MERITS

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INTRODUCTION

This brief is filed on behalf of the petitioner, Owens-Corning Fiberglas Corporation ("Owens-Corning"), one of several defendants/appellees below. The respondents are the plaintiffs/appellants below, Lee Loyd Copeland ("Copeland") and Vaudeen Copeland. References to the record will be designated "R."

STATEMENT OF THE CASE

The Copelands brought this product liability action against Owens-Corning and other manufacturers of various asbestos products, claiming injuries sustained by exposure to asbestos dust (R. 1-7). Based upon Copeland's sworn answers to interrogatories and his own deposition testimony, the trial court deter-

mined that the applicable statute of limitations had run and entered judgment accordingly (R. 1999-2000).

The District Court of Appeal, Third District, reversed the summary final judgment on the statute of limitations and, relying upon the contemporaneous opinion in the companion case of Copeland v. Celotex Corporation (DCA Case No. 81-997), rev. pending, S.Ct. Case Nos. 65,124 and 65,154, held that, "the plaintiff was not obliged to establish that he was exposed to identifiable asbestos products of the defendants herein in order to establish a prima facie case of product liability."

In neither of the Copeland cases in the district court did the plaintiffs assert that market share liability should be adopted by the court. In the companion Copeland case (district court case number 81-997; in this Court, case number 65,124 and 65,154), neither the Copelands nor Celotex (the only appellee in that case) briefed the issue of market share liability in their briefs filed in the Third District. The briefs focused primarily upon the sufficiency of identification of Celotex products by Mr. Copeland, the Copelands taking the position that Mr. Copeland had adequately identified such products in his deposition and Celotex taking the position that on a motion to dismiss the deposition testimony was irrelevant. Moreover, in the present case (district court case number 81-1369), in their reply brief the Copelands expressly disclaimed any intent to rely upon market share liability. They stated:

> Appellant would stress that the applicability of the theory of enterprise liability is not at issue in this appeal. Appellant has not argued that Appellees be held liable on a theory of enterprise liability, but instead has cited specific evidence in the record establishing the manufacturers of products to which Appellant was exposed throughout his career. Appellee H. K. Porter's discussion of enterprise liability is wholly inapposite and does not reflect any issue on appeal. In reviewing this case, this Court is compelled to examine the record and to take note of the specific product indentification provided therein. [reply brief at 5-6; emphasis in original].

STATEMENT OF THE FACTS

For purposes of appellate review, the facts will be taken entirely from Copeland's sworn answers to interrogatories and his deposition testimony. On January 12, 1981, plaintiff's answers to supplemental interrogatories were filed of record and included the following:

> 128. State the extent of your knowledge with respect to the health hazards of inhaling asbestos.
> a. The date, time and place that you first acquired such knowledge.
> b. Specific identity of each source of information providing or leading to such knowledge.
>
> Answer: We knew asbestos was harmful to our health but had to work in it in order to hold our job. On at least one job I was on there was one foreman who pulled his men out and refused to work until conditions were improved. This was the Bechtel job - Homestead - Turkey Point in 1965 or 1966.

* * *

25. Do you now or have you ever experienced shortness of breath? Yes. If yes, when did you first experience this shortness of breath? 1970. Under what circumstances? A gradual build up. Is now a part of my life. Do you still experience shortness of breath? Yes

26. Do you now or have you ever experienced an excessive cough? Yes If yes, when About same time as breathing problems and under what circumstances.
a. Was it a dry cough? Yes
b. Was it a productive cough? _____

27. Have you ever coughed up blood?

Answer: Yes.

If so when?

Answer: Some with each cold I have had. 1972 through present.

28. Have you ever experienced chest pain, tightness or wheezing? Yes If so, when did you first experience this pain/tightness/wheezing? About 1972, and under what circumstances. Came on overnight. Is now a part of my life. [R. 699-700].

During his deposition, Copeland answered the following questions:

Q. Now, when in your life did you first come to believe that the inhalation of dust containing asbestos was dangerous or harmful in some way?

A. I would say in the late 60's.

Q. What was the source of that information?

A. Well, I began to have breathing problems, watery eyes when you got into where the dust was blowing in your eyes, or your eyes would water.

Q. And you felt at that time that asbestos was causing that?

A. Well, I didn't know it was asbestos. I knew the dust was what was causing it. I didn't know it was asbestos at that time.

