IN THE SUPREME COURT OF FLORIDA

CASE NO.: 67,124

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AMERICAN CYANIMID COMPANY,

Defendant/Petitioner,

vs.

LESTER K. ROY,

Plaintiff/Respondent.

On Discretionary Jurisdiction Review of the Decision of the District Court of Appeal, Fourth District, State of Florida

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS SUPPORTING POSITION OF RESPONDENT

THE ACADEMY OF FLORIDA TRIAL LAWYERS

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TABLE OF CONTENTS

DESCRIPTION	PAGE
Table of Citations	ii
Preface	v
Introduction	1
Statement of the Case and Facts	2
Summary of Argument	3
ARGUMENT	4
I. THE DECISION OF THE DISTRICT COURT BELOW AFFIRMING THE PUNITIVE DAMAGE AWARD SHOULD BE APPROVED AS CONSISTENT WITH WHITE CONSTRUCTION	4
A. The Standard For Recovery Of Punitive Damages in Florida	5
B. The Policy Considerations Which Justify Punitive Damages	6
C. White Construction Did Not Create A New Legal Standard For The Recovery Of Punitive Damages	8
D. The Opinion Of The District Court Of Appeal Does Not Expressly And Directly Conflict With White Construction Or Tampa Drug	15
II. THE COURT SHOULD REJECT THE "REFORMS" ADVOCATED BY DEFENDANT	17
A. There Is No Need To Modify Directed Verdict Practice	22
B. The Court Should Not Create A New Presumption Of Due Care For Mere Compliance With Trade Association Or Government Standards	23
C. It Is The Responsibility Of Individual Litigants To "Focus The Attention Of The Lower Courts Upon The Degree Of Risk"	24
Conclusion	25
Certificate of Service	26

TABLE OF CITATIONS

CITE(S)	PAGE(S)
Albertson v. Richardson-Merrill, Inc., 441 So.2d 1146 (Fla. 4th DCA 1983) rev. denied, 451 So.2d 850 (Fla. 1984).	15
American Motors Corp. v. Ellis, 403 So.2d 459 (Fla. 5th DCA 1981) rev. denied, 415 So.2d 1359 (Fla. 1982)	11, 22
American Cyanamid Co. v. Roy, 466 So.2d 1079 (Fla. 4th DCA 1984)	passim
Banker's Multiple Line Insurance Company v. Farish, 464 So.2d 530 (Fla. 1985)	10
Buie v. Barnett First National Bank of Jacksonville, 266 So.2d 657 (Fla. 1972)	9
Campbell v. Government Employees Insurance Co., 306 So.2d 525 (Fla. 1975)	6, 7, 9, 11
Cassisi v. Maytag Co., 396 So.2d 1140 (Fla. 1st DCA 1981)	24
Clement v. Rousselle Corp., 372 So.2d 1156 (Fla. 1st DCA 1979) cert. denied, 383 So.2d 1191 (Fla. 1980)	23
Como Oil Company, Inc. v. O'Loughlin, 466 So.2d 1061 (Fla. 1985)	10, 22
Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981)	11
Dr. P. Phillips & Sons, Inc. v. Kilgore, 12 So.2d 465 (Fla. 1943)	9
Dunn v. Shaw, 303 So.2d 6 (Fla. 1974)	6
Florida Southern Railway Co. v. Hirst, 30 Fla. 1, 11 So. 506 (Fla. 1892)	5, 8

CITE(S) **PAGE(S)**

Goddard v. Grand Trunk R.R., 57 Me. 202, 2 Am. Rep. 39 (1869) 7

Griffith v. Shamrock Village, Inc., 94 So.2d 854 (Fla. 1957) 9

Helman v. Seaboard Coastline R. Co., 349 So.2d 1187 (Fla. 1977) 4

Hutchens v. Weinberger, 452 So.2d 1024 (Fla. 4th DCA), rev. denied, 459 So.2d 1040 (Fla. 1984) 6

In re Standard Jury Instructions, 198 So.2d 319 (Fla. 1967) 5

Johns-Manville Sales Corporation v. Janssens, 463 So.2d 242 (Fla. 1st DCA 1984), rev. denied, 467 So.2d 999 (Fla. 1985). 12, 24

LaPorte v. Associated Independents, Inc., 163 So.2d 267 (Fla. 1964) 9

Piper Aircraft Corp. v. Coulter, 426 So.2d 1108 (Fla. 4th DCA), rev. denied, 456 So.2d 100 (Fla. 1983). 12, 14

