IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,124

AMERICAN CYANAMID COMPANY,	)
	)
Defendant/Petitioner,	)
	)
v.	)
	)
LESTER K. ROY,	)
	)
Plaintiff/Respondent.	)
	)
	)

BRIEF OF AMICUS CURIAE FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTRODUCTION

This amicus curiae brief is filed on behalf of the Florida Defense Lawyers Association ("the Association") in support of Petitioner's contention that punitive damages are not allowable in this case. A primary reason for submitting this brief is the Association's concern that the salutary intent and purpose of this Court's recent landmark decision in White Construction Co. v. Dupont, 455 So.2d 1026 (Fla. 1984) will be eroded, if not subverted, by ensuing district court decisions, if the decision now under review is permitted to stand.[1/] This brief will undertake to analyze the underlying intent and effect of White, to demonstrate that the district court's decision below is patently inconsistent with the rationale and holding of White, and to show that there are compelling policy reasons why the White decision should be applied to preclude the recovery of punitive damages in this and similar cases.

STATEMENT OF THE CASE AND FACTS

The Association adopts by reference the Statement of the Case and Facts in Petitioner's Brief on the Merits.

1/ See also Wolmer v. Chrysler Corporation, 474 So.2d 834 (Fla. 4th DCA 1985), which, in the view of the Association, also evinces a departure from the holding in White, despite the district court's purported acknowledgment of the White decision.

SUMMARY OF THE ARGUMENT

In White Construction Company v. DuPont, 455 So.2d 1026 (Fla. 1984), this Court revitalized the criminal conduct test for punitive damages that it adopted in Carraway v. Revell, 116 So.2d 16 (Fla. 1959). The Court essentially held in White that even where a defendant has a duty to use reasonable care and actual knowledge of a dangerous condition, his failure to take action to alleviate the danger is not sufficient to establish the criminal misconduct necessary for submission of punitive damages to a jury. The Court's adherence to the criminal manslaughter test was reaffirmed in Como Oil Company, Inc. v. O'Loughlin, 466 So.2d 1061 (Fla. 1985).

This case affords this Court an opportunity to apply the principles of White and Como to products liability actions, in which punitive damage claims have become the norm, not the exception. There is simply no basis for determining that a manufacturer or seller is guilty of criminal conduct when it has not violated, willfully or otherwise, any governmental regulation, statute or industry standard, when its asserted misconduct consists merely of nonfeasance in failing to improve its product by making it "safer" or affixing an explicit warning, and when there is no criminal "cover-up".

The liberal pre-White attitude toward punitive damages has encouraged the indiscriminate assertion of punitive damage claims. Such claims significantly hinder reasonable settlement of cases and result in (1) the clogging of court dockets by the trial of cases which could otherwise be settled for an amount commensurate with the plaintiff's actual damages, and (2) the payment of inflated settlement demands which in turn increase the cost of insurance and of doing business, without any corresponding public benefit. The proliferation of punitive damage claims also increases the volume and scope of discovery and the cost of litigation while at the same time undermining the litigant's right to a forum in which the relevant evidence can be dispassionately considered by a panel of fair and impartial jurors.

This Court should curtail the abuse of the judicial system by applying White and Como to products liability actions so as to limit punitive damage claims to cases truly involving criminal misconduct.

ARGUMENT

THE DECISION OF THE DISTRICT COURT BELOW AFFIRMING THE PUNITIVE DAMAGE AWARD SHOULD BE REVERSED ON THE GROUND THAT IT IS CONTRARY TO THIS COURT'S DECISION IN WHITE.

This Court's decision in White relied on its earlier dictum in Carraway v. Revell, 116 So.2d 16 (Fla. 1959) in stating that "the character of negligence necessary to sustain conviction

for manslaughter is the same as that required to sustain recovery for punitive damages." (emphasis added; 455 So.2d at 1028, quoting with approval, 116 So.2d at 20).

What this Court did in White is, however, at least as important as what it said. The profound and far-reaching effect of the adoption of the "manslaughter" test in White, is apparent from the result reached in that case: Even though the owner and lessor knew that a huge forty-ton, twenty-two-foot high loader would be operated without brakes at top speed in a mining pit where others were working, thereby exposing them to serious injury or even death, and even though the defendants failed to repair the brakes, this Court held that there was no basis for submitting the issue of punitive damages to the jury.

This result shows graphically what this Court meant in White when it revitalized the criminal conduct test of Carraway. In essence, this Court held that even where a defendant has a duty to use reasonable care and actual knowledge of a dangerous condition, his failure to take action to alleviate the danger is not sufficient to establish the criminal misconduct necessary for submission of punitive damages to a jury.

Seven months after White, this Court reaffirmed its adherence to the criminal manslaughter test. In Como Oil Co., Inc. v. O'Loughlin, 466 So.2d 1061 (Fla. 1985), this Court exercised its conflict jurisdiction to quash a decision of the District Court of Appeal, Fourth District, which had reversed a

directed verdict for the defendant gasoline distributor on punitive damages.