Q. Did you discuss this dust with your co-workers, what was in the dust?

A. I don't remember whether I did or not, no.

Q. My first question was, Mr. Copeland, when you first became to believe that breathing asbestos dust was in any way harmful; when was that?

A. I would say in the late 60's.

Q. You knew then that this dust that you were breathing on the jobsites contained asbestos.

A. Well, I was told it was asbestos, yes.

Q. Who gave you that information?

A. I don't remember.

Q. Co-workers?

A. Yes, co-workers. [R. 884-5.]

Earlier in his deposition he testified:

Q. When did you first discover that that powdery substance was asbestos?

A. Oh, in the late 60's. I would say the late 60's, yes.

Q. How did you make that discovery?

A. I was told by other craft or other workers, by other people putting up the insulation.

Q. How did that topic of conversation arise?

A. Well, I don't know actually how. Naturally, some of them would have problems, you know, and have a strike and walk off the job claiming that stuff was harming their health and what-have-you. [R. 866-7].

With regard to his own medical condition, Copeland testified:

Q. You testified previously that it was in the late 60's that you first came to believe that the inhalation of asbestos dust was harmful.

Did you seek any medical attention at that time?

A. Not for that particular reason, no.

Q. Did you seek any medical attention because of shortness of breath?

A. Not until later years, I don't think. In '72, I believe, was the first time I had problems breathing enough to go to a doctor or hospital.

Q. At that time did you believe that the dust on the job was causing your shortness of breath?

A. No, I didn't know.

Q. You did believe at that time that breathing asbestos dust was harmful?

A. I figured it was harmful, yes.

Q. And your shortness of breath was getting increasingly more of a problem to you, correct?

A. As you go along, yes.

Q. What was the first doctor that you saw because of these shortness of breath problems?

A. Well, I guess Sapp in Plant City would have been about the first one.

Q. S-a-p-p, Dr. Edward W. Sapp?

A. Or either Drawdy, one or the two. I don't remember which one I went to first. Both of them attended me while I was in the hospital.

Q. In 1972 you went to South Florida Baptist Hospital because you were coughing up blood, weren't you?

A. Yes, at times I was.

Q. Weren't you having shortness of breath at that time, too?

A. When was that?

Q. That was in April of 1972.

A. '72?

Q. Yes.

A. Yes. I was having breathing problems then. [R. 887-8].

* * *

Q. What is Dr. Sapp's specialty?

A. Oh, more or less heart and blood and what-have-you.

Q. Who recommended him to you?

A. I don't remember. What I was in the hospital somebody brought him in there. I don't know if Drawdy brought him in there or the wife, or who.

Q. That is South Florida Baptist Hospital?

A. Right. I might have had him first and my regular doctor come in. I don't remember how it was. I was a sick boy back then.

Q. Back about that time did you talk to Dr. Drawdy about asbestos dust?

A. No, sir, I didn't.

Q. Did you talk to him about dust at all?

A. Right.

Q. Did you tell him there were dusty conditions in the workplace?

A. Right.

Q. Did he tell you that that may be causing your shortness of breath?

A. No, he suggested that I change jobs.

Q. Did you change jobs?

A. Not right then, no. You didn't get a job any time you wanted one.

Q. Am I correct that Dr. Drawdy wanted you to change jobs because of the dust that you described on the jobsite?

A. I don't know why. All I know is he told me to change jobs.

Q. Did he tell you to get away from the dust?

A. No, that wasn't the words he said. He just said to change jobs. [R. 889-90].

* * *

Q. When did you first receive a diagnosis of emphysema and from whom?

> A. 1972. Dr. Sapp said I had emphysema. He's the only one that ever said I had that. [R. 891].

Copeland retired in April 1975 because of his medical disability and shortness of breath (R. 1030-31). Over four years later, on May 11, 1979, the Copelands filed their original complaint against the several defendants (R. 1-7).

ISSUES PRESENTED FOR REVIEW

I.

WHETHER THE DISTRICT COURT ERRED IN REVERSING THE SUMMARY FINAL JUDGMENT BASED UPON THE EXPIRATION OF THE APPLICABLE STATUTE OF LIMITATIONS.

II.

WHETHER 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.

III.

