IN THE SUPREME COURT OF FLORIDA

CASE NO. 67, 124

AMERICAN CYANAMID,

Petitioner,

v.

LESTER ROY,

Respondent.

LESTER ROY'S ANSWER BRIEF AND APPENDIX

DON LACY
2916-B Battle Mountain Way
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and

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TOPICAL INDEX

CITATIONS OF AUTHORITY

PREFACE

For the most part, the parties shall be referred to as they stood before the trial court. The Petitioner, AMERICAN CYANAMID will sometimes be referred to as the Defendant. The Respondent, LESTER ROY, will sometimes be called the Plaintiff.

Citations to the Record will usually be indicated with an "R" followed by the page number involved. However, certain testimony was previously written up, and with respect to that testimony, please note that the following abbreviations are used. Dr. Jon Fichtelman's testimony is indicated by an "F" followed by the appropriate page number. Dr. Robert Cunitz's testimony is indicated by a "C" followed by the appropriate page number.

STATEMENT OF THE CASE

The jury heard Defendant's version of the facts, as stated in Petitioner/Defendant's brief. They also were given the verdict form requested by Defendant. Their answers were as follows:

"1. Did AMERICAN CYANAMID COMPANY place AM-9 on the market with a defect, by reason of a defective warning?

A: YES

2. Was said defect a legal cause of damage to LESTER K. ROY and LUCILLE ROY?

A: YES

3. Was there negligence on the part of AMERICAN CYANAMID COMPANY?

A: YES

4. If so, was said negligence a legal cause of damage to LESTER K. ROY and LUCILLE ROY?

A: YES

5. Was there negligence on the part of LESTER K. ROY in failing to read or heed warnings or in using the AM-9?

A: YES

6. If so, was said negligence a legal cause of his damage?

A: YES

7. State the percentage of any responsibility that you charge to:

AMERICAN CYANAMID COMPANY: 70%

LESTER K. ROY: 30%

8. Was the plaintiff, LUCILLE ROY, married to the plaintiff, LESTER K. ROY, at any time during which he was exposed to AM-9/Q-Seal which caused him injury?

A: YES

9. (a) What is the total amount of any damages sustained by LESTER K. ROY and caused by the incident in question?

A: $292,000.00

(b) What is the total amount of any damages sustained by LUCILLE ROY and caused by the incident in question?

A: $12,500.00

10. Do you find that the defendant, AMERICAN CYANAMID, committed a fraud or misrepresentation in this action?

A: YES

11. Were the acts of the defendant, AMERICAN CYANAMID COMPANY, done with malice, moral turpitude, wantonness, willfulness, or with reckless indifference to the rights of others?

A: YES

12. WE, the jury, find for the plaintiff, LESTER K. ROY, on the claim for punitive damages and assess his punitive damages at:

$45,000.00"

As stated in Petitioner, AMERICAN CYANAMID's, brief, this verdict was later reduced according to the relative degrees of negligence despite the jury's answers to interrogatories 10 and 11.

The jury not only heard AMERICAN CYANAMID'S version of the facts, but they also heard LESTER ROY'S facts. The jury also heard all of the arguments set forth in AMERICAN CYANAMID'S brief. Having heard all these things, and having observed the candor and demeanor of the witnesses, who appeared live before them, the jury answered the interrogatory verdict questions from AMERICAN CYANAMID as set forth above.

AMERICAN CYANAMID presented the same facts and argument to the Trial Judge, who denied its motion for directed verdict. AMERICAN CYANAMID presented the same

facts and argument to the Fourth District Court Of Appeal, which decided that the jury verdict was supported by substantial competent evidence, and based upon the verdict rendered, the judgment should stand. Now, AMERICAN CYANAMID is before the Supreme Court arguing facts again, and saying that the finding of facts by this jury cannot stand as a matter of law. This is not proper on Conflict Jurisdiction, and this Honorable Court should deny the petition as improvidently granted.

One thing should be noted. At page 2 of Petitioner, AMERICAN CYANAMID'S, brief, they state that:

> "CYANAMID requested this court to invoke its discretionary jurisdiction and this Court has done so on the issues related to CYANAMID'S appeal."

Respondent, LESTER K. ROY, would respectfully disagree with that contention. The Conflict basis for Petitioner's application was related to the sole and exclusive point set forth by AMERICAN CYANAMID at page 5 of their brief on jurisdiction:

> "THE DECISION OF THE FOURTH DISTRICT IS IN JURISDICTIONAL CONFLICT WITH THE DECISIONS IN TAMPA DRUG CO. v. WAIT, 103 So. 2d 603 (Fla. 1958) and WHITE CONSTRUCTION CO. v. DuPONT, 455 So. 2d 1026 (Fla. 1984)"

Respondent, LESTER K. ROY, would contend that AMERICAN CYANAMID is still arguing over the jury's finding of facts and their response to their questions on the verdict form. The evidence was in conflict on every issue, and the jury saw the witnesses appear in person at trial. Therefore, the real issue on this petition should be whether, given the verdict, there is any conflict jurisdiction based upon Tampa Drug and Wait. Nothing else is before this court.

In other words, given these findings:

[Re: 10]: AMERICAN CYANAMID committed a fraud or misrepresentation in this action;

and

[Re: 11]: The acts of AMERICAN CYANAMID COMPANY were done with malice, moral turpitude, wantonness, willfulness, or with reckless indifference to the rights of others.

* * * given those findings of fact, do Tampa Drug and White Construction prohibit punitive damages in Florida as a matter of law? Therein lies the only issue on this petition!

STATEMENT OF THE FACTS

Preface

Plaintiff/Appellee/Respondent, LESTER K. ROY, does not feel that the highest court of Florida should be requested to review facts before the trial court when the trial judge (who observed the candor and demeanor of the witnesses appearing live before him) declined to grant AMERICAN CYANAMID'S Motion for Directed Verdict, and the Fourth District Court Of Appeal was forced to search through a voluminous Record and Transcript before it also agreed that there was competent substantial evidence supporting the jury's findings of: (1) fraud/misrepresentation plus (2) acts of AMERICAN CYANAMID which were done with malice, moral turpitude, wantonness, willfulness/with reckless indifference to the rights of others. However, since this same argument, by AMERICAN CYANAMID, is taking place, the Respondent, LESTER K. ROY, will reluctantly again, for the third time, review a few of the pertinent facts showing the conflicts which were resolved by this jury several years ago. It is unfortunate that jury verdicts cannot be laid to rest, once and for all, and matters before this Honorable Court be decided on legal issues.