Tampa Drug Co. v. Wait, 103 So.2d 603 (Fla. 1958) 14, 15, 16

Toyota Motor Co. v. Moll, 438 So.2d 192 (Fla. 4th DCA 1983) 12

United States Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983) 17

White Construction Company v. DuPont, 455 So.2d 1026 (Fla. 1984) . . . . passim

Winn-Dixie Stores, Inc. v. Robinson, 472 So.2d 722 (Fla. 1985) 10, 11, 22

Winn & Lovett Grocery Company v. Archer, 171 So. 214 (Fla. 1936) 6

Wolmer v. Chrysler Corp., 474 So.2d 834 (Fla. 4th DCA 1985) 13

PAGE(S)

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Florida Constitution:

Article V, Section 3 (1980) 4

Florida Standard Jury Instructions:

CIVIL -
6.12 . . . . 5, 8
PL 5 24

CRIMINAL -
Manslaughter (F.S. 782.07) 11
Culpable Negligence (F.S. 784.05) 11

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PREFACE

Petitioner, AMERICAN CYANIMID COMPANY, was the defendant in the trial court and the appellant/cross-appellee in the district court of appeal. Respondent, LESTER K. ROY, was the plaintiff in the trial court and the appellee/cross-appellant in the district court of appeal. Herein, ROY and AMERICAN CYANIMID will generally be referred to as "plaintiff" and "defendant," respectively. Amicus Curiae, the Academy of Florida Trial Lawyers, will be referred to as "the Academy"; Amicus Curiae, the Florida Defense Lawyers Association, will be referred to as "FDLA"; and Amicus Curiae, Product Liability Advisory Counsel, Inc., will be referred to as "PLAC". References to the initial brief of the defendant and to the briefs of FDLA and PLAC will be abbreviated with the appropriate page numbers as [DB, p. 1], [FDLA, p. 1], and [PLAC, p. 1], respectively.

INTRODUCTION

This Amicus Curiae Brief is submitted on behalf of the Academy of Florida Trial Lawyers in support of the jury's verdict assessing punitive damages and in support of the rulings of the trial court and the district court of appeal approving the award of punitive damages. The Academy is particularly concerned that the defendant and its amici (FDLA and PLAC) do not merely contend that the evidence in this case was insufficient to create a prima facie case of punitive damages for the jury; rather, they urge this Court, implicitly and at times explicitly, to reject nearly one hundred years of jurisprudence and to adopt radical modifications to the existing law which would effectively abolish punitive damages in product liability cases. Such extreme changes to the law of Florida are unnecessary, undesirable and would in fact abrogate many of the remaining legal incentives for product safety.

STATEMENT OF THE CASE AND OF THE FACTS

The Academy adopts by reference the Statement of the Case and Facts in the respondent's Answer Brief.

SUMMARY OF THE ARGUMENT

This Court has historically recognized that punitive or exemplary damages in civil cases serve important societal purposes. Florida courts have followed established precedent in approving punitive damages in cases of malicious or outrageous wrongdoing by manufacturers of defective products. The Court's recent opinion in White Construction is entirely consistent with the earlier law of Florida governing punitive damages; it is also consistent with the Florida decisions approving punitive damages in cases of product liability, including the decision of the district court of appeal under review.

The Academy submits that there was evidence in the present case from which the jury was entitled to award punitive damages against American Cyanimid; that the trial court was correct in submitting the issue of punitive damages to the jury and in approving the verdict; and that the district court of appeal was correct in affirming the verdict and judgment. Should this Court disagree and conclude that the evidence was insufficient to make out a prima facie case of punitive damages, then the Academy respectfully submits that, for the benefit of the bench, the bar and the public, the Court should emphatically reaffirm the existing law of Florida and reject the radical measures urged by the defendant and its amici.

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT BELOW AFFIRMING THE PUNITIVE DAMAGE AWARD SHOULD BE APPROVED AS AS CONSISTENT WITH WHITE CONSTRUCTION

In this product liability case, the jury returned a special verdict specifically finding the defendant guilty of "fraud or misrepresentation" in addition to "willfulness and wantonness." The award of punitive damages was therefore not based on a merely negligent or even "grossly negligent" failure to provide adequate warning -- it was based upon a finding of affirmative misrepresentation by the defendant. The jury assessed punitive damages in the amount of $45,000 -- less than one-sixth of the compensatory damages assessed (the amount of which is not challenged on this appeal) and less than three one-thousandths of one percent (.003%) of the defendant's net worth. It is therefore not a case of economic castigation or of a runaway jury verdict. The narrow legal issues raised in this proceeding are whether the opinion of the district court affirming the judgment for punitive damages expressly and directly conflicts with the decisions of this Court or with the decisions of the other district courts of appeal, Florida Constitution article V, section 3 (1980); and, if jurisdictional conflict exists, whether on the merits there is any competent evidence to support the jury's verdict. Helman v. Seaboard Coastline R. Co., 349 So.2d 1187 (Fla. 1977).