WHETHER THE DISTRICT COURT ERRED IN ITS CREATION AND ADOPTION OF A MARKET SHARE THEORY OF ENTERPRISE LIABILITY.

SUMMARY OF ARGUMENT

It has often been said that hard cases almost always make bad law. In the end, however, it is far better that the established rules of law should be strictly applied, even though in particular instances apparent hardship may thereby be inflicted upon some individuals. Nevertheless, the subtle distinctions invented and resorted to solely to escape such conse-

quences, at the expense of long settled and firmly established doctrines, should be avoided.

> It is for the legislature, by appropriate enactments, and not for the courts, by metaphysical refinements, to provide a remedy against the happening of hardships which may result from the consistent application of established legal principles.

Demuth v. Old Town Bank of Baltimore, 85 Md. 315, 320, 37 A. 266 (1897). Here, the district court departed from established legal principles in two respects. The district court endorsed an unwarranted expansion of the discovery rule, finding that the statute of limitations does not begin to run until there is a medically confirmed diagnosis of asbestosis. This conclusion is contrary to well settled Florida case law. The statute of limitations begins to run when some form of identifiable injury is sustained with the correlative appreciation for the source of that injury.

The second departure from established legal principles is in the district court's adoption of a market share theory of enterprise liability, abandoning the time honored rule that it is necessary for the plaintiff to prove that the defendant manufactured or produced the product that caused the plaintiff's injury and ignoring the fact that the Copelands had expressly stated that they were not relying on any form of enterprise liability.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN REVERSING THE SUMMARY FINAL JUDGMENT BASED UPON THE EXPIRATION OF THE APPLICABLE STATUTE OF LIMITATIONS.

Copeland's own testimony conclusively established that the statute of limitations had begun to run more than four years prior to the May 11, 1979 filing of his lawsuit. The summary final judgment was proper. By his own admissions, Copeland was having breathing problems in the late 1960's which he knew to be caused by the inhalation of asbestos dust in his work environment. Copeland had sustained demonstrable physical injury and Copeland knew the source of that physical injury. The statute of limitations begins to run when some form of identifiable injury is sustained with the correlative appreciation for the source of that injury. The inhalation of dust at his place of employment was causing him physical harm. Copeland was then on notice of the possible invasion of his legal rights. See, generally, Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976).

This case is closely analogous to Steiner v. Ciba-Geigy Corporation, 364 So.2d 47 (Fla. 3d DCA 1978). There, the plaintiff noted a correlation between the decrease in his vision at about the same time as he was taking a certain drug. He recalled that he ". . . just got to wondering, is this coincidence or what?" He felt that "[s]omething was doing it," and stated, ". . . it seemed that there was a temporal relationship, I guess." Steiner, at 50.

The argument rejected by the district court in Steiner is essentially the same argument now adopted by the district court below. The district court concluded that Copeland must be advised by a competent authority that he has a cause of action before the statute begins to run. To follow this line of reasoning, however, changes the wording of the statute which requires only that the facts giving rise to the cause of action be discovered or capable of discovery with the exercise of due diligence. Steiner, at 52.

In this case as in the Steiner case, there is no genuine issue of material fact. The question is whether the facts known to the plaintiff were sufficient as a matter of law to begin the running of the statute of limitations. Copeland was on notice in the late 1960's that the inhalation of dust at his work place was causing him physical harm. His injury was such as to require hospitalization and medical treatment in 1972. He retired in April 1975 because of his disabilities. Copeland's law suit filed May 11, 1979, was time barred as a matter of law.

In requiring a diagnosable manifestation of a specific disease, i.e. asbestosis, the district court decision departs from and conflicts with established precedent to the contrary. Most recently, this Court had occasion to say:

> Plaintiff's alleged injuries fall in the category of occupational injuries. '[T]he statute of limitations begins to run from the time that the employee knows or should have known that the disease was occupational in origin, even

> though diagnosis of the exact cause has not yet been made.'

Universal Engineering Corp. v. Perez, 451 So.2d 463, 468 (Fla. 1984).

The district court decision is also contrary to the following statements of law contained within City of Miami v. Brooks, 70 So.2d 306, 308-9 (Fla. 1954):

> The general rule, of course, is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefore, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.
>
> * * *
>
> [T]he statute attached when there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action. . . . [T]he statute must be held to attach when the plaintiff was first put on notice or had reason to believe that her right of action had accrued.

