

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 67, 124

AMERICAN CYANIMID COMPANY,)
Defendant/Petitioner,)
vs.)
LESTER K. ROY,)
Plaintiff/Respondent.)

FILED
S. J. WHITE
FEB 22 1980
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Deputy Clerk

**AMICUS CURIAE BRIEF OF THE
FLORIDA CONSUMERS FEDERATION
SUPPORTING THE POSITION OF RESPONDENT**

The Florida Consumers Federation

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STATEMENT OF THE CASE AND OF THE FACTS

The Florida Consumer Federation adopts by reference the Statement of the Case and of the Facts in the Respondent's Answer Brief.

SUMMARY OF ARGUMENT

The petitioner American Cyanimid Company and its amici curiae, the Florida Defense Lawyers Association (FDLA) and the Product Liability Advisory Council (PLAC), have asked this Court to restrict or to take away altogether the right of injured victims to seek exemplary damages from manufacturers of defective products -- even when a manufacturer continues to market an unsafe product with knowledge that it is defective and is likely to cause injury or death. The Florida Consumers Federation urges the Court to reject these attempts to abrogate or restrict the common law remedy of punitive damages and to approve the decision of the district court of appeal.

ARGUMENT

THE DECISION OF THE DISTRICT COURT
OF APPEAL SHOULD BE APPROVED AS
CONSISTENT WITH WHITE CONSTRUCTION

Amicus curiae, the Florida Consumers Federation, is a statewide umbrella organization with 124 affiliated organizations including consumer, environmental, senior citizen and labor groups. The Federation is extremely concerned that American Cyanimid, FDLA and PLAC have asked the Court to make serious inroads into the Florida law of punitive damages. Such changes to the law are not only entirely unnecessary to the resolution of this case, but are also highly undesirable from the point of view of consumers.

The district court below essentially held that there was evidence from which the jury could properly conclude that American Cyanimid knew that the warning label on its AM-9 was inadequate, but nevertheless chose to retain the defective warning and to conceal the true nature of the product hazard, thereby exposing persons such as Mr. Roy to serious injury; that on such a finding, the jury was entitled to award punitive damages; and that the award of punitive damages was appropriate under the Supreme Court's recent opinion in White Construction Co. v. DuPont, 455 So.2d 1026 (Fla. 1984). American Cyanimid Co. v. Roy, 466 So.2d 1079, 1084 (Fla. 4th DCA 1984). The

Federation submits that there is no conflict with the rule of law expressed in White Construction, nor was the rule misapplied, and that the district court's opinion should therefore be approved.

American Cyanimid and its industry and defense attorney association supporters seek to extend White Construction far beyond the holding expressed in that case, chiefly by restating arguments which have been rejected in the legislative arena. The industry-sponsored arguments completely ignore the important and beneficial purposes served by the law of punitive damages in product liability litigation:

"Punishment and deterrence, the basis for punitive damages in Florida as elsewhere, see Campbell [v. Government Employees Ins. Co., 306 So.2d 525, 531 (Fla. 1975)] are no less appropriate with respect to a product manufacturer who knowingly ignores safety deficiencies in its product that may endanger human life than in [other cases of punitive damages]." Dorsey v. Honda Motor Co., Ltd., 655 F.2d 650,655 (5th Cir. 1981).

The potential sanction of punishment and deterrence through an award of punitive damages provides some measure of assurance that a financially motivated manufacturer will not consciously disregard serious product defects -- even when it may be more profitable to disregard the defect and pay compensatory damages to those victims who recognize and pursue their legal remedies. On the other hand, if punitive damages in product liability actions are restricted to the point of being unavailable as a practical matter (as they would be under American Cyanimid's

interpretation of White Construction), then irresponsible, but profit-motivated manufacturers would be faced with no practical disincentive to refrain from concealing hazardous defects or from the intentional marketing of products with known hazardous defects. This is why Professor David Owen, counsel for PLAC, maintains that punitive damages should still be permitted against such manufacturers even when the common law system of tort liability is replaced by alternative compensation schemes. Owen, Deterrence and Desert in Tort: A Comment, 73 Cal.L.Rev. 665, 670 (1985). *

Industry's complaints that there is a "crisis" caused by punitive damages in product liability lawsuits has simply not been borne out by the facts. See American Bar Association, The Special Committee on the Tort Liability System, Toward a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law (1984). The proposed Federal Product Liability Act, which has been aggressively lobbied by industry groups and which would limit the right to recover punitive damages in ways similar to those advocated by American Cyanimid, has received a very cold reception in Congress.