A. The Standard For Recovery Of Punitive Damages In Florida

In 1892, this Court adopted a standard for exemplary damages in civil cases that has been consistently applied through the present time. In Florida Southern Railway Co. v. Hirst, 30 Fla. 1, 11 So. 506 (Fla. 1892), the Court held that in order to recover punitive damages, the plaintiff must prove more than "gross negligence"; he must prove that the conduct of the defendant:

> "[Evinces] reckless disregard of human life, or of the safety of persons exposed to its dangerous effects; or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them." 11 So. at 513.

In 1967, this criterion was summarized and adopted by the Court as Florida Standard Jury Instruction 6.12. In re Standard Jury Instructions, 198 So.2d 319 (Fla. 1967). [1/] It continues to be the law of Florida today. See White Construction Company v. DuPont, 455

1/ Standard Jury Instruction 6.12: "If you find for (claimant) and find also that (the defendant)(any defendant whom you find to be liable to (claimant)) acted with malice, moral turpitude, wantonness, wilfulness or reckless indifference to the rights of others, you may, in your discretion, assess punitive damages against such defendant as punishment and as a deterrent to others. If you find that punitive damages should be assessed against (the) (any) defendant, you may consider the financial resources of such defendant in fixing the amount of such damages. (You may assess punitive damages against one defendant and not the other(s) or against more than one defendant in different amounts)."

So.2d 1026, 1029 (Fla. 1984). Punitive damages have also been held appropriate when the defendant has committed a malicious fraud or misrepresentation. Dunn v. Shaw, 303 So.2d 6 (Fla. 1974); Hutchens v. Weinberger, 452 So.2d 1024 (Fla. 4th DCA), review denied, 459 So.2d 1040 (Fla. 1984).

B. The Policy Considerations Which Justify Punitive Damages

The Court has recognized two broad purposes served by punitive damages in civil cases: (1) punishment of the defendant; and (2) deterrence to the defendant and to others. Campbell v. Government Employees Ins. Co., 306 So.2d 525 (Fla. 1975). As our society and economy have evolved, different types of wrongful commercial activity have been held to justify the imposition of exemplary damages -- particularly when the wrongs were committed against relatively powerless individuals or consumers by large, institutional defendants.

There is perhaps no more eloquent statement of the reasons for such damages than that quoted by the Court in Winn & Lovett Grocery Company v. Archer, 171 So. 214 (Fla. 1936):

> "All attempts ... to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind, confound the judgment.... If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the

wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage men can be secured, who will not handle and smash trunks and band boxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured." 171 So. at 220, quoting Goddard v. Grand Trunk R.R., 57 Me. 202, 223, 2 Am. Rep. 39 (1869).

Certainly, the Court has never credited the position that a judgment for punitive damages is a symptom of a judicial system out of control. To the contrary, as economic conditions have changed, the Court has consistently reiterated the public policy considerations supporting exemplary damages in appropriate cases. In Campbell v. Government Employees Insurance Co., 306 So.2d 525 (Fla. 1975), holding that punitive damages may be recovered from an insurer by an insured for bad faith refusal to settle, the Court stated:

> "Punitive damages are recoverable by an aggrieved to serve the predominant function of deterrence and punishment. In nearly all states punitive damages are recognized to be recoverable. **They are no longer looked upon as monstrous but are awarded to vindicate wrongs arising from antisocial behavior.** The incentive to bring actions for punitive damages is favored because it has been determined to be the most satisfactory way to correct evil-doing in areas not covered by the criminal law. Punitive damages have helped to maintain public tranquility by permitting the

wronged plaintiff to take his revenge in the courtroom and not by self-help...." Id. at 531. (emphasis added)

C. White Construction Did Not Create A New Legal Standard For The Recovery Of Punitive Damages

As noted above, White Construction adhered to and applied the historical standard for the recovery of exemplary damages expressed in Hirst and Standard Jury Instruction 6.12 -- i.e., reckless disregard of the consequences or that entire want of care which is tantamount to conscious indifference to the consequences. 455 So.2d at 1029. By way of illustration, the Court noted in White Construction that the level of recklessness or negligence which will support an award of punitive damages is equivalent to "the character of negligence necessary to sustain a conviction for manslaughter...." 455 So.2d at 1028. Even amicus PLAC acknowledges that the "key definitional portion" [PLAC, p. 22] of the White Construction opinion is the language reciting the traditional standard, and **not** the "manslaughter analogy." Unfortunately, however, a great many trial courts and members of the bar have applied the manslaughter language literally and have taken White Construction to hold that punitive damages may be recovered only if a technical case of criminal manslaughter is established.