In Kelley v. School Board of Seminole County, 435 So.2d 804 (Fla. 1983), this Court held:

> As a general rule, a statute of limitations begins to run when there has been notice of an invasion of legal rights or a person has been put on notice of his right to a cause of action. City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954).

In Kelley, this Court approved the holding in Havatampa Corp. v. McElvy, Jennewin, Stefany & Howard, Architects/Planners, Inc., 417 So.2d 703 (Fla. 2d DCA 1982), rejecting a requirement for "knowledge of the specific nature of the defect" before the statute of limitations commences to run. Kelley, 435 So.2d at 806. The statute of limitations begins to run when there has been notice of an invasion of legal rights. A lack of knowledge of the specific cause will not toll the running of the statute of limitations.

Finally, the district court opinion is in conflict with Roberts v. Casey, 413 So.2d 1226 (Fla. 5th DCA 1982), pet. den. 424 So.2d 763 (Fla. 1982), where the Fifth District affirmed a final summary judgment granted upon the running of the statute of limitations. There, the plaintiff appellant described in her deposition a conversation in which she learned that "it was possible" that the illness sustained by her infant daughter may have been contracted at the hospital where she was born. The Fifth District held that this awareness of the possibility of a causal connection was sufficient to commence the running of the statute against both the hospital and the physician. The Court held:

> The statute of limitations in a medical malpractice action begins to run when the plaintiff has been put on notice of an invasion of his legal rights. [Citations omitted]. This occurs when the plaintiff has notice of either the negligent act which causes the injury or the existence of an injury which is a

> consequence of the negligent act. [413 So.2d at 1229].

In essence, Copeland contends that the statute of limitations did not begin to run until December 1978 when the full extent of his injury was diagnosed. This type of argument was rejected by this Court in Christiani v. City of Sarasota, 65 So.2d 878 (Fla. 1953). There, the minor plaintiff was struck by a city owned vehicle. The child was thrown to the ground and sustained blows to his head and body. The full extent of his injury, however, did not materialize until much later. The trauma ultimately resulted in blindness of the right eye which was not discovered until some eighteen months after the accident. The subsequent suit was barred by the statute of limitations notwithstanding that the full extent of the injury did not materialize - and remained undiagnosed - until long after the incident.

While there may be sympathy for a plaintiff deterred or misled by a misdiagnosis of his condition, this fact can neither toll the running of the statute of limitations, nor cause it to start anew. Copeland was on notice of the potential invasion of his legal rights in the late 1960's. In April 1972, his condition was arguably misdiagnosed as emphysema. The district court found this factor significant in its reversal of summary final judgment. In so holding, however, the district court departed from the rule of law that, "where the statute of limitations has commenced running, it runs over all subsequent disabilities."

Wade v. Doyle, 17 Fla. 522, 527 (1880). See, also, Bennett v. Herring, 1 Fla. 387 (1847); Doyle v. Wade, 23 Fla. 90, 1 So. 516 (1887); Gillespie v. Florida Mortgage & Investment Co., 96 Fla. 35, 117 So. 708 (1928).

Owens-Corning in no way concedes that Copeland's condition is causally related to the inhalation of asbestos. The 1972 diagnosis is credible evidence that Copeland's condition is not asbestos related. Indeed, it cannot be known as a legal fact whether asbestos caused Copeland's condition until such is established by legal processes. The definitive diagnosis will not be made until the jury renders its verdict. If a confirmed diagnosis is the trigger then the statute of limitations will not begin to run until the case is over. Cf. Steiner, at 51-2. The statute of limitations began to run when Copeland sustained identifiable injury with appreciation for its source. The statute of limitations does not await the resolution of conflicting diagnoses subsequently made.

Owens-Corning and the other defendants were entitled to summary judgment upon Copeland's testimony of his own subjective association in the late 1960's of his breathing problem with his inhalation of asbestos dust on the job site. He was thus "on notice" of the potential invasion of his legal rights. Copeland's shortness of breath was actionable, if caused by the negligence of one or more of the defendants. A confirmed diagnosis of his disease is a matter of proof of proximate causa-

tion. It does not affect the right to bring suit ab initio. Moreover, the ascertained or ascertainable progress of his disease affects the measure of his damages, not the accrual of his cause of action.