I. ACRYLAMIDE TOXICITY AND KNOWLEDGE OF AMERICAN CYANAMID

AMERICAN CYANAMID knew of the dangerousness of Acrylamide for many years before LESTER ROY'S first exposure. Even AMERICAN CYANAMID'S brief admits such knowledge at, among other places, page 21:

> "The attack here is against the manufacturer of an extremely useful product which has an inherent characteristic that is dangerous to some people who come in contact with it. CYANAMID knew of the inherent risks in its product * * *"

AMERICAN CYANAMID relies heavily upon the testimony of Dr. Herbert H. Schaumburg, and therefore it would be interesting to review some of what he admitted before the jury. The relevant, and extensive, literature in evidence was discussed starting at record page 880. Schaumburg's article from Environmental Health Perspectives, Vol. 11, pp. 129-133, 1975 (Appendix exhibit "A"), was used in cross-examination starting at page 881 of the record. Quoting the article co-authored by this defense witness, which was in evidence and presented to the jury, will shed some light upon the nature of the poison involved herein:

" Acrylamide, widely employed as a vinyl monomer in the polymer industry, is a potent neurotoxin to man and to animals. The cumulative effect of prolonged, low-level exposure to acrylamide monomer is the insidious development of a progressive peripheral neuropathy. Sensory symptoms begin in the hands and feet (numbness, pins and needles), certain reflexes are lost and, with severe exposure, muscle weakness and atrophy occur in the extremities. The peripheral neuropathy may be supplemented by symptoms indicative of central nervous system damage (ataxia, tremor, somnolence and mental changes).

The neuropathologic basis for this clinical picture has been determined in cats. Here, chronic acrylamide intoxication produces selective peripheral and central nerve fiber degeneration. Degeneration first occurs in the extremities of long and large nerve fibers which later undergo a progressive, scriate proximal axonal degeneration known as dying-back. Especially vulnerable are sensory axons supplying Pacinian corpuscles and muscle spindles in the hindfoot toepads, while adjacent motor nerve axons die back later. Distal central nerve fiber degeneration is seen in the medulla and the cerebellum.

The neurotoxic property of acrylamide is of practical concern in two areas. One major problem is the protection of factory workers engaged in the manufacture of acrylamide. A sensitive test of neurological function in these individuals, ie, touch sensation, based on the experimental observation of the exquisite vulnerability of Pacinian corpuscles in acrylamide intoxicated cats, is presently under consideration. The second area of concern is the exposure of the populace to minute amounts of neurotoxic acrylamide monomer which contaminate acrylamide polymers currently deployed in the environment. Federal restrictions on the maximum permitted exposure to acrylamide, based on a largely clinical study of acrylamide

neurotoxicity conducted ten years ago, may require a re-evaluation in the light of recent advances which have pinpointed the initial sites of nerve fiber degeneration." (page 129)

"That acrylamide is neurotoxic to man was discovered in 1954, shortly after the commencement of manufacture of acrylamide from acrylonitrile, when several factory workers developed peripheral nerve disease." (page 129)

"Individuals exposed to acrylamide monomer should be encouraged to report any unexplained change in health status such as skin peeling, excessive tiredness, "pins and needles" sensations, numbness, or sweating in the hands or feet. Warning labels on bags of monomer should contain a clear message that acrylamide is a contact poison, and that repetitive exposure might result in brain and nerve damage." (page 131 - emphasis supplied)

"Because of recent data which have underlined the danger of prolonged low level exposure, the possibility of irreversible central nervous system effects and the identification of peripheral nerve damage before clinical symptoms appear, it seems important to confirm that present regulations are adequate." (page 132)

AMERICAN CYANAMID had supported Dr. Herbert Schaumberg's work from 1973 to about 1975 or 1976. (R 911) He admitted that no animal is immune from the effects of this poison. (R 844) Axons to the nerve fibers supply

Pacinian corpuscles in the feet, and they are exquisitely vulnerable to acrylamide. In fact, the corpuscles disintegrate and axons disappear with exposure. The Pacinian corpuscles never recover. (R 848)

In humans, sexual dysfunction and bladder dysfunction are caused by exposure to DMAPN. (R 877) Acrylamide is a potent neurotoxin, and there is a cumulative effect with prolonged low level exposure. (R 881) There is an insidious development of progressive peripheral neuropathy. (R 882) One of the insidious problems with neurotoxins is that the cause goes unrecognized. (R 884-885)

Sufferers are often not allowed to come to work because they are accused of being drunk. (R 891-892) Severe acrylamide toxication results in confusion and changes in mental state. (R 903)

The fact that the trucks were coated inside and out with white powder would certainly indicate that the workers could inhale acrylamide. (R 915)

At page 883 of the Record, Dr. Schaumberg also referred to the article by Dr. Pamela M. LeQuesne with approval. [This appears in the Appendix as Exhibit "B," and was included in the "Green Binder" referred to in the list of exhibits. Voluminous technical reports and articles were in evidence before the jury in the form of 2 red binders and 1 green binder - as so indicated on the exhibit list.] Quoting from Dr. LeQuesne:

> "One of the most important uses of acrylamide is as a grouting agent, particularly in mining and tunnel construction. Liquid acrylamide is pumped into the soil with a catalyst and after polymerization the soil becomes waterproof.
>
> * * *
>
> The neurotoxic properties of acrylamide were recognized soon after the substance was first manufactured.
>
> * * *
>
> Toxicity tests in animals showed that the substance had a cumulative toxic effect on the nervous system and, about the same time, several workers in a pilot plant making acrylamide developed tingling and numbness of their fingers with ataxia and weakness of their legs.
>
> * * *
>
> Since the monomer but not polymer is neurotoxic, it is mainly those involved in manufacture of the monomer or in the polymerization process that are at risk of developing toxic effects."
>
> (page 309)

"Acrylamide is very soluble in water and is easily absorbed following all routes of administration, intravenous, intraperitoneal, subcutaneous, intramuscular, oral, and dermal. (33) It is similarly neurotoxic whichever route is used.