Amicus FDLA now suggests that the Court should jettison the historical standard and adopt the "criminal manslaughter test" as the only standard for the review of punitive damages in product

liability actions [FDLA, pp. 3-6]. This "literalist" interpretation of White Construction is completely inconsistent with many of the Court's earlier decisions, if only because of the difficulties in analogizing various types of wrongful conduct to manslaughter. See, e.g., Dr. P. Phillips & Sons, Inc. v. Kilgore, 12 So.2d 465 (Fla. 1943) (affirming verdict for punitive damages in action for malicious conspiracy to injure plaintiff's credit rating); Griffith v. Shamrock Village, Inc., 94 So.2d 854 (Fla. 1957) (where the defendant's clerk failed to make any effort to deliver a telephone message to the plaintiff and thereby caused the plaintiff to miss his brother's wedding, the Court held the issue of punitive damages should have been submitted to the jury); LaPorte v. Associated Independents, Inc., 163 So.2d 267 (Fla. 1964) (an award of punitive damages was affirmed where one of the defendant's employees deliberately threw a garbage can at the plaintiff's dog, killing the dog); Buie v. Barnett First National Bank of Jacksonville, 266 So.2d 657 (Fla. 1972) (affirming a verdict for punitive damages against a bank for wrongfully repossessing the plaintiff's automobile); Campbell v. Government Employees Insurance Co., 306 So.2d 525 (Fla. 1975) (punitive damages were held recoverable in an action by an insured against his insurance carrier for bad faith in refusing to settle a claim against the insured).

Indeed, the Court has previously recognized that even in the case of a drunk driver the criminal manslaughter standard cannot always be literally applied to determine the propriety of an award

of punitive damages:

> "The intentional infliction of harm, or a recklessness which is the result of an intentional act, authorize punishment which may deter future harm to the public by the particular party involved and by others acting similarly. Cases in this category may be likened, **in general terms**, to culpable negligence in criminal proceedings. **The higher burden of proof in a criminal suit, however, prevents the comparison of results in similar factual situations as a means of resolving civil disputes.**" Ingram v. Pettit, 340 So.2d 922, 924 (Fla. 1976) (emphasis added).

The manslaughter analogy becomes still more attenuated when the tortious conduct under review shifts from an employee's isolated act of negligence, as in White Construction and Como Oil Company, Inc. v. O'Loughlin, 466 So.2d 1061 (Fla. 1985), to a corporate act deliberately undertaken. For example, in two recent decisions the Court discussed the liability of a corporate defendant for punitive damages without reference to the manslaughter analogy. In Bankers' Multiple Line Ins. Co. v. Farish, 464 So.2d 530 (Fla. 1985), the Court remanded the case for a new trial on the issue of punitive damages where there was evidence that a managing agent of the defendant corporation intentionally and unjustifiably interfered with an attorney-client contract. In Winn-Dixie Stores, Inc. v. Robinson, 472 So.2d 722 (Fla. 1985), the Court approved the district court's reversal of a directed verdict on the issue of punitive damages where there was evidence that the defendant's managing agent caused the false arrest of the plaintiff -- although the petit theft

charges against the plaintiff were later dropped. Significantly, in neither Farish nor Robinson, both decided **after** White Construction, did the Court suggest that on remand the case should be decided (or the jury instructed) according to the law of criminal negligence. [2/] The reason is clearly that it makes little sense to analogize a false arrest or contractual interference to manslaughter. The same is true of a corporate decision to market a known hazardous product or to conceal or to understate deliberately known product hazards.

The Florida cases which have approved punitive damages in product liability actions may not fit precisely within the "manslaughter analogy"; they are, however, solidly based on the historical standard for recovery of punitive damages and on the principles supporting exemplary damages as expressed by this Court. See Campbell v. Government Employees Ins. Co., 306 So.2d 525 (Fla. 1975) (dicta) (citing with approval punitive damage awards against manufacturers of thalidomide); Dorsey v. Honda Motor Co., 655 F.2d 650, 657 (5th Cir.1981) (approving punitive damages where defendant "knew that it was creating unreasonable risks ... and received recommendations for eliminating or minimizing these unreasonable risks but did not accept them"); American Motors Corp. v. Ellis, 403 So.2d 459 (Fla. 5th DCA 1981), rev. denied, 415 So.2d 1359 (Fla.

2/ Ironically, Fla. Std. Jury Inst. (Crim.) [Manslaughter, F.S. 782.07] and [Culpable Negligence, F.S. 784.05] speak in terms of "gross and flagrant" negligence, rather than "malice, wantonness, willfulness or reckless indifference," suggesting perhaps a **lower** standard for the conviction of a criminal offense.

