IN THE SUPREME COURT OF FLORIDA.

CASE NO. 67,124

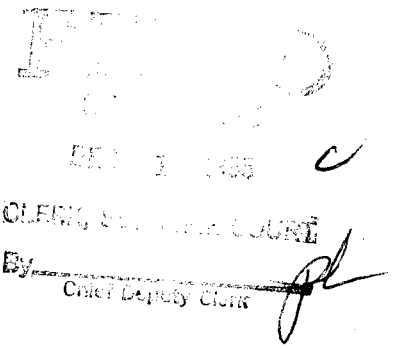
AMERICAN CYANAMID COMPANY,

Appellant/Petitioner,

vs.

LESTER K. ROY,

Appellee/Respondent.



BRIEF OF APPELLANT/PETITIONER, AMERICAN CYANAMID COMPANY

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P R E F A C E

This appeal/discretionary review has been brought by the Defendant, AMERICAN CYANAMID COMPANY, from a final judgment entered on October 8, 1982 and from an order denying the Defendant's post-trial motions dated October 12, 1982. The District Court of Appeal of Florida, Fourth District, affirmed the trial court's decision and judgment unanimously on December 19, 1984, and denied all motions addressed to that decision on May 1, 1985. (The original decision was unanimous; the decision on rehearing with respect to punitive damages was 2 to 1. 466 So.2d 1079 (Fla. 4th DCA 1984).) (A-4).

The parties will be referred to as they stand before this Court, or as follows:

LESTER K. ROY and LUCILLE ROY	Plaintiff, ROY
AMERICAN CYANAMID COMPANY	Defendant, CYANAMID

The following symbols will be used unless otherwise indicated:

R	Record on Appeal (including the transcript of the trial)
A	Appendix to this Brief

All emphasis is that of CYANAMID, unless otherwise indicated.

STATEMENT OF THE CASE

The Amended Complaint framing issues upon which the case went to trial was filed on June 23, 1978, and challenged the quality of AMERICAN CYANAMID COMPANY's (CYANAMID's) warning for AM-9. (R 1124, A-1). Count I sounded in negligence; Count II requested punitive damages and alleged that CYANAMID had acted improperly in the face of knowledge of the dangerous propensities of AM-9; and Count III requested compensatory and punitive damages sounding in breach of warranty and fraud or misrepresentation with respect to the same warning. CYANAMID raised the affirmative defense of comparative negligence. (R 1130).

Immediately prior to the commencement of the trial, ROY added a consortium claim and a count for strict liability. (R 12, 1145, 1151). The answer was amended to raise misuse as a defense. (R 22).

The jury, by special verdict, found that CYANAMID did market a product that was defective because of its warning and found it negligent in the marketing of that product. These, along with ROY's own negligence, were found to have been causes of his injuries. The fault was apportioned, 70% to CYANAMID and 30% to ROY. ROY had damages assessed in his favor of $292,000.00 and Mrs. ROY had $12,500.00 assessed in her favor.

The jury also determined that CYANAMID had committed a fraud or misrepresentation and had acted with sufficient conduct to warrant the imposition of punitive damages. They assessed such damages in the amount of $45,000.00. (R 1197, A-2).

All post-trial motions were denied (R 1201, 1202, 1473), and a final judgment with compensatory damages awards in the amounts of $204,400.00 for ROY and $8,750.00 for Mrs. ROY were entered. (R 1209, A-3).

An appeal was taken to the Fourth District, challenging the propriety of submitting the case to the jury on the punitive issue, seeking a new trial on compensatory damages and liability, and challenging the consortium claim.

The original decision of the Fourth District unanimously affirmed each aspect of the main appeal. CYANAMID filed a motion for rehearing and a motion for rehearing en banc, as well as a suggestion of question of great public importance. Each of these was denied by a majority of the court, although one member of the panel dissented in part and concluded that an error had been made on the punitive damage issue. Judge Anstead in dissent stated that "the facts simply do not reflect the kind of flagrant misconduct that would justify a finding of willful and wanton disregard for the safety of persons, such as the Appellee." (A-4).