* * *

The earliest reports of acrylamide neuropathy concerned workers in a pilot plant where acrylamide was being synthesized in the early 1950's."

(page 310)

"In all, only approximately 50 affected subjects have been described in the literature (51), although doubtless there have been many more and probably numbers unrecognized. For instance, among the six patients described by Garland and Patterson (14), five were diagnosed only after the authors made inquiries and visited factories where acrylamide was used. Similarly, five of the six patients described by Kesson and associates (31) were diagnosed only when examined after the cause of the illness in the first patient was recognized."

(page 311)

"Recognition of the clinical features of acrylamide intoxication is more important than laboratory tests for diagnosis. The combination of truncal ataxia with peripheral neuropathy, predominantly motor is suggestive. However, if excessive sweating and redness and peeling of the skin of the hands and feet are also present the diagnosis becomes even more likely. The combination of these signs with a history of exposure to acrylamide leaves little room for doubt. Since intoxication

occurs only in those with obvious exposure and, as yet, environmental contamination from unrecognizable sources has not reached dangerous levels, diagnostic difficulties are not encountered in practice as long as the medical practitioner is aware that the condition exists."

(page 312)

"COURSE OF ILLNESS, RECOVERY AND TREATMENT

* * *

However, in those more severely affected, although improvement may continue for many months, there may be residual abnormalities. There is no constant pattern of abnormalities clinical signs at a late stage. Various combinations of residual ataxia, distal weakness, reflex loss or sensory disturbance have been described (12). There is no known treatment for acrylamide intoxication. Removal from exposure is the only effective measure which can be taken."

(page 313)

"Although Schaumburg and co-workers (46) found unmyelinated fibers in somatic nerves in the cat to be relatively resistant to the effects of acrylamide, it is now clear that they are involved when intoxication is severe." (page 318)

"Thus, at present, there is no human disease recognized as likely to have the same fundamental defect as that produced by acrylamide intoxication."

(page 324)

One further comment requires a response. At page 3 of AMERICAN CYANAMID's brief, they strenuously point to the so-called usefulness of their poisonous chemical. It should be pointed out that this is analogous to the usefulness of asbestos which was involved in the recent case of Johns-Manville Sales Corp v. Janseens, 463 So. 2d 242 (Fla. 1st DCA 1984), rev. denied 467 So. 2d 999 (Fla. 1985). Obviously, in our recent, and continuing fuel crisis, nothing could be more useful than asbestos insulation, however, that cannot be the deciding factor where life-long disability, disease, and perhaps even death are involved!

Tylenol capsules may be useful, but that did not stop Johnson & Johnson from pulling them off the market when the cyanide-laced capsules were found. The space-shuttle program has been put on the back-burner because the "useful" urgency to launch took priority over unanimous warnings from Thiokol engineers. At what point does commercial expediency take priority over human lives? When do we start erring on the side of human lives and human rights to health? The most important thing which anyone possesses is health, and the poison involved herein permanently destroys a user's health!

II. LABELING

It is important to realize that everyone in this country is a consumer. Furthermore, many ultimate user's are functionally illiterate. Therefore, they need to be suitably warned so that they can modify their behavior. Any warning couched in language using medical terms, or language which is clearly understood by attorneys, doctors, and judges, may simply not be enough. But going one step further, even to the highly educated, what warning is sufficient? On page 21 of AMERICAN CYANAMID's brief, they state that:

> "CYANAMID knew of the inherent risks in its product (because it discovered and disclosed it), but has been found liable for both compensatory and punitive damages because a plaintiff's expert opined that the warning label was not only wrong, but was a terrible misrepresentation."

But to whom did they "disclose" the danger? Just putting a disclosure of the "insidious" danger of this poison in the technical literature is not warning to the ultimate user! Also, knowing that the user may likely be functionally illiterate, disclosure of anything in technical terms is a blatant cover-up! What would the following mean to someone who is functionally illiterate:

> "Contains Acrylamide. Warning: repeated skin contact, inhalation or swallowing may cause nervous system disturbances."

At a time when many manual laborers are so functionally illiterate that they cannot properly fill out an employment application without assistance, it is impossible to believe that they would have any idea of what is meant by: "* * * nervous system disturbances." This warning, quoted at page 9 of AMERICAN CYANAMID's brief, is simply not adequate for any purpose. What is a "disturbance" of the nervous system? Does that mean that you might be temporarily nervous as perhaps in a job interview? Where is the warning suggested by Defendant's own witness, Dr. Herbert Schaumberg, where he suggested the word "poison" be used together with an indication that the user might suffer brain and nerve damage? [See page 9 above] Even to someone who clearly understood the terminology, where is any language to give the necessary motivation to take any precautions whatsoever. Rather than alert the manual laborer, who is the ultimate user, to any dangers, this non-warning lulls him to sleep and makes him confident that the product can be used with a total disregard to the manner involved!

It certainly does not take much imagination to see why the jury unanimously found that AMERICAN CYANAMID committed a fraud or misrepresentation and that their acts were done with reckless indifference to the rights of the consumer!

DR. ROBERT CUNITZ

Dr. Robert Cunitz testified on behalf of the plaintiff, and he was the only expert in warnings and labeling as they relate to human engineering. Therefore, his testimony is unrebutted.