* In addition to abrogating the common law tort system, Professor Owen would modify the standards for recovery of punitive damages to make it more difficult for victims to recover exemplary damages.

In fact, no version of the proposed legislation has even been voted on by the full Senate or House of Representatives. The reasons for widespread opposition to such changes in the law have been summarized as follows:

"The Product Liability Act would ... place severe limitations on the recovery of punitive damages. Undoubtedly there have been instances of excessive awards of punitive damages. But despite the shrill cry of the large corporate defendants to the contrary, trial courts and appellate courts have been quite willing (too willing some argue) to reduce these large awards.

"In addition to the unduly restrictive rules pertaining to punitive damages (such as requiring proof of egregious conduct by clear and convincing evidence), the proposed act demonstrates the patrician attitude of its supporters. Under the act, the trier of fact would first determine whether punitive damages were appropriate, and if so, then the judge -- not the jury -- would determine the amount of punitive damages. Trial by jury is government reposed in the people. Is there just too much democracy around these days?

"Even if we did not have empirical proof, common sense would tell us that fear of punitive damages encourages the production of safer products. The adage that 'one modest fence at the top of a cliff is worth many ambulances in the valley below' is not lost even upon the mass-producers of consumer products. The therapeutic or deterrent value of compensatory and punitive damages cannot be gainsaid." Wilson, Litigation, Vol. II, No. 4, pp. 3-4 (Summer 1985).

We entirely agree and submit that these considerations militate against any judicial erosion of the right of victims to recover punitive damages from manufacturers guilty of egregious wrongdoing.

The cases recognizing the appropriateness of punitive damages have provided a much needed incentive for product safety. See Dorsey v. Honda Motor Co. Ltd., supra; American Motors Corp. v. Ellis, 403 So.2d 459 (Fla. 5th DCA 1981), rev. denied, 415 So.2d 1359 (Fla. 1982); Piper Aircraft Corp. v. Coulter, 426 So.2d 1108 (Fla. 4th DCA), rev. denied, 456 So.2d 100 (Fla. 1983); Johns-Manville Sales Corp. v. Janssens, 462 So.2d 242 (Fla. 1st DCA 1984), rev. denied, 467 So.2d 999 (Fla. 1985); Toyota Motor Co. v. Moll, 438 So.2d 192 (Fla. 4th DCA 1983); Wolmer v. Chrysler Corp., 474 So.2d 835 (Fla. 4th DCA 1985). The need for the sanction of punitive damages is all the greater in this era of decreased governmental regulation of product safety. See Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U.Chi.L.Rev. 1, 59 (1982).

The Federation joins in the arguments of the plaintiff/respondent and amicus curiae The Academy of Florida Trial Lawyers. We urge the Court to recognize the salutary purposes served by punitive damages in product liability lawsuits and to affirm the validity of the foregoing Florida decisions.

CONCLUSION

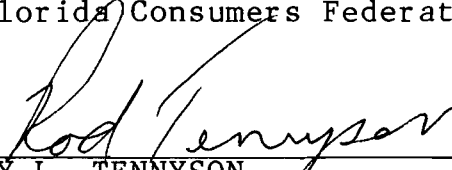
Amicus curiae the Florida Consumers Federation respectfully submits that the decision of the Fourth District Court of Appeal should be approved as consistent with White Construction and that

the Court should declare that the Florida law of punitive damages continues to apply to the irresponsible manufacturer who sells a known defective product with conscious indifference to the safety of consumers and users.

Respectfully submitted,

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Certificate Of Service

I HEREBY CERTIFY a copy of the foregoing has been furnished to Earl Lee Butler, Esquire, 1995 East Oakland Park Boulevard, Suite 100, Fort Lauderdale, Florida, 33306; Paul R. Regensdorf, Esquire, Post Office Box 7028, Fort Lauderdale, Florida, 33338; James E. Tribble, Esquire, 2400 AmeriFirst Building, One South East 3rd Avenue, Miami, Florida, 33131; Don Lacy, Esquire, 2916-B Battle Mountain Way, Tallahassee, Florida, 32301-3657; and Edward T. O'Donnell, Esquire, 200 South Biscayne Boulevard, Suite 4500, Miami, Florida, 33131-2378, by U.S. Mail, this 19 day of February, 1986.



ATTORNEY