The plaintiff in Como had been seriously burned in a gasoline explosion and fire caused when the defendant's gasoline truck driver overfilled an underground gasoline storage tank, creating a "lake" of fifty to three hundred gallons of gasoline. According to the evidence summarized in the Como decision, the defendant failed to maintain and equip its delivery truck properly, in that there was no dip stick or other device to determine the amount of gasoline which could be pumped into a receiving tank, and the delivery hose lacked a critical rubber grommet which would have prevented the spill. Moreover, the defendant hired untrained drivers without checking their qualifications or instructing them in the proper handling of the large quantities of volatile gasses they were delivering. The defendant's driver left the truck unattended while pumping the gasoline, ignored leaks in the equipment pointed out to him by others, and failed to watch the filling operation, while some fifty to three hundred gallons of gasoline overflowed the tank he was supposed to be filling. Notwithstanding this evidence, this Court applied the criminal manslaughter test and held that:

> [U]nder no view of the evidence does Como Oil's conduct reach the willful and wanton level necessary to support an award of punitive damages. The trial court correctly directed a verdict for Como Oil on this issue. Id. at 1062.

Although White and Como were not products liability cases, the broad principles of those decisions apply with equal force and validity to cases involving the liability of manufacturers or sellers of products. Even where there is knowledge of potential danger, the necessary element of criminality is absent as a matter of law where the basis for liability is a manufacturer's failure to act affirmatively to make the product safer or to issue a suitable warning. This is particularly true where, as here, the manufacturer has not departed from any industry standard or practice, violated any government regulations, or engaged in any criminal concealment.

There are ample and compelling policy reasons to support the stringent application of the criminal manslaughter test to claims for punitive damages in products cases. The sheer number of reported cases on the subject show that punitive damage claims in products liability actions have become routine. What should be the exception has become the norm.

The liberal, pre-White attitude toward punitive damages necessarily encouraged the routine assertion of punitive damage claims, which have nothing to do with compensating a plaintiff for his injuries. The widespread assertion of such claims has a profound detrimental effect on judicial administration, because punitive claims inevitably result in inflated settlement demands bearing no relationship to the plaintiff's actual damages, thereby hindering reasonable compromise and settlement.

The difficulty of settling these overpriced claims is exacerbated by the state of the law on insurance coverage for punitive damages.[2/] Except in rare cases where a punitive claim is unquestionably predicated on the direct willful misconduct of top level management, it is difficult or impossible to predict in advance of a jury verdict whether there will be insurance coverage for any punitive damages awarded. Insurance companies are naturally reluctant to pay a settlement demand inflated by a punitive damage claim for which there is probably no coverage; and insureds are even more reluctant to contribute money to settle a claim for which there is unquestionably insurance coverage for compensatory damages. The significant hindrance to reasonable settlement caused by indiscriminate assertion of punitive claims results in (1) the clogging of court dockets by the trial of cases which could otherwise be settled for an amount commensurate with the plaintiff's actual damages; and (2) the payment of inflated settlement demands in excess of the amount necessary to compensate for actual damages, thereby increasing the cost of insurance and of doing business, with no discernable corresponding public benefit.

2/ See, U.S. Concrete Pipe Company v. Bould, 437 So.2d 1061 (Fla. 1983), in which this Court held that although "Florida public policy prohibits liability insurance coverage for punitive damages assessed against a person because of his own wrongful conduct", it does not preclude insurance coverage of punitive damages when the insured is solely vicariously liable for another's wrongdoing.

There are numerous other reasons of public policy and sound judicial administration which support this Court's decision to restrict punitive damage claims to actual criminal misconduct. The court judicially knows that the inclusion of a punitive damage claim greatly expands the factual issues in a tort case and thereby increases the volume and scope of discovery. Costs of litigation are also multiplied by the common and necessary practice of retaining two sets of defense counsel -- one retained by the insured to protect its interest on a punitive damage claim, and another retained by the insurer in fulfillment of its obligation to provide a general defense of claims covered by liability insurance.3/

A primary aim of our judicial system is to provide a forum for litigants in which the relevant evidence can be dispassionately considered by a panel of fair and impartial jurors. The indiscriminate permissive use of punitive claims seriously undermines that purpose. The very aim and intent of a plaintiff's counsel armed with a punitive count is to deny the defendant his legitimate right to a dispassionate consideration of the

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3/ Public Service Mutual Insurance Company v. Goldfarb, 53 N.Y.2d 392, 442 N.Y.S.2d 422, 425 N.E.2d 810 (N.Y. App. 1981); San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc., 162 Cal.App.3d 358, 208 Cal.Rptr. 494 (Cal. App. 1984); Parker v. Agricultural Insurance Company, 109 Misc.2d 678, 440 N.Y.S.2d 964 (1981).

evidence, by talk of retribution against outrageous conduct, calculated to inflame the jury.[4/] The present case affords this Court the opportunity to curtail such abuse of the judicial system, by limiting punitive damage claims to cases truly involving criminal misconduct.