Dr. Cunitz holds a doctorate in the field of psychology in areas of experimental and human factors, and industrial psychology. (C 2) His expertise is in the area of warnings and labeling - instructions. (C 8)

The fact that something is a hazard by itself is not the whole problem if nobody is exposed to it. One must try to understand how people might be exposed to this poison. That involves understanding the packaging in which it comes, and the way it is handled. (C 13)

Acrylamide is a dangerous poison because it is hazardous in three different ways, ie inhalation, swallowing, and just through skin contact. It is clear that people are exposed to it in the normal course of using the product. Dr. Cunitz's analysis centered on warnings because barriers to prevent the exposure do not exist. Strong warnings were needed to reduce the risk factor. (C 14)

A warning is a written message meant to change behavior. (C 19) Any warning has got to stand out from the background. It has got to be bright and bold. (C 20) A warning must also be given at the right time and place. (C 21) The warning must also tell someone what to do to avoid being hurt. It must be very clear and it has to be something which can be followed, something which can actually be accomplished. (C 23)

Dr. Cunitz examined the warnings available to Mr. Roy. (C 15) The typography does not stand out from the rest of the bag. It does not use the red, black and white danger colors. The fine print used does not attract one's attention. And it uses the wrong signal word - "warning." (C 26) It contains no skull and crossbones. The product is highly toxic poison. The bag grossly understates the nature of the danger. Instructions on the bag are impossible

to follow. How do you not get the material in your eyes and on skin and clothing? (C 27) How do you avoid breathing the dust? The bag also says: "wash thoroughly after handling" - thus acknowledging that it will indeed get on your hands. It states: "wear clean work clothing daily" - which means that clothing is known to accumulate this poison. The point is, it is impossible to follow the directions to keep the poison off your person. (C 28) As to the placard, it was located in the interior of the truck towards the front - furtherest from the opening in the rear. Also, it does not tell you why you should follow the directions, ie there is no motivation. (C 30) The poster again fails to show the motivation. It fails to tell what the problem is. There is no reference at all to the toxicity of acrylamide. It says to: "wear respirator if necessary." How is the worker supposed to know when it is necessary? (C 31)

These warnings, which existed when Roy was working for the City of Hollywood, could not have been effective, and they would not provide people with the information they needed and with sufficient motivation to change their behavior and act in such a way as to not have any exposure to this poison. (C 32) Also, you need to test out these warnings with similar working people. (C 35)

The literature put out by the defendant itself describes the product as highly toxic. It is a poison, and should be labeled with the word "poison" with a skull and crossbones and the word "dangerous." It can kill and/or permanently injure. (C 36)

Furthermore, the warnings changed over the years. Early warnings in the fifties were stronger than the later ones which seem to have gotten weaker over time rather than stronger. (C 37)

The warning issued by defendant was a terrible misrepresentation of the dangerousness of this product. This is a highly toxic poisonous substance and AMERICAN CYANAMID did not advise of the dangerousness of that exposure, and failed to provide sufficient motivation to go through the rigamarole and discomfort of following any precautions, if that is even possible, from exposure to this poison. (C 47) Defendant admits that this product is a poison, and it ought to be labeled as a poison. (C 76)

III. LESTER ROY'S EXPOSURE, CONDITION, & TREATMENT

Mr. Roy began working in 1965 for Penetryn as a laborer working with the AM-9 chemical grout. (R 3-5) He received only on-the-job training since there were no pamphlets and no other instructions. (R 5) He spent two years working for Penetryn (R 7), and then he went to work for the City of Hollywood. (R 8) Mr. Roy learned how to mix the substance involved, on the job. (R 4)

Once Mr. Roy went to work for the City of Hollywood, he at all times followed all safety procedures with which he was familiar. For example, he wore boots, wore clean clothes every day, showered after he got home, and attempted to wash off the chemical when it got on him. (R 23) Although the City of Hollywood had monthly safety meetings, they covered mostly traffic and nothing was mentioned about what Mr. Roy's job involved as it related to the dangerous chemical he was handling daily. (R 75) In particular, there were no instructions on safety procedures, handling, or signs on the trucks. (R 6)

There was no sign, and no set of instructions posted in the trucks when Mr. Roy worked at the City of Hollywood. (R 24) At all times, he used gloves and the

prescribed ordinary work clothes. (R 7) No respirators and no goggles were provided. (R 7) All the workers had was rain gear. (R 17)

Mr. Roy said that he knew there was a notice on the bags, but this did not mean much to him. (R 6, 10) It certainly did not make him realize he was dealing with a poison! (R 11) Mr. Roy never, while working with the grouting powder, learned that it could even cause harm. (R 31) In fact, it was only as he was leaving the City of Hollywood that he learned that the grouting agent could have a poisonous effect on his body. (R 32) Mr. Roy knew there was a notice, but he did not know there was a danger. (R 59) He did not know the amount you had to be exposed. (R 60) <u>If he had known the danger, he would not have worked with the poison</u>. (R 33)

While Mr. Roy worked for the City of Hollywood, a representative of AMERICAN CYANAMID did come there. (R 9) This person never watched how the work was being performed, never passed out any safety literature, and never gave any instructions or warnings. (R 10)

Mr. Roy's exposure continued until the day when he left the City of Hollywood, May 1st, 1975. (R 73) He was doused with the poison periodically when

plumbing in the truck would fail. (R 18) When he was doused, he would go home and change clothes. (R 19)

Mr. Roy spent all of his time on the mixing truck up until the time when he was made foreman. (R 25) Thereafter, he was on the TV truck, but even then he would go to the mixing truck when they had any problems. No other worker was exposed as long as Mr. Roy. (R 26)

Plaintiff Roy first saw the instruction booklet after he left the City of Hollywood. He obtained it from Penetryn Systems. (R 28) Even this booklet really didn't tell him anything. (R 32) Defendant's placard was not there when he worked for the City of Hollywood. (R 21)

Mr. Roy first developed a rash and eventially was referred to Dr. Simonson, a dermatologist. (R 11) Other problems from the poison developed. They included numbness, tingling, twitching, jerking, bladder trouble, high blood pressure, a skin problem with peeling all over the body, sensitivity to temperature changes, trouble with memory, impotency, trouble shaving, and inability to drive. (R 15, 35 & 39)

Mr. Roy left the City of Hollywood because his doctor told him to get away from the poison. (R 13) After

that, he was never able to find work which he could do. (R 14)

On the issue of medical treatment, AMERICAN CYANAMID seems to contend that LESTER ROY'S medical bills were minimal, and that all of his condition is unrelated to acrylamide poisoning, ie for example due to vascular disease etc.