1982)(reversing directed verdict on punitive damages where there was evidence that automobile manufacturer had actual knowledge of dangerous design, but chose not to conduct any crash tests beyond minimal government requirements and chose not to implement the recommendations of its engineers for a safer alternative design); Toyota Motor Co. v. Moll, 438 So.2d 192 (Fla. 4th DCA 1983)(per curiam)(approving verdict for punitive damages on closely similar facts); Piper Aircraft Corp. v. Coulter, 426 So.2d 1108 (Fla. 4th DCA), rev. denied, 436 So.2d 100 (Fla. 1983) (punitive damages approved where defendant airplane manufacturer learned, after airplane's design and manufacture, that door was defective, but ignored such information, failed to warn purchasers and ultimately destroyed records regarding the defect).

In Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242 (Fla. 1st DCA 1984), rev. denied, 467 So.2d 999 (Fla. 1985), the First District Court of Appeal had an opportunity to consider whether the holding in White Construction would absolve a manufacturer of known defective asbestos products from liability for punitive damages where the defendant was aware of the extremely hazardous nature of the products but nevertheless sold them without adequate warnings. After the district court's original opinion was entered, a motion for rehearing was filed by the defendant manufacturer based upon the Supreme Court's opinion in White Construction. Johns-Manville, like the defendant in the present case, argued that White Construction effectively overruled all of the prior Florida law regarding

punitive damages as it applied to product liability cases. The court disagreed:

> "We do not agree that Johns-Manville's interpretation of the White Construction case is correct.... Nor did the Supreme Court explain that its decision in White Construction was intended to overrule or recede from any of the punitive damages decisions of the Supreme Court or the intermediate appellate courts of Florida...."
>
> "Unlike White Construction, the evidence in this case was substantially different in character and scope. Johns-Manville learned of the high probability of danger to thousands of persons manufacturing and using asbestos products over a period of years and, despite such knowledge, made conscious decisions at the executive level not to disclose the presence of this danger nor to alert affected individuals to the potential harm that could result from such exposure over a long period of time. Johns-Manville's conduct in this case is a far cry from the single incident of negligence in White Construction and is clearly of a character evincing a reckless disregard for human life or the safety of persons exposed to its dangerous effect, which supports a finding by the jury of a conscious indifference to consequences, wantonness, recklessness, and a grossly careless disregard of the safety and welfare of members of the public. In short, the tortious acts by Johns-Manville in this case are not analogous to the single episode in White Construction, but are much more in keeping with the conduct held sufficient to support punitive damages in Louisville & Nashville R. R. Co. v. Hickman, 445 So.2d 1023 (Fla. 1st DCA 1983), pet. for rev. dismissed, 447 So.2d 887 (Fla. 1984)." 463 So.2d at 263, 264.

See also, Wolmer v. Chrysler Corp., 474 So.2d 834, 836 (Fla. 4th DCA 1985).

In each of the Florida product liability cases approving punitive damages, the defendant manufacturer has been guilty of far more than mere knowledge of the defective nature of the product; the manufacturer has been shown to have been actually aware of the defect **and of the overwhelming danger of injury or death**, but has nevertheless chosen not to remedy or appropriately warn of the danger. In some cases, the defendant's wrongdoing has gone further and resulted in active concealment of the defect. See, e.g., Piper Aircraft Corp. v. Coulter, supra. All of the cases are based upon the principle that a manufacturer's knowledge of a product defect which is likely to cause (or which is causing) injury or death, coupled with a conscious disregard of that danger, is sufficient to meet the traditional standard for punitive damages of reckless or conscious indifference to the consequences. Regardless of its decision on the merits of the specific evidence in the present case, we urge the Court to recognize and reaffirm the propriety and continuing vitality of these cases.

D. The Opinion Of The District Court Of Appeal Does Not Expressly And Directly Conflict With White Construction Or Tampa Drug

Petitioner asserts express and direct conflict between the district court's opinion and White Construction, supra, and Tampa Drug Co. v. Wait, 103 So.2d 603 (Fla. 1958). To the contrary, the district court specifically recognized and applied the standard for recovery of punitive damages applied in White Construction. 466

So.2d at 1082. The facts which the court summarized as supporting the verdict for punitive damages [3/] include the following: the warning label on the product stated **only** that it "may cause nervous system disturbances"; the label provided for certain safeguards in the use of the product; the plaintiff generally followed these procedures (except that he had no protection from inhaling the substance); the defendant became increasingly aware over time of the extremely toxic properties of the product and of the inadequacies of the warning; yet, the defendant chose not to modify the warning or to take other appropriate remedial action. 466 So.2d at 1082-1083. While recognizing that the present case presents a close question on the issue of punitive damages, we submit that the district court's analysis was correct and that these facts, among others, were sufficient to justify submission of the issue of punitive damages to the jury under White Construction.

There is very clearly no conflict with Tampa Drug, which held that a manufacturer owes a duty to the public to use reasonable care to give adequate warning of latent, inherent dangers in the use of its product. 103 So.2d at 608. Tampa Drug was decided under principles of negligence. [4/] The jury found American Cyanimid

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3/ The district court made it clear that its opinion only summarized **some** of the facts supporting the claim for punitive damages. 466 So.2d at 1083.