II.

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.

It is elementary that appellate courts may not pass on questions which were not presented to or considered by the trial court. Jacques v. Wellington Corp., 134 Fla. 211, 183 So. 718 (1938); Henry v. Lemack Builders, Inc., 245 So.2d 115 (Fla. 3d DCA 1971). The appellate court should not go beyond the record made and appearing in the lower court. Jacques, supra. Furthermore, the appellate court is not authorized to pass upon issues other than those properly presented on appeal. Lightsee v. First National Bank of Melbourne, 132 So.2d 776, 778 (Fla. 2d DCA 1961). See also, Larkin v. Tsavaris, 85 So.2d 731 (Fla. 1956) (a point not raised can have no effect upon the outcome of an appeal).

In the instant case, the issue of whether the theory of market share liability first adopted in Sindell v. Abbott Laboratories, 26 Cal.3d 588, 607, P.2d 924, 163 Cal Rptr. 132 (1980) should be adopted was not placed directly before the trial court and was not argued at all in the Third District. In fact,

enterprise liability was expressly not made an issue by the Copelands.

This Court has specifically criticized advisory opinions:

> It is a fundamental principle of appellate procedure that only actual controversies are reviewed by direct appeal. 4 C.J.S., Appeal and Error §1354(a), page 1945. We have repeatedly held that this Court was not authorized to render advisory opinions except in the instances required or authorized by the Constitution. [Sarasota-Fruitville Drainage District v. Certain Lands Within Said District, etc., 80 So.2d 335, 336 (Fla. 1955)].

Likewise, an appeal will not be allowed to settle mere abstract questions. Cottrell v. Amerkan, 35 So.2d 383, 384 (Fla. 1948).

The district court in this case rendered an advisory opinion, adopting a theory which the Copelands did not urge either in the trial court or in the district court. The Third District thus violated these fundamental precepts of appellate law, and the decision under review must therefore be quashed.

III.

THE DISTRICT COURT ERRED IN ITS CREATION AND ADOPTION OF A MARKET SHARE THEORY OF ENTERPRISE LIABILITY.

Owens-Corning's substantive argument in this case is substantially the same as the argument it made in its brief in Case Nos. 65,124 and 65,154. Rather than adopt that argument by reference, Owens-Corning offers a comprehensive argument here to avoid the need to refer to other briefs in other files.

It is well settled that in a products liability suit the plaintiff must identify the manufacturer of the article in question in order to state a cause of action. Although courts of a few jurisdictions have substantially expanded certain existing theories or adopted new theories which avoid the need for identification, these cases represent a substantial departure from established principles of tort law. The rule requiring identification of the manufacturer in a products liability suit has been stated by Prosser as follows:

> [Plaintiff] still has the burden of establishing that the particular defendant has sold a product which he should not have sold, and that it has caused his injury. This means that he must prove, first of all, not only that he has been injured, but that he has been injured by the product. The mere possibility that such may have occurred is not enough, and there must be evidence from which the jury may reasonably conclude that it is more probable than not.

Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791, 840 (1966).

Until the district court's departure from existing law in this case, the law of Florida has been clear that identification of the manufacturer in a products liability suit is essential. Matthews v. GSP Corp., 368 So.2d 391 (Fla. 1st DCA 1979) is illustrative of the importance of manufacturer identification. In that case, the plaintiff was injured when one of the cables supporting the scaffold on which he was working broke. The plaintiff sued a number of defendants, including the alleged manufacturer of the cable and the company that supplied the cables with which the scaffold was originally equipped. Based

upon evidence that the cables had been replaced twice before the accident occurred, the trial court directed a verdict in favor of the alleged manufacturer and cable supplier.

The First District affirmed, because of the absence of proof that the cable supplier had in fact supplied the cable involved in the accident and the fact that the plaintiff had failed to present evidence showing the identity of the manufacturer of the cable which broke. See also, West v. Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976) (the manufacturer's relationship to the product is an essential element of strict liability); Sansing v. Firestone Tire & Rubber Co., 354 So.2d 895 (Fla. 4th DCA 1978) (same); Vecta Contract, Inc. v. Lynch, 444 So.2d 1093 (Fla. 4th DCA 1984) (reversed because proof did not sufficiently support a jury finding that the defendant had manufactured the chair which collapsed and caused plaintiff's injuries). In Vecta, the Fourth District stated the applicable rule a follows:

> In a products liability case, it is necessary to present evidence that the defendant manufactured or produced the product that caused the injury. Morton v. Abbott Laboratories, 538 F.Supp. 593 (M.D. Fla. 1982).