As to medical bills, Dr. LeQuesne, at page 313 of her article, mentions the fact that: "There is no known treatment for acrylamide intoxication." As a result, how could anyone have extensive medical bills for treatment? That is like saying to an AIDS patient: "well I guess you are not too sick since you do not have any medical bills." Furthermore, LESTER ROY'S complete medical work-up was done in the VA hospital. Since when did they start charging veterans?

LESTER ROY underwent a complete and very extensive medical work-up in the VA hospitalization where all medical conditions were carefully explored. After numerous experts completely checked out each and every symptom and complaint, the discharge summary read:

"Paresthesias in the feet. Possible mild peripheral neuropathy."

There was absolutely no mention of vascular disease findings or any other thing. (R 868, 901-902) These were admissions of AMERICAN CYANAMID'S witness, Dr. Herbert Schaumburg, who could only explain that all those other doctors must have made a mistake!

Although, as previously stated, LESTER ROY feels that a third re-argument of facts before the jury is improper, nevertheless since AMERICAN CYANAMID seems determined to proceed on this basis, it is necessary to very briefly point out a very few other items before the fact-finders:

Dr. Louis Simonson, a board certified dermatologist, assigned a 10% permanent residual disability within his area of expertise, ie dermatology. (R 439-441, and 445)

Dr. Jon Fichtelman, testified on behalf of the plaintiff, LESTER ROY. (F 2) He is board certified in anatomic and clinical pathology. (F 2) In fact, he was the only real toxicologist who testified at the trial.

Toxicology is a part of clinical pathology. (F 4; R 600-601)

Dr. Fichtelman said that the first noticeable symptoms consist of nausea, vomiting, general malaise, and upset stomach. Then headaches, motion sickness, memory disturbances, peripheral nerve disease, and loss of feeling in the distal extremities develop. The third phase results in more serious nerve problems and loss of muscle function distally. (F 9)

Mr. Roy had a complete university medical center workup, with every facility available, and after seven physical examinations, vascular problems were ruled out as the cause of his unusual problems. Roy did have peripheral neuropathy. (F 12) Next, Roy saw Dr. Simonson who diagnosed contact dermatitis. (F 13) Roy was suffering the effects of acrylamide exposure. (F 16)

Acrylamide poison attacks the body through inhalation, skin exposure, and through the eye's mucous membrances. It is a small, light-weight molecule which can sublimate. And it's effect is cumulative. (F 17) Some molecular residuals are stuck down in the distal ends of the nerves. It generally stays there or to some degree is probably broken down. (F 18)

Mr. Roy was impaired by his exposure. He was certainly disabled. (F 20) Acrylamide is a toxic substance, a dangerous substance. (F 25) Mr. Roy has more exposure than anybody else to the compound. His symptomatology matches perfectly with what one would expect being exposed to that extent. He is suffering the effects of the exposure right now. (F 26) Mr. Roy definitely shows the effects of acrylamide toxicity. (F 85)

Dr. Kenneth Heilman was Mr. Roy's physician in Gainesville, and saw him both at the University of Florida Shands Teaching Hospital, and the VA hospital. (R 274 & 276) Dr. Heilman is a full professor of neurology and is board certified. (R 283)

It was Dr. Heilman who suggested that Roy be hospitalized, and he outlined a complete list of diagnostic procedures to be undertaken. (R 284) Mr. Roy had a history of shooting pains in his arms and legs, muscle cramping, etc. (R 285) Examination revealed diminished sensation in the lower extremities, ie a polyneuropathy. There was also spasticity and increased tone in the lower extremities. (R 285) Dr. Heilman wanted to make certain that Roy was not suffering from something else going on or another disease that could be causing both his neuropathy

and his spasticity. He wanted to admit Roy to make certain that he was not missing something, that they were not missing a tumor in his spinal cord that could be compressing his nerve, or some medical disease. (R 286)

No tumor was found, and no other disease was found. (R 299) Since the other things were ruled out, acrylamide poisoning was the cause of Mr. Roy's problems. (R 305) The neuropathy was consistent with acrylamide intoxication. (R 291, 292 & 303)

And finally, we also would quickly point to some of the testimony given by C. Boyd Shaffer, Ph. D. He has testified on behalf of AMERICAN CYANAMID on many occasions, and has never found any of their labelings and warnings deficient. (R 775)

He testified that this poison can be inhaled, swallowed, and absorbed through the skin. (R 754) It does not fall within DOT categories. Admittedly, an earlier publication put out by the defendant did describe this poison as "highly toxic." (R 773)

Dr. Shaffer was aware of the fact that in rat experiments, the animals gradually lost control of

their hindquarters, and eventually lost all use of them. But before the rats lost control, there were disturbances in locomotion. (R 776-777) Shaffer described both myelin degeneration and nerves dying back. (R 779) This is a peripheral neuropathy which manifests itself as a tingling in the hands, feet, arms, and legs. (R 779) The damage is not confined to animal experiments. In fact, employees of the defendant were injured by the poison. (R 781-782) Rats which lost control of their hindquarters were permanently injured and never fully recovered. (R 782) The extent of injury was a function of both dose and time. (R 783) The poison affects both the central and peripheral nervous system. (R 789) Also, DMAPN causes severe damage in the eye, ie it is almost corrosive to the eyes. (R 790) And, of course, all the effects are cumulative. (R 794)

Dr. Shaffer also stated that MCA (which set out the labeling standards) was a private organization which has no consumer or government members or representatives. Only manufacturers of chemicals are eligible for membership and representation. (R 785) And, most significantly, when defendant, AMERICAN CYANAMID, developed its labels and warnings, no psychologist or anyone who studied the impact of words, colors, size of type, or other human factors was involved. (R 783) Nor did the defendant ever give any

consideration to dissolvable bags so as to have a closed mixing system. Nor, was any consideration ever given to manufacturing the poison as pellets or granules to avoid the inhalation of fine dust. (R 792)

This defense witness further admitted that acrylamide presents a serious hazard. (R 803) No animal species is immune, and humans are definitely affected by exposure. (R 802) AMERICAN CYANAMID was on notice of the dangerous propensities from the first results of animal tests. (R 806)

On the issue of standards, LESTER ROY would point out that the present case is totally distinguishable from the government standards upon which defendants seem to rely in Wolmer v. Chrysler Corp., 474 So. 2d 834 (Fla. 4th DCA 1985); petition pending on the issue of jurisdiction before the Supreme Court [Case # 67, 761] Wolmer is not a warning case - rather a ". . . refused or failed to do research . . . failed to fully consider, evaluate and act on the results of [testing] . . ."