CYANAMID requested this Court to invoke its discretionary jurisdiction and this Court has done so on the issues related to CYANAMID's appeal. Oral argument was dispensed with.[1]

[1] Because of this Court's order of November 5, 1985, no request for oral argument has been filed. Nevertheless, should this Court feel that oral argument would assist it in its deliberations, CYANAMID would welcome that opportunity.

STATEMENT OF THE FACTS

I. AM-9 - The Product.

In the early 1950's, CYANAMID began to research and to develop a chemical known as Acrylamide. This chemical came to be used in a wide variety of products and was useful in many sectors of society.

Among the uses to which this product was beneficially put were its use in water and sewage treatment. Further, the product was used in purifying processed water, such as that recycled in a variety of mining and paper mill operations. Acrylamide was also useful in the production of paper itself and, in its perhaps most familiar form, it was used in the creation of a new family of paints. (R 729).

Acrylamide was further refined into a product known as AM-9, which consisted of 95% Acrylamide.

Of more direct relevance to this case, this product, AM-9, was found to be very useful in the stabilization or sealing of underground structures with respect to water intrusion. This product successfully was used in sealing subways and similar tunnels and also in deep excavations near bodies of water, such as in the World Trade Center project. (R 730).

A different company, Penetryn Company, designed a system, as well as the equipment to be utilized, for taking AM-9 and sealing underground sewer lines. (R 727-28). The Environmental Protection Agency recognized its merit as a significant money saver in the

operation of sewer systems and, although CYANAMID was not involved directly in the field testing of AM-9 in sewer grouting, the EPA asked CYANAMID to assist in a test of the product. CYANAMID later advertised the results of that EPA test. (R 730-31).

II. Toxicity Studies and Labeling.

In the 1940's, CYANAMID created a Label Committee pursuant to a company General Order, which was the highest priority of order that CYANAMID had in its corporate system. (R 739). That order required that, before any chemical product could be shipped, the new Label Committee created would have to consider all information relevant to it and determine whether any precautionary or warning labels were necessary. The Committee would also create any labels it found to be necessary. (R 739-40).

Consistent with this General Order, in the early 1950's the Label Committee began the first of a series of projects designed to determine the nature and extent of toxicity inherent in the Acrylamide chemical it was beginning to develop. (R 771). As was the case with later work, these first studies were done both in-house and by outside testing concerns. (R 766-67). The results of these early tests indicated to CYANAMID that Acrylamide might have a neurotoxic effect. In other words, the product might cause some disturbance of the neurological system. (R 771-75). Accordingly, when the product was first produced, the label stated, among other things, "Warning: May have neurotoxic effects." (R 775). This was based upon early animal studies indicating that, fed in

sufficient quantities, rats could gradually lose control of their hindquarters. (R 776). This first warning was followed up in 1953 by the first non-research label which, among other things, stated: "Warning. Neurotoxic by skin contact, inhalation or swallowing. May cause paralysis of legs or arms." (R 778). This label and all others since then went on to describe a variety of precautions and preventive measures that were to be used with the product.

Following these early studies, additional university research was funded by CYANAMID, and this research, along with other research funded and published at the behest of CYANAMID, led CYANAMID to be concerned that there may, in some individuals, be neurological effects before paralysis was noted. Accordingly, the warning label was modified to say at the beginning of the warning: "Warning. Repeated skin contact, inhalation or swallowing may cause nervous system disturbances." (R 772). (The complete Label Committee minutes over the years dealing with AM-9 were introduced in evidence as Defendant's Exhibit 1).