4/ The failure to give adequate warning may also give rise to a cause of action sounding in strict liability. See Albertson v. Richardson-Merrill, Inc., 441 So.2d 1146 (Fla. 4th DCA 1983), rev. denied, 451 So.2d 850 (Fla. 1984); Restatement (2d) of Torts §402A, comment j.

negligent in failing to provide adequate warnings, **before going on to find that the defendant had committed fraud and had acted maliciously.** Thus, the ordinary negligence principles enunciated in Tampa Drug (and which support the jury's underlying determination of liability for compensatory damages) simply have nothing to do with the award of punitive damages in the present case.

II. THE COURT SHOULD REJECT THE "REFORMS" ADVOCATED BY DEFENDANT

Several rather vague proposals for "reforms" have been suggested to the Court. These include a generalized plea for more directed verdicts [PLAC, pp. 23-25], creation of a legal presumption against liability for punitive damages where there is any evidence of compliance with trade association or government standards [PLAC, pp. 26-27], and a request to somehow "focus the attention of the lower courts" upon the degree of risk associated with the defective product [PLAC, p. 28]. At times, the Court is also unabashedly asked to effectively abrogate punitive damages in product liability actions [FDLA, p. 10]. On the record in this appeal, we submit the Court would be extremely ill-advised to adopt any such far-reaching modifications of existing law.

Most of the "reforms" urged upon the Court are based upon unverified, emotional factual arguments concerning matters wholly outside the record (e.g., concern about multiple punitive damage

awards against the same defendant). [5/] If these non-record, hypothetical matters are truly significant (and some of them may be significant in specific factual settings), then they will be made a matter of record in other cases. The facts and the law will then be appropriately briefed and the Court will have a basis for making an informed decision. If we go beyond the opinion of the district court and the record proper to rebut the non-record assertions of defendant and its amici, then we are violating the rules no less than American Cyanimid, FDLA and PLAC. But, if we leave their incorrect assertions unrebutted, then we will be sanctioning not only their improper argument, but also their highly misleading representations. We must accordingly fight fire with fire and point out the following:

(1) Those policy makers who **have** had complete information on the broad economic and social implications of punitive damages have rejected industry's efforts to modify radically the common law. For

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5/ The most extreme example of such improper non-record argument is FDLA's suggestion that court dockets are clogged due to cases which liability insurance carriers would like to settle but cannot because of claims for punitive damages [FDLA, pp.7-8]. Aside from the fact that the empirical data suggests FDLA is wrong, see pages 18-21, infra, there is no liability coverage for **direct** (versus vicarious) claims for punitive damages **as a matter of Florida law.** U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983). All of the Florida cases approving punitive damages in the product liability context have been based upon direct corporate wrongdoing (rather than vicarious liability for punitive damages). Thus, to accept FDLA's argument, one must assume that liability carriers are willing to pay "inflated settlement demands" [FDLA, p. 7] on clearly frivolous demands which are not covered as a matter of law. FDLA's argument on this point is not only improper, it is a red herring.

example, a massively-financed lobbying campaign for the past several years has failed even to get a bill affecting punitive damages to a vote in either House of Congress. [6/] No such legislation has ever been passed by the Florida Legislature. There is clearly very little legislative or political enthusiasm for further restrictions on liability for punitive damages.

(2) The legal profession has also rejected such calls for extreme changes in the law. In a recent comprehensive study on the continuing effectiveness of the common law tort system -- which specifically addressed the role of juries in assessing punitive damages in product liability suits -- a Special Committee of the American Bar Association, [7/] chaired by former Attorney General Griffin Bell, considered "hardship" arguments similar to those

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6/ Several proposed versions of a Federal Product Liability Act which would restrict punitive damages have been introduced in Congress. In the 97th Congress, a Senate bill was introduced, but was not referred out of committee. In the 98th Congress, Senate Bill 44 was referred out of committee, but never came to a vote by the full Senate. In the 99th Congress, Senate Bill 100 was voted down in committee in May, 1985. Similar legislation introduced in the House of Representatives has never been referred out of committee.

7/ Amicus FDLA, like the Academy, has a partisan interest in this case -- the ABA does not. We suggest that the FDLA's rather lugubrious concern for the well-being of our judicial system should be taken by the Court with a grain of salt -- as should the FDLA's suggestion that the Court should abrogate punitive damages before the Legislature does [FDLA, pp. 11-12]. In fact, there is not even any bill on the state legislative horizon which would accomplish the "reforms" sought by the FDLA.

advanced by FDLA and PLAC, but found no objective confirmation:

> "We observe that there is a lack of hard data about whether developments in product liability law have, on balance, produced injustice for sellers, and ultimately for consumers. Thus, for example, we know of no statistical trend which indicates that courts are tending to resolve cases unfairly in favor of consumer plaintiffs. **With respect to the much-discussed issue of punitive damages, we are unaware of data demonstrating intolerable levels of such judgments, either in numbers of awards or amounts.**" American Bar Association, The Special Committee on the Tort Liability System, Towards A Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law, pp. 11-43 (1984) (footnotes omitted) (emphasis added).

The Committee also analyzed other criticisms of punitive damages in products cases, but recognized and lucidly summarized the responses to those criticisms:

> "The use of punitive damages in products liability cases draws support from the idea that they provide a special inducement to manufacturers to warn of hazards discovered after products are on the market. Another argument, responsive to the assertion that punitive damages are essentially criminal in nature, views such awards as serving the 'tort law's goal of providing security for individual interests,' by contrastwith the retributive function of the criminal law. A further reply to the contention that punitive damages are a form of criminal penalty, threatening a sort of double jeopardy, is that it is 'naive to suppose -- even where conduct is of a type that is frequently prosecuted -- that the criminal system will always fulfill its function.'
>
> At a more abstract level, a noted claimants' attorney has argued that punitive damages play an important role in a society where '[c]ivilization is so complex, industries so large, commodities so varied and complicated, and governments so encumbered,

> that checkmates are needed, wherever possible, to assure that a conscience is formed where there is no patent responsibility.' **In that milieu, punitive damages may be said to represent an independent societal judgment on the character of conduct, a remedy which is complementary both to compensatory damages in tort and to criminal punishment and which provides a valuable intermediate function between the two.**" Id. at pp. 5-191 to 5-192 (emphasis added) (footnotes omitted).

On balance, the Special Committee concluded that punitive damages "provide an important bridge between tort and criminal law" (pp. 13-15) and that, generally, there was little or no need for any reform. A similar conclusion was recently reached by the Florida Bar's Tort Litigation Review Commission. See Report of The Florida Bar Tort Litigation Review Commission (1986). [8/]

(3) PLAC's and FDLA's demands for changes are, in fact, almost entirely unsupported except by industry groups and a few academicians (such as counsel for PLAC, Professor David G. Owen). But, as recently as 1982, even Professor Owen acknowledged the propriety of punitive damages against a manufacturer who knowingly markets a defective product, and the **necessity** of punitive damages in view of the current efforts to diminish federal regulation of product safety:

> "My conclusion in 1976 was that punitive damages awards should be permitted in

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8/ The only area in which either the Special Committee of the ABA or the Florida Bar Commission noted that some reforms may be appropriate is the case of the manufacturer who faces liability for multiple punitive damage awards for the same product defect -- an issue not presented by the case under review.

appropriate products liability cases. After the judicial experience of the ensuing years I **remain convinced of the need to retain this tool of legal control over corporate abuses** -- a conclusion reinforced by the current [Reagan] Administration's move to restrict the regulation of product safety by the Consumer Product Safety Commission." Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U.Chi. L.Rev. 1, 59 (1982) (footnotes omitted) (emphasis added).

Indeed, Professor Owen now suggests that, although we should probably do away **entirely** with the common law system of tort liability for compensatory damages, we should nevertheless **retain** traditional tort liability for punitive damages in product liability cases:

> "If our accident law of torts should be abolished, as one day it probably should, a question arises whether there is any remaining place in the legal system for retribution or deterrence. **I think there is.**" Owen, Deterrence and Desert in Tort: A Comment, 73 Cal.L.Rev. 665, 670 (1985) (emphasis added).

This is the highly experimental context in which Professor Owen's proposals for reform should be viewed. Other commentators, who are perhaps less aligned with industry, have concluded that no crisis in the field of product liability law exists at all:

> "Current proposals are an attempt by manufacturers and insurers to turn back the clock to more favorable times.... In the absence of a genuine crisis, the wisdom of tampering with the centuries old common law system to protect special interests is debatable." Dworkin, Federal Reform of Products Liability Law, 57 Tulane L.Rev. 603, 613 (1983).