And the last item which will be mentioned under this abbreviated third re-hash of the facts, is the very misleading character of the so-called manuals which were put out by AMERICAN CYANAMID. Appendix exhibit "C-1" shows a worker mixing AM-9 chemical grout in violation of all safety procedures supposedly advocated by the Defendant. The worker has no mask, no gloves, his arms are bare, and he is wearing no protective clothing. Appendix exhibit "C-2" shows the same picture as it appeared in the manual just before Mr. Roy left his employment. The Defendant has painted on gloves and a face mask, but it still does not include any protective clothing, and the worker still has his bare arms exposed. The photos are identical except for the "artist's" correction of the most obvious misleading impression!

POINTS ON APPEAL/REVIEW

POINT I ON APPEAL/REVIEW

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING CYANAMID'S MOTION FOR DIRECTED VERDICT ON THE ISSUE OF PUNITIVE DAMAGES AND IN SUBMITTING THE PUNITIVE DAMAGES ISSUE TO THE JURY AND WHETHER THE FOURTH DISTRICT ERRED IN AFFIRMING THOSE DECISIONS

POINT II ON APPEAL/REVIEW

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GRANTING CYANAMID'S MOTION FOR NEW TRIAL ON LIABILITY AND COMPENSATORY DAMAGES OR IN NOT REMITTING ROY'S COMPENSATORY DAMAGE AWARD

LESTER ROY would point out to this Honorable Court that these are the points as they are presented by AMERICAN CYANAMID. They duplicate the issues presented by Defendant before the Fourth District Court Of Appeal as is obvious after examination of page eighteen (18) of AMERICAN CYANAMID'S initial brief before the 4th DCA. It is clear that They are treating this as just another appeal, re-arguing the same things, and have totally ignored the basis for this petition.

SUMMARY OF ARGUMENT

The jury found that the defendant, AMERICAN CYANAMID, committed a fraud and misrepresentation in their labeling and the actions of defendant, AMERICAN CYANAMID, were done with malice, moral turpitude, wantonness, willfulness, and reckless indifference to the rights of LESTER ROY, the user of the mislabelled poisonous sewer grout.

AMERICAN CYANAMID had known about the toxicity of their poison since 1954, yet they only printed a very inocuous warning, in highly technical medical language, on the bag containing this deadly poison. They put out manuals supposedly showing how to use the poison which showed pictures of a worker not using gloves, mask, or protective clothing in direct contrast to their own recommendations. Defendant made up their own labelling standards by chemists who admittedly did nothing to study the human engineering factors in making the label sufficiently understandable to the general public. They recklessly failed to investigate any methods to manufacture pellets or put the poison in dissolvable bags so that it could be mixed in a closed mixing system.

ARGUMENT

POINT I ON APPEAL/REVIEW

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING CYANAMID'S MOTION FOR DIRECTED VERDICT ON THE ISSUE OF PUNITIVE DAMAGES AND IN SUBMITTING THE PUNITIVE DAMAGES ISSUE TO THE JURY AND WHETHER THE FOURTH DISTRICT ERRED IN AFFIRMING THOSE DECISIONS

LESTER ROY would submit that there was no such error, but would further argue that this is not what is before this Honorable Court. [See page 4 above]

At page 24 of their brief, AMERICAN CYANAMID mentions Tampa Drug v. Wait, 103 So. 2d 603 (Fla. S. Ct. 1958). They admit that there was knowledge of the potential danger in the use of the product, in this case, acrylamide. Therefore, we move on to the second test which they glean from Tampa Drug. Quoting from their brief:

> "In this case, CYANAMID had 'actual knowledge' and thereby knew of the inherent danger in its product, AM-9. Accordingly, this Court in Wait again recognized the obligation the manufacturer has under those circumstances:

> 'This duty simply is to take reasonable precautions to supply users with an adequate warning notice that would place them on their guard against the harmful consequences that might result from use of the commodity.'
>
> 103 So. 2d at 608. See also Edwards v. California Chemical Co., 245 So. 2d 259 (Fla. 4th DCA 1971)."

Since Tampa Drug requires that "users" be placed on notice, AMERICAN CYANAMID'S seminars and information to distributors seems to be irrelevant event though they make much to do about that. Obviously, if those precautions were adequate, why would any warning on the bags be required whatsoever? But Tampa Drug requires that "users" in the field be warned, and this would certainly require that something be used which would be sufficient to put illiterate workers on notice of the hazard. AMERICAN CYANAMID has used a warning on their bags in highly technical and ambiguous language which would not even put a medical doctor on notice of the danger.

> "Warning: Repeated skin contact, inhalation or swallowing may cause nervous system disturbances."
>
> (Petitioner's brief pg 9)

That is like saying, "WARNING: your first date may cause nervous system disturbances!" Yes - so what? Or:

"WARNING: You may be struck by lightning sometime in your lifetime!" Again - yes, but so what? "WARNING: watching horror movies may be dangerous and raise goose-bumps. It might cause other disturbances to your nervous system!" Although this may seem silly, the main thrust is an adequate warning of the permanent disability which may result from acrylamide, and how it can cripple the user for life. That is precisely what Tampa Drug is all about. That case does not prohibit the newspaper movie section from advertising a movie which will excite you, horrify you, even cause "nervous system disturbances." What we are talking about is a deadly poison capable of causing permanent injury, and this requires (according to Tampa Drug) an adequate warning which would place the user on their guard against the harmful consequences that might result from use of the commodity.

Do these labels comply with Tampa Drug's requirement that users be placed on their guard? It is no wonder that the jury unanimously found that AMERICAN CYANAMID committed a fraud or misrepresentation and that their acts were done with reckless indifference to the rights of the consumer! There is no conflict jurisdiction with Tampa Drug, and this petition for discretionary review should be denied as improvidently granted on that ground.