CYANAMID continued to fund further investigatory work into the toxicity and effects of Acrylamide and continued to do so up through the time when the Plaintiff in this cause was last exposed to AM-9 in 1975. There was absolutely no evidence in this record that CYANAMID at any time ever refused or failed to do research on this product; hid or covered up the results of any research on this product; failed to fully consider, evaluate and act on the results of research on this product; tried to coerce company

or independent researchers to modify the results of their research; or do anything else, other than to create and share information about this product. It should be noted that CYANAMID produced this product itself and, consequently, the results of its research were consistently applied, not only in its labeling function for public safety, but also by its in-house industrial hygienists, to improve worker safety. (R 767).

III. CYANAMID's Publication and Dissemination of Information With Respect to AM-9.

As set forth above, CYANAMID consistently, throughout the development and production period of this product relevant to ROY, actively engaged in research of its own, funded research of others, and published the research of both for the medical and professional communities. In addition, although not involved in the development of the sewer grouting system, CYANAMID published and disseminated extensive and detailed manuals to the users of AM-9 to insure that the ultimate users would have the results of CYANAMID's research and the benefit of its thinking on precautions with respect to the use of AM-9. CYANAMID also distributed a wealth of information, including placards, posters and other pictographic information, that described the proper method of preparing AM-9 for use, safe work practices, precautions, warnings, disposal requirements, cleanup procedures, and a host of other topics. (See, e.g., R 142, 143-46, 149-50, 160, 164, 174, 178-80, 183, Trial Exhibits 1-9, 12, and 2A). CYANAMID also sent technical service personnel into the field to see if the grout was being

applied correctly and the Label Committee received many reports from this source. (R 786-87).

Moreover, CYANAMID developed and put on three-day seminars at both its Connecticut and New Jersey factories, where ultimate users could come to learn how to use the chemical and to train applicators on how the equipment and chemical should be used. (R 731). (A large portion of this seminar was addressed to safety and the handling of the chemical itself). (Id.). Further, CYANAMID took the three-day seminar and created a "canned" seminar with the use of 35 mm slides, so that those who were not able to come to the factories would be able to review these materials. (R 731-32). This program was made available to Cues, the company that actually supplied the equipment and the materials to ROY's employer. CYANAMID was not a direct supplier to the City of Hollywood (ROY's primary employer). (R 734).

IV. Labeling Standards.

The only labeling standards that the jury in this cause was informed of (or which have otherwise been shown to exist) were those created by, or based upon studies done by, the Manufacturing Chemists Association. This is an association of 200 manufacturers who manufacture approximately 90% of all chemicals made in the United States. This organization develops standards, not only on toxicity, but also flammability, corrosiveness, etc., which standards have been adopted by the U. S. Department of Transportation as mandatory for transporting chemicals. (R 742, 764).

Unlike other industries, where minimum standards are created but may be exceeded (such as where a protective plate may be made out of a still thicker piece of metal than "required" or an electrical connection could be made with a heavier gauge of wire), the MCA's labeling standards are keyed to provide accurate information to users.

Through a series of detailed testing procedures, the toxicity of substances (ability of a substance to have deleterious effects on humans) is carefully computed and then substances are divided into three categories. In our case, it is uncontradicted that Acrylamide falls into the middle, and not the highest, category -- toxic, as opposed to highly toxic. (R 750, 760-62). Because there are a host of substances far more toxic to humans than Acrylamide, the industry and the federal government have determined the appropriate level of labeling -- a level established to insure that individuals are properly warned of the dangers of substances like Acrylamide, but also a system designed to insure that when confronted with truly "poisonous" substances, the user is suitably impressed. See Guide to Precautionary Labeling of Hazardous Chemicals, pp. 15-16, 1970 MCA Edition. (A-5).

The correct signal word to be used for labeling "toxic" substances, such as Acrylamide, is Warning; whereas, the appropriate signal word for "highly toxic" substances is Danger. (Id.). Similarly, to avoid diluting the effect of the warnings on highly toxic substances, the use of the word "Poison" or the skull and crossbones

symbol is limited to those substances which are highly toxic. If these symbols were to be applied indiscriminately, the public would begin to distrust or disbelieve the severity of the warning. (R 755, 757-58).