The effect of punitive damages in civil cases is to impose punishment for criminal acts, but without affording a defendant the basic constitutional protections afforded to persons accused of crimes. As stated by one experienced commentator on the subject:

> One of the most telling criticisms of punitive damages in civil actions is that the defendant is denied the traditional safeguards to which he would be entitled in a criminal proceeding. The defendant may be compelled to testify against himself. He may be found guilty without having the benefit of the measure of proof beyond reasonable doubt.[5/] Silliman, Punitive Damages Related to Multiple Litigation Against a Corporation, 16 FEDERATION QUARTERLY 91, 92 (1966).

4/ See Judge Smith's dissenting opinion in Wackenhut Corp. v. Canty, 359 So.2d 430, 443 (1978), n.6.

5/ Another commentator on the subject, once a staunch advocate of punitive damages, has more recently recommended the adoption of a "clear and convincing" evidentiary test. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. CHI. L. REV. 1, n.5, at 58-59. Accord, Acosta v. Honda Motor Co., 717 F.2d 828 (3d Cir. 1983). Although the Association recognizes that the quantum of proof for punitive damages is apparently not an issue in the present proceeding, it notes its endorsement of a requirement of proof beyond a reasonable doubt, as in any criminal case, or at least by clear and convincing evidence.

In a criminal case, the maximum punishment by fine is set by statute. In a civil case for punitive damages, there is no fixed ceiling for punishment, and the jury can fix punishment according to the wealth of the defendant. In products liability cases in particular, constitutional questions of fundamental fairness arise from a defendant's potential exposure to multiple punitive judgments for essentially the same acts. Id.

Punishment, especially for acts that fall short of criminal conduct, has no legitimate place in the civil court system, the purpose of which should be to compensate for injury. Since courts have no general investigative or fact-finding capability beyond the particular case being tried, they are ill-suited forums for assessing the detrimental or beneficial impact of civil punishment. This is an area of the law better left to the criminal justice system acting in accordance with criminal statutes, or to administrative agencies charged with industry regulation. As stated more than twenty years ago by an eminent member of the Florida defense bar:

> And what of the other possibility, if the actions of the defendant do not constitute a crime? Then he simply should not suffer punishment, either under the criminal law or from a nefarious award of punitive damages. If the defendant's conduct has not been of a nature to invoke society's sanctions, if his entire community has not previously seen fit to call out for punishment of such acts, there is clearly no reason why a given jury may (or may not, as their sole discretion determines) in an emotion-ridden court room, enact and enforce punitive measure on an ad hoc basis. Let the injured party be made

whole -- but no more. Conrad, Punitive Damages: A Challenge to the Defense, 5 FOR THE DEFENSE 9, 10-11 (1964).

In sum, the Association urges that this Court should reinforce and reemphasize its message in White and Como, and apply it with vigor to punitive claims in products liability actions. There is simply no basis for determining that a manufacturer or seller is guilty of criminal conduct when it has not violated, willfully or otherwise, any governmental regulation, statute or industry standard, when its asserted misconduct consists of merely of nonfeasance[6/] in failing to improve its product by making it "safer" or affixing an explicit warning, and when there is no criminal "cover-up". The evidence falls far short of that necessary to maintain a manslaughter conviction.[7/]

One of the primary aims of the Association is to preserve the jury system of compensation for tort claimants. Members of the Association, including this writer, have what we believe to be a well-founded fear that if the courts of this

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6/ Compare Butchikas v. Travelers Indemnity Co., 343 So.2d 816, 817 (Fla. 1976), holding that punitive damages were not allowable against an insurer for excess liability, where the insurer's fault consisted of "nonfeasance and a complete lack of essential communication between the insurance company and its insured."

7/ See, E.G. Getsie v. State, 193 So.2d 679 (Fla. 4th DCA 1966), cert. den. 201 So.2d 464 (Fla. 1967), holding that even where a defendant pointed a gun, which he knew to be loaded, at a person, and cocked and slowly released the hammer several times in a reckless attempt to show off was insufficient to sustain a manslaughter conviction where the gun discharged and killed the defendant's wife.

state, and primarily this Court, do not impose reasonable restraints on the allowance of damages, including punitive damages, the system may not survive the increasingly desperate importunities of the manufacturing and insurance industries of this nation for legislative relief in the form of an alternative system of tort reparations.[8/] We believe that our present system is precious and well worth preserving, but that its survival may ultimately depend on the application of well-reasoned and judicious restraints by this Honorable Court.

Respectfully submitted,

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8/ See, Barrett and Merriman, Legislative Remedies for Punitive Damages, 28 FEDERATION QUARTERLY 339, 343-345 (1978).

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae Florida Defense Lawyers Association in Support of Petitioner was mailed to PAUL R. REGENSDORF, ESQUIRE, Fleming, O'Bryan & Fleming, Post Office Drawer 7028, 1415 East Sunrise Boulevard, Fort Lauderdale, FL 33338; DON L. LACY, ESQUIRE, Post Office Box 6298, Tallahassee, FL 32314 and EARLE LEE BUTLER, ESQUIRE, Butler & Pettit, P.A., Suite 100, 1995 E. Oakland Park Boulevard, Fort Lauderdale, FL 33306 this 9th day of December, 1985.

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