The only other ground for alleging conflict jurisdiction is supposedly based upon White Construction Co. v. DuPont, 455 So. 2d 1026 (Fla. S. Ct. 1984). [See discussion at page 4, above.]

The same conduct, in different settings, could and does result in different degrees of liability - there is no conflict. It is fanciful for AMERICAN CYANAMID to say that the Court at once acknowledged and ignored the punitive damages test restated by this Court in White Construction. Note the First District's own Ellis v. Golconda Corp., 352 So. 2d 1221 (Fla. 1st DCA 1977), for applying the standard stated in Carraway v. Revell, 116 So. 2d 16 (Fla. 1959). The First District's Johns-Manville decision and the Fourth District's decision in LESTER ROY are completely consistent with White Construction. Actually, the present, LESTER ROY case is stronger than the Johns-Manville case. In Carraway, this Court explained what Petitioner consciously ignores:

> "Different degrees of negligence are far easier to demonstrate than to define. The same conduct, in different settings, could and does result in different degrees of liability. " 116 So. 2d at 19

With this in mind, the Court was careful to emphasize in White Construction that there was no view of the evidence

which would have supported punitive damages. 455 So. 2d 1029 The Court used the term "no view of the evidence" because:

> "When claims for punitive damages are made, the respective provinces of the court and the jury are well defined. The court is to decide at the close of the evidence whether there is a legal basis for recovery of punitive damages shown by any interpretation of the evidence favorable to the plaintiff."
>
> Arab Termite and Pest Control v. Jenkins, 409 So. 2d 1039, 1041 (Fla. S. Ct. 1982)

And in Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242 (Fla. 1st DCA 1984), review denied at 467 So. 2d 999 (Fla. S. Ct. 1985), at page 250, the DCA faithfully followed this fundamental rule, and applied it:

> "Without detailing all the evidence, we conclude the jury could find that Johns-Manville knew asbestos was causing asbestosis in employees working in its plants and in persons using its asbestos products during 1942 through 1951, the period of Mr. Janssens' exposure, and that Johns-Manville not only failed to warn, but deliberately and persistently refused to disclose or disseminate warnings of any danger during that period and for many years thereafter. The jury could reasonably infer from the evidence that Johns-Manville conduct amounted to a wanton disregard for the health and safety of persons using its asbestos products and evinced a reckless indifference to the potential consequences of its deliberate business decision not to warn the users of its products to take some measures of protection from the potentially harmful effects of prolonged exposure to excessive amounts of asbestos dust and fibres."

And, again on rehearing:

> "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 more in keeping with the conduct held sufficient to support punitive damages in Louisville & Nashville, R.R. Co. v. Hickman, 455 So. 2d 1023 (Fla. 1st DCA 1983), pet. for rev. dismissed, 447 So. 2d 887 (Fla. 1984)."

Similarly, this Court has ruled that when a wrongdoer "has been repeatedly warned of the dangers incident to" its negligence, "chose to save money rather than correct the known dangerous condition," and "failed to warn [those at risk] of the dangerous condition," punitive damages may be awarded. Atlas Properties, Inc. v. Didich, 213 So. 2d 278, 279

(Fla. 3rd DCA 1968), specifically approved, 226 So. 2d 684, 690 (Fla. 1969). Similar rulings have regularly occurred in the products liability field in Florida. American Motors v. Ellis, 403 So. 2d 459 (Fla. 5th DCA 1981), pet. for rev. den., 415 So. 2d 1359 (Fla. 1982); Piper Aircraft Corp. v. Coulter, 426 So. 2d 1108 (Fla. 4th DCA 1983), pet. for rev. den., 436 So. 2d 100 (Fla. 1983); Toyota Motor Company Ltd. v. Moll, 438 So. 2d 192 (Fla. 4th DCA 1983); Dorsey v. Honda Co. Ltd. 655 F. 2d 650 (5th Cir. 1981).

It is one thing to be slow about fixing the brakes on a piece of equipment at an isolated mining site (White Construction); it is quite another to deliberately cause thousands of workers to suffer crippling neuropathy (LESTER ROY). If Caterpillar had been a defendant in White Construction, and had produced thousands of 40 ton loaders with known defective brakes and had deliberately failed to give an adequate warning which was understood by the ultimate user about the defect, and continued its conduct even though it knew people were being injured, this Court would have found a legal basis for punitive damages. Campbell v. Government Employees, Inc. Co., 306 So. 2d 525, 531 (Fla. 1975) (dicta favorably noting punitive damages in Thalidomide cases).

Thus it is seen that this case does not conflict with the principles in either Tampa Drug or with White Construction. The petition should be denied by this Honorable Court.

POINT II ON APPEAL/REVIEW

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GRANTING CYANAMID'S MOTION FOR NEW TRIAL ON LIABILITY AND COMPENSATORY DAMAGES OR IN NOT REMITTING ROY'S COMPENSATORY DAMAGE AWARD

Petitioner's arguments on the two points raised seem to run together. Therefore, this Honorable Court's indulgence is respectfully requested if it seems that this answer should be more logically arranged otherwise. Again LESTER ROY would say that there was no error, that this is a rehash and attempt at another appeal, and the entirety of AMERICAN CYANAMID'S brief is not properly responsive to the narrow legal issue upon which this matter should be viewed.

This Honorable Court has long since laid arguments like this to rest. Bould v. Touchette, 349 So. 2d 1181 (Fla. S. Ct. 1977) was a wrongful death and survivorship action brought against the driver and owner of a tractor-trailer which rear-ended decedents' vehicle. The Supreme

Court held that: (1) an award of $100,000 compensatory damages for loss of support to the 87-year old wrongful death plaintiff, who was unemployed, and had been supported by the accident victims for years, and who was in excellent health and who was totally ambulatory, and whose need for support increased during the period of time between the accident and trial, was not excessive; (2) an award of $65,000 compensatory damages to the survivorship plaintiff, acting as administrator of the estate of both accident victims, was not excessive; (3) an award of $800,000 punitive damages in favor of the survivorship plaintiff was not excessive where the owner of the tractor trailer had a net worth of $13,145,000 at the time of trial; and (4) in the absence of any evidence showing the net worth of the tractor trailor operator, it could not be said that $5,000 punitive damages against the operator was excessive.