A. There Is No Need To Modify Directed Verdict Practice

The notion that the number of directed verdicts should somehow in the abstract be increased [PLAC, pp. 23-25] may have some limited academic appeal. See Twerski, Seizing The Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts, 57 N.Y.U.L.Rev. 521 (1982). However, no **specific** "reforms" in this area have been suggested, none would be practical, and none should be adopted. Although we are aware of no scientific surveys in Florida, it is the Academy's observation that only the very rare case of extreme wrongdoing goes to the jury on punitive damages. Moreover, it certainly appears that trial courts are reversed as often for erroneously directing a verdict on punitive damages as they are reversed for erroneously submitting the issue to the jury. Compare Winn Dixie Stores, Inc. v. Robinson, 474 So.2d 722 (Fla. 1985)(reversing directed verdict on punitive damages) and American Motors Corp. v. Ellis, 403 So.2d 459 (Fla. 5th DCA 1981), rev. denied, 415 So.2d 1359 (Fla. 1982)(reversing directed verdict on punitive damages) with White Construction Co. v. DuPont, 455 So.2d 1026 (Fla. 1984) (reversing failure to direct verdict) and Como Oil Co., Inc. v. O'Loughlin, 466 So.2d 1061 (Fla. 1985) (reversing failure to direct verdict). This suggests there is no reluctance on the part of Florida trial courts to direct verdicts on the issue of punitive damages.

B. The Court Should Not Create A New Presumption Of Due Care For Mere Compliance With Trade Association Or Government Standards

Almost casually, and without any support in the record on appeal or in the case law or the evidence code, PLAC suggests that the court should create a new legal presumption of due care for mere compliance with self-serving trade association standards or minimum floors set by government regulation. The brief treatment given to such a radical and far-reaching proposal is understandable, given the lack of precedent or authority. Because industry standards are admissible on the issue of reasonable care, see Clement v. Rousselle Corp., 372 So.2d 1156, 1160 (Fla. 1st DCA 1979), cert. denied, 383 So.2d 1191 (Fla. 1980), and because the standards invariably are promulgated only with the approval of the association's constituents, there is little chance that any manufacturer will ever be shown to have violated such standards. If the Court were to accede to PLAC's request and create a new legal presumption of due care, any remaining effectiveness of trade association standards in promoting safety would be diminished; and a new impetus would be given to industry's movement to minimize the standards set by federal regulation of product safety.

C. It Is The Responsibility Of Individual Litigants To "Focus The Attention Of The Lower Courts Upon The Degree Of Risk"

Amicus PLAC suggests, again rather vaguely, that, like a teacher scolding errant students, this Court should "focus the attention of the lower courts" upon the "degree of risk" of injury or death which supports the claim of product defectiveness. [PLAC, p. 28]. Of course, the "degree of risk" is a central issue in every safety engineering decision and is often the most critical issue in product liability trials. The degree of risk versus the benefit of the product warning or design indeed may determine whether or not a product is legally defective. See Cassisi v. Maytag Co., 396 So.2d 1140, 1145-46 (Fla. 1st DCA 1981); Florida Standard Jury Instruction (Civil) PL 5. Obviously, "risk versus benefit" evidence is admissible; it is the individual litigants' responsibility to see that the evidence (or lack of it) is properly the focus of the trier of fact's attention -- or at least a matter of record; and neither plaintiffs nor defendants should be permitted to neglect the issue at trial (presumably as a matter of strategy) and then argue for the first time on appeal that the lower courts are at fault for "disregarding" the degree of risk. See Johns-Manville Sales Corp. v. Jannsens, 463 So.2d 242, 252 (Fla. 1st DCA 1984), rev. denied, 467 So.2d 999 (Fla. 1985).

CONCLUSION

The cry of wolf that punitive damages need to be restricted or abolished in products actions has been rejected by the public, by the Congress, by the Legislature, by the legal profession and by the courts. A handful of law review articles and the emotional, non-record and extremely self-serving assertions of industry groups is weak authority indeed for the revisions to the law this Court is now asked to make.

The Academy submits that the decision under review is harmonious with the existing law of Florida and should be approved. Perhaps more important than the particular result in the present case, however, is the broader impact of the Court's opinion. We urge the Court to declare and recognize the continuing vitality of the Florida decisions approving punitive damages in product liability actions where the defendant is guilty of conscious indifference to the safety of the public.

Respectfully submitted,

THE ACADEMY OF FLORIDA TRIAL LAWYERS

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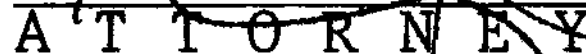
CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing Amicus Curiae Brief of The Academy of Florida Trial Lawyers Supporting the Position of Respondent has been furnished to Earl Lee Butler, Esquire, 1995 East Oakland Park Boulevard, Suite 100, Ft. Lauderdale, Florida, 33306; Don Lacy, Esquire, 2916-B Battle Mountain Way, Tallahassee, Florida, 32301; Paul R. Regensdorf, Esquire, Post Office Box 7028, Ft. Lauderdale, Florida, 33338; James E. Tribble, Esquire, attorney for Florida Defense Lawyers Association, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida, 33131; and Edward T. O'Donnell, Esquire, attorney for Products Liability Advisory Council, 200 South Biscayne Boulevard, Suite 4500, Miami, Florida, 33131-2378, by U.S. Mail, this 19th day of February, 1986.



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