In Morton, a DES case, the federal court rejected all four theories of recovery urged by the plaintiff in that case: (1) market share liability, (2) enterprise liability, (3) concert of action and (4) alternative liability. The Morton court rejected market share liability as it did the other theories, because it did not believe that the Florida courts would adopt

the theory which "unquestionably represents a radical departure from the traditional concept of causation." 538 F.Supp. at 599.

Like the Morton court, a number of courts have criticized market share liability in DES and asbestos cases. For example, the District Court in South Carolina in Ryan v. Eli Lilly & Company, 514 F. Supp. 1004, 1018 (D.S.C. 1981), described the action of the Sindell court as follows:

> While the Court in Sindell v. Abbott Laboratories, supra, correctly rejected the applicability of "alternative liability," "concert of action" and "enterprise liability," a bare majority went on to fashion a remarkable new burden-shifting theory which is not now the law of either North Carolina or South Carolina.

In Starling v. Seaboard Coastline Railroad Co., 533 F.Supp. 183 (S.D. Ga. 1982), an asbestos case, the court held that market share liability is a theory that has no basis in Georgia law and that such a rule would be contrary to Georgia's product liability rule that a manufacturer is not an insurer of his products. 533 F.Supp. 189, 190. See also, Tidler v. Eli Lilly & Co., 95 F.R.D. 332 (D.D.C. 1982) (applying Maryland and District of Columbia law). Similarly, the rule in Florida is that manufacturers are not insurers of their products. West v. Caterpillar Tractor Co., supra, 336 So.2d at 90. The District Court in South Carolina in Mizell v. Eli Lilly & Co., 526 F.Supp. 589 (D.S.C. 1981) in a case where the DES pills were purchased in California, went so far as to refuse to apply California law, holding that the Sindell theory was so antithetical to South Carolina policy that it would not apply California law even though the injury occurred in that state.

A federal district court in Texas initially reached a contrary result, in giving preliminary approval to the market share liability approach by ordering that one of the defendants could take discovery from the others relating to market share information. Hardy v. Johns-Manville Sales Corp., 509 F.Supp. 1353 (E.D. Tex. 1981). However, the court in Hardy specifically stated that it was "not thrust in the position of making a final adjudication of whether market share is applicable." 509 F.Supp. at 1355. Furthermore, even the Hardy court later rejected the market share approach (see Sept. 28, 1982 order in Hardy v. Johns-Manville, contained in appendix to this brief).

The most recent pronouncement on this subject comes from the Supreme Court of Missouri in Zafft v. Eli Lilly & Co., Case Number 65685 (Mo., September 11, 1984). A copy of this opinion is included in the appendix to this brief. Zafft is a DES case, in which the court addressed the four theories of enterprise liability which are most often asserted by plaintiffs in such cases: alternative liability, concert of action, industry-wide or enterprise liability and market share liability. The court determined that none of the theories would be adopted, notwithstanding that the DES plaintiff claimed that she could not prove which of the several defendants manufactured the DES ingested by her mother. Particularly relevant is the court's discussion of market share liability. The court summarized its position as follows:

> Thus far, Sindell stands alone in adopting market share liability. The court in Sindell failed to resolve numerous problems with application of the

> theory. These problems persist and discourage courts in other jurisdictions from embracing the theory as a solution to the DES cases. [slip op. 10].

The court recognized that one of the major problems with market share liability is the difficulty in determining market share for purposes of apportioning damages, defining the relevant market, and determining what constitutes a "substantial" share of the market. Id. Finally, the court recognized the policy arguments being asserted by the plaintiff; that is, that plaintiffs are innocent and claim serious injuries alleged to result from their mother's use of DES and that as between plaintiffs and defendants, the latter should bear the cost of injury because they are better able to absorb this cost. The court stated that this argument ignores strong counterveiling considerations:

> The development of products liability and comparative negligence in this state leave this established requirement of proving causation intact; neither logic nor fairness requires this Court to dispense with this requirement in the present cases.... To shift the burden of proof on causation to respondents substantially alters the existing rights and liabilities of the litigants. There is insufficient justification at this time to support abandonment of so fundamental a concept of tort law as the requirement that a plaintiff prove, at a minimum, some nexus between wrongdoing and injury. (citations omitted). [slip op. 12].