V. The AM-9 Label.

Photographs and copies of the entire Acrylamide or AM-9 label are in the record in this cause. The portion of the label most applicable to this cause states:

> Contains Acrylamide. Warning: Repeated skin contact, inhalation or swallowing may cause nervous system disburbances. Do not get in eyes, on skin, on clothing. Do not breathe dust. Wash thoroughly after handling. Wear clean work clothes daily. In case of contact, immediately flush eyes or skin with plenty of water. Wash contaminated clothing before reuse. (R 1278).

Among other factors, this label was based upon the following research by CYANAMID or others, which gave them the following information:

1. Acrylamide was not a "highly toxic" or "poisonous" substance, but was instead well below those levels in toxicity. As such, it was a "toxic" substance. Such a substance, according to the MCA labeling standards, requires the use of the signal word "Warning." (It should again be noted that the industry or MCA standards which were voluntary were also adopted by the United States Department of Transportation and were made mandatory by that organization for any labels on materials transported in interstate commerce). (R 742, 764). Thus, the use of the "Danger" signal

word or the use of the word "Poison" or the skull and crossbones symbol would be a violation of the voluntary MCA and the mandatory DOT standards.

2. Acrylamide does not create a reaction in all human beings. Many people with exposures greater than ROY's have no reaction. Further, those people who do have a reaction of some sort do not universally have nervous system disturbances. Many have dermatological or skin irritations (which are distinctive and unique to Acrylamide contact). Since Acrylamide does not affect everyone it comes in contact with and does not affect (in the same way) all people who do react, the label states that contact "may cause nervous system disturbances." (Emphasis added).

VI. ROY's Exposure to AM-9.

From 1965 until early 1975, ROY was employed in jobs that required him to use the AM-9 sewer grout manufactured by CYANAMID. Throughout the last eight years of this period, the AM-9 came in a powder form and was packaged in 25 pound bags. (R 1260). While being mixed in truck-mounted tanks, it is possible that ROY could have become exposed to AM-9 by skin contact, inhalation, and conceivably ingestion. He sometimes got small amounts of liquid on him (R 169); and in 1975, he testified that in one isolated incident, he was doused with a significant quantity of this liquid. (R 1236).

ROY recalled seeing a warning label on the bags of AM-9 that he used and these warnings told him that the material contained a chemical that may be dangerous to his nervous system. (R 1224).

ROY could not recall any other warnings or informational materials, but he admitted that AM-9 could cause injury to the central nervous system, although he figured that it wouldn't happen to him. (R 1277-78).

Co-workers testified that they recalled ROY following certain safety procedures (e.g., R 140, 173), but ROY denied ever using the respirators supplied by the City and further denied ever using the rain suit provided to avoid or minimize contact with the skin. (R 1225, 1241). He also admitted that he did not always wash his hands or his gloves after using AM-9. (R 1242).

Although ROY could not recall any other warnings or explanatory materials, his co-workers and supervisor testified as to the presence of signs and placards detailing safety precautions on the City-owned trucks, and further testified to the availability of more detailed manuals and pamphlets in the City trucks and the City Utility Department office. (E.g., R 144, 146, 147, 149, 160, 164, 178, 183, 210, 236).

VII. ROY's Medical Condition and Treatment.

In the trial, ROY testified to a wide variety of illnesses and ailments, although many of them were not blamed on AM-9. Included in the appendix to this Brief is a detailed recitation of the medical testimony relative to his medical condition, which could have borne upon the jury's verdict in this cause. (A-6). The following is an excerpt of that presentation:

A. Dermatological Complaints.

In late 1974 or early 1975, ROY developed a rash. (R 1229). He went to two doctors (who did not testify) and received no help. He then went to a dermatologist, Dr. Simonson. Dr. Simonson saw ROY for approximately nine months in 1975 and early 1976 and concluded that he had an acute contact dermatitis. (R 441). As of January 9, 1976, the doctor concluded that ROY had no continuