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 REPLY BRIEF ON THE MERITS

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REPLY ARGUMENT

I.

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

Owens-Corning is fully aware of the law of summary judgments, epitomized in Holl v. Talcott, 191 So.2d 40 (Fla. 1966). This case does not turn upon standard of review. Owens-Corning and the other defendants below relied entirely upon Copeland's own testimony and sworn answers to interrogatories, as set forth verbatim in Owens-Corning's main brief at pages 3-9. The sufficiency of that testimony to establish the running of the statute of limitations was a question of law properly submitted to the trial court for resolution on summary judgment.

The fallacy in Copeland's position is best reflected in his misstatement of Owens-Corning's position in this matter. At page four of Copeland's answer brief, he erroneously states, "The Petitioner asserts, however, that Mr. Copeland should have known that he suffered from asbestosis four years prior to his filing suit." Owens-Corning does not assert or require that Mr. Copeland should have known that he suffered from the diagnosable illness of "asbestosis." That is the whole thrust of this point on appeal. The diagnosis of a particular disease is not a pre-requisite to suit and is not the event that triggers the running of the statute of limitations.

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 then "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.

Copeland knew that asbestos dust was causing him breathing problems sufficiently severe to require hospitalization and medical treatment in 1972. His condition was diagnosed by Dr. Sapp as emphysema. Nothing prohibited Copeland from bringing suit against Owens-Corning and the other defendants in 1972 upon allegations that asbestos was the proximate cause of his diagnosed condition of emphysema. Such a complaint would not have

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been subject to a Rule 1.140(b)(6) motion to dismiss for failure to state a cause of action. Whether asbestos dust caused "emphysema," "asbestosis," or merely aggravated a pre-existing undiagnosed condition, Copeland would have been entitled to a verdict upon proof of proximate causation.

It is patently absurd to suggest that Copeland would never have a cause of action without first having been diagnosed as having "asbestosis." Diagnosis does not affect the right to bring suit ab initio. The ascertained or ascertainable progress of Copeland's condition, as well as his prognosis for the future, affects the measure of his damages, not the accrual of his cause of action.

The statute of limitations begins to run with the manifestation of a demonstrable injury. The manifestation of a demonstrable injury is not the legal or factual equivalent of a confirmed diagnosis of a discrete disease. Copeland's condition was not "latent," as argued in his brief. Copeland's injury manifested itself with breathing problems sufficiently severe to require hospitalization and medical treatment in 1972. Copeland retired in April 1975 because of his disability. Copeland's law suit filed May 11, 1979, was time barred as a matter of law.

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.

The Copelands' argument in response to this point, as well as to Point III, is an adoption of their argument in Case Nos. 65,124 and 65,154. Rather than just merely adopt its reply argument in those consolidated cases, Owens-Corning repeats those arguments here, to avoid the need to refer to briefs in other cases.

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 appellate principles set forth in Owens-Corning's main brief.

III.

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

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).[1/] 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, 451 So.2d 463 (Fla. 1984); 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,

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1/ References are to the Copelands' Answer Brief in Case Nos. 65,124 and 65,154.

Dombroff v. Eagle-Picher Industries, Inc., 450 So.2d 923 (Fla. 3d DCA 1984), 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 at his deposition by manufacturer name. 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 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.

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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

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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 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 do the courts squarely address the imposition of industrywide 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 the Copelands, 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.

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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

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 Reply Brief on the Merits was mailed to all counsel on the service list this 20th day of November, 1984.

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