Significantly, a federal court in California refused to extend the Sindell rule to asbestos cases. In re Related Asbestos Cases, 543 F.Supp. 1152 (N.D. Cal. 1982). The court was of course bound to follow Sindell in an appropriate case, and

thus did not discuss the public policy or rationale for adopting or not adopting the theory. The court's consideration was limited to whether market share liability should be adopted in an asbestos case. The court determined that it should not, for several reasons. First, in an asbestos case, numerous factors would make it exceedingly difficult to ascertain an accurate division of liability along market share lines. This is so because asbestos fibers are of several varieties, each used in varying quantities by defendants in their products and each differing in its harmful effects. Second, defining the relevant product in geographic markets would be an extremely complex task due to the numerous uses to which asbestos is put, and to the fact that some of the products to which the plaintiffs were exposed were undoubtedly purchased out-of-state at a time prior to the plaintiff's exposure. Third, some plaintiffs were exposed to asbestos over a period of many years, during which time some defendants began or discontinued making asbestos products. Finally, and most importantly, the court considered the following:

> [P]laintiffs in the present case apparently plan to call as witnesses individuals who will testify that plaintiffs were exposed to asbestos products manufactured by defendants. Where a plaintiff does have information as to the identity of the defendants who caused his alleged injury, the rationale for shifting the burden of proof in Sindell is simply not present. [543 F.Supp. at 1158].

In Prelick v. Johns-Manville Corp., 531 F.Supp. 96 (W.D. Pa. 1982) the court determined that it need not decide whether Pennsylvania would adopt market share liability, because the plaintiffs had identified some manufacturers who supplied the asbestos-containing products to which plaintiff was exposed.

> We conclude, therefore, that where, as here, the plaintiff is able to identify at least one manufacturer or supplier whose product caused plaintiff's injury, the "Sindell" or "enterprise" theory is inapplicable. [531 F.Supp. at 98].

See also, Hannon v. Waterman Steamship Corp., 567 F.Supp. 90 (E.D.La. 1983) (market share liability inappropriate in asbestos case).

This rationale should be applied to the present case. Here, the Copelands were able to identify Mr. Copeland's exposure to certain of the defendants' products. Under these circumstances, there is no reason to consider, much less adopt, market share or any other form of enterprise liability.

Market share liability in effect imposes absolute liability on those asbestos manufacturers or distributors which the plaintiff chooses to name as defendants--even though the plaintiff cannot show that any of these defendants played a part in bringing about the injury of which the plaintiff complains. Such a result would not only be patently unfair, but a violation of due process as well. See, e.g., Cleveland Board of Education v. Lafleur, 414 U.S. 632, 644 (1974); Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

The adoption of market share liability in asbestos cases results in a situation where those asbestos manufacturers or distributors which the plaintiff chooses to name as defendants are liable not only for their own products but for the products of other manufacturers as well. Such a result, particularly in a situation where the product involved is manufactured in several forms and under many conditions, is fundamentally unfair. This result deprives persons of the opportunity to be heard on an individual basis and thus violates procedural due process. See, e.g., Bell v. Burson, 402 U.S. 535 (1971); Stanley v. Illinois, 405 U.S. 645 (1972). In addition, due process requires a meaningful opportunity to present evidence and to be heard. Armstrong v. Manzo, supra; Saunders v. Shaw, 244 U.S. 317 (1917).

The Sindell court admitted that the rule it was adopting was a complete departure from recognized rules of causation and liability. The court nevertheless held that a plaintiff could state a cause of action if she joined in the action the manufacturers of a substantial share of the DES ingested by her mother. The majority stated, as an explanation for this unprecedented judicial legislation, its "rough justice" belief that under the new rule each defendant would be held liable for the proportion of the judgment represented by its share of the market unless the defendant demonstrates that it could not have made the product which caused the plaintiff's injuries. If market share in the relevant geographic area and relevant time period is proved by substantial competent evidence, the analysis nevertheless fails when one considers the following: (a) a certain

proportion of manufacturers will no longer be in business at the time of suit and (b) a certain proportion of manufacturers will not be subject to the jurisdiction of the forum state. The relatively few companies which have remained unchanged organizationally since the time the DES was taken by the plaintiffs' mothers and which do business in a substantial number of states to the extent that they are amenable to suit will be disproportionately subjected to liability. The same difficulty exists in asbestos cases.

The Sindell court purports to avoid these problems and justify its formulation of market share liability by requiring the plaintiff in a DES suit to join as defendants "the manufacturers of a substantial share of the DES which her mother might have taken." 163 Cal. Rptr. at 145. The court noted that one authority had suggested that 75 to 80 percent of the market be joined, but the court declined to determine the required percentage, holding only that "a substantial percentage is required." Id. The court further declined to define the "market" although it recognized the existence of the practical problems involved in defining the market and determining market share. Id.

Similarly, the majority opinion in the companion Copeland case failed to define the market and failed to provide any guidelines for the application of the theory, stating that:

> Defining the market and determining market share are matters of proof not susceptible to determination at the pleading stage of the proceedings, . . . [447 So.2d at 914].

The existence of numerous practical problems in effecting market share liability in asbestos cases should bear on the decision whether to adopt market share liability. Not only did the district court ignore the practical problems in its consideration of the theory, it refused even to address them or to provide any guidance to the trial court.

Some of the many practical problems which will inevitably arise at the trial of a DES or asbestos case, in any jurisdiction adventuresome enough to adopt the Sindell rule, are: What is the "market"--geographically and otherwise? What is the relevant time period? In determining the market share, does the court take into account only those manufacturers before the court? What kind of liability is imposed; i.e., joint and several or otherwise? How is market share determined when one or more of the defendant manufacturers have incomplete records or no records at all for the relevant time period? If the plaintiff and defendants are in the same position with respect to availability of proof of market share, whose burden is it to go forward with proof? What happens, from the standpoint of proof of market share, when one or more defendants settle with the plaintiff and are no longer defendants in the case? How does the court determine which defendants are to be considered in determining market share; i.e., all named defendants or just those which have been served? How much does the plaintiff have to prove regarding the defendants' manufacture of the product before the burden shifts to the defendants to prove or disprove market share? How does the court deal with companies which are out of

business at the time of suit? See generally, Zafft v. Eli Lilly & Co., supra.

These uncertainties demonstrate the fundamental unfairness of the market share approach. This theory provides little more assurance that the manufacturer of the product involved in a particular case will be held financially responsible than the other theories rejected by the Sindell court--"enterprise liability," "alternative liability," and "concert of action."

The market share liability approach ignores the very likely result that certain "target companies" will bear the entire financial burden. The presumption that a static, definable product market existed is simply incorrect. Any attempt to determine actual market share percentages will likely be costly, complicated, and often times speculative.

The Sindell court, very simply, determined that the defendants should be held liable because they are "deep pockets" who are better able to bear the cost of injury. 163 Cal.Rptr. at 144. The dissenting opinion in Sindell, however, demonstrates the fallacy of the majority's determination in this regard:

> But as a general proposition, a defendant's wealth is an unreliable indicator of fault, and should play no part, at least consciously, in the legal analysis of the problem. In the absence of proof that a particular defendant caused or at least probably caused plaintiff's injuries, a defendant's ability to bear the cost thereof is no more pertinent to the underlying issue of liability than its "substantial" share of the relevant market. A system priding itself on "equal justice under law" does not flower when the liability as well as the damage aspect of a tort action is determined by a defendant's wealth. [163

Cal.Rptr. at 149 (Richardson, J., dissenting) (emphasis in original).]

Market share liability extends far beyond any concept of joint liability recognized in Florida. The substantial change in Florida law which results from the adoption of market share liability effectively imposes liability on all defendants named by the plaintiff when one, and perhaps none, was the actual cause of plaintiff's injuries. Such a result should be rejected by this Court.

CONCLUSION

This Court should quash the reversal of the summary final judgment and reinstate the trial court judgment for all defendants.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Main Brief on the Merits was mailed to all counsel on the attached service list this 11th day of October, 1984.

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