The Bould court specifically discussed most of the leading cases in this area including Lassiter v. Int'l Union of Operating Engineers, 349 So. 2d 622 (Fla. S. Ct. 1977). Bould stated that the party who assails the amount of a verdict as being excessive has the burden of showing that it is unsupported by the evidence or that the jury was influenced by passion or prejudice. Dertermination of the amount of damages in a personal injury suit is peculiarly

within the province of the jury. Where recovery is sought for personal tort, or where punitive damages are allowed, courts cannot apply fixed rules to a given set of facts and say that the verdict is for more than would be allowable under a correct computation. The court should never declare a verdict excessive merely because it is above the amount which the court itself considers the jury should have allowed, and a verdict should not be disturbed unless it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which a jury may properly operate. Even when a single element of damage is pecuniary value of loss of support suffered by a plaintiff, this does not mean that recovery is limited to a present value of anticipated support which must be measured to mathematical certainty.

AMERICAN CYANAMID has injected two separate issues into this point. The second one deals with the punitive damages, and this issue has already been covered under POINT I. The only remaining issue has to do with excessiveness. First of all, it should be noted that the defendant's net worth was stated to be in excess of $1.5 BILLION dollars. The jury returned a punitive damage verdict of only $45,000! This is hardly a significant amount.

The Bould court spoke to this issue at page 1187:

> "(14) Concrete Pipe's net worth at the time of trial was $13,145,000, so the punitive damage award amounted to 6.2% of its total worth. This award is not so gross as to raise the spector of bankruptcy, and is totally consistent with the guidelines established by the above authorities. See also, Sperry Rand Corp. v. A.T.O., Inc., 447 F. 2d 1387 (4th Cir. 1971) [punitive damages of $175,000, net worth $750,000, approved]; Fuchs v. Kupper, 22 Wis. 2d 107, 125 N. W. 2d 360 (1963) [punitive damages 12-1/2% of net worth approved]; Malco, Inc. v. Midwest Aluminum Sales, 14 Wis. 2d 57, 109 N. W. 2d 516 (1961) [punitive damages 7-1/2% of net worth approved]

A lengthy restatement of the facts in evidence is not felt necessary at this point in view of the fact that a few of the highlights have been already set forth above. However, an important matter about loss of income needs to be itemized. From the time when Mr. Roy had to stop working, up until the time of trial - was some 87 months. He was making about a thousand and four hundred dollars a month. Past lost wages thus totalled over $120,000. ROY had testified why he couldn't work and what attempts he had made to seek employment given his disabilities. There was supporting medical testimony to the effect that he could never again work in the sun, and this was the only type of employment ROY had ever held. Given his age, and all of his numerous physical problems, the job market was closed to LESTER ROY. Lost wages

until age 65 would amount to another 8 years, or slightly more than those lost in the past. Of course, there was also a claim for pain and suffering, permanent disability, disfigurement, loss of the enjoyment of life, mental anguish, etc. ROY, and others, testified amply to many facts showing his extensive losses in all of those areas. Under any sort of per diem consideration, the amounts for these losses could easily far exceed the rather nominal $292,000 unreduced amount in the jury verdict. And, again, comparing that sum to the wealth of AMERICAN CYANAMID, clearly shows that the jury absolutely could not have considered defendant's wealth in arriving at their verdict. The sums of money awarded are so very tiny by comparison that there could not have logically been any connection whatsoever. AMERICAN CYANAMID has failed to carry their burden of proof that the verdict is tainted. If there was any error, it certainly was harmless.

Furthermore, one last issue on the issue of damages must be pointed out. In this cause, the jury specifically found not only negligence, but also fraud, misrepresentation, malice, moral turpitude, wantonness, willfulness, and that the acts of defendant were done with reckless indifference to the rights of others. Under this finding, the trial court erred in reducing the total verdict by the plaintiff's comparative negligence since comparative negligence is not a defense to an intentional tort nor to gross negligence.

In Florida, wilful and wanton misconduct is not a degree of negligence, but differs in kind from negligence, and therefore the comparative negligence doctrine should not be invoked to reduce a plaintiff's damages by the percentage of his ordinary negligence where the defendant is guilty of wilful and wanton misconduct. This evident since under the common law of this state a plaintiff's ordinary negligence was not allowed to bar his recovery where the defendant was guilty of wilful and wanton misconduct. National Car Rental System, Inc. v. Holland, 269 So. 2d 407 (Fla. 4th DCA 1972); Boyce v. Pi Kappa Alpha Holding Corp., 476 F. 2d 447 (5th Cir. 1973); Johnson v. Rinesmith, 238 So. 2d 659 (Fla. 1st DCA 1969); Florida Railway Co. v. Dorsey, 59 Fla. 260, 52 So. 963 (1910)

Further evidence that Florida courts have held wanton and wilful misconduct is a difference in kind, rather than degree, from negligence is the fact that gross negligence has been held not to amount to willful and wanton misconduct. Dowling Lumber Co. v. King, 50 So. 337 (Fla. 1912). additionally, it has been held that gross negligence will not justify imposition of punitive damages. Carter v. Lake Wales Hospital, 213 So. 2d 898, but that wanton and willful misconduct will support punitive damages. Sauer v. Sauer, 128 So. 2d 761 (Fla. 2 DCA 1961). It follows that if gross negligence will not support a claim for punitive damages, but willful and

wanton misconduct will, then willful and wanton misconduct is not a degree of negligence.

To put a defendant, guilty of reckless disregard of safety (willful and wanton misconduct) to reap the benefit of any ordinary negligence by plaintiff would be to put the plaintiff in a worse position now than was enjoyed under the stricter doctrines of the common law. Surely, this state's movement into the comparative negligence arena was not intended to accomplish such a result!

CONCLUSION

There is not conflict jurisdiction in this cause, and the outcome is entirely consistent with the Tampa Drug and White Construction cases. This petition should be dismissed as improvidently granted on the jurisdictional issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 27th day of February 1986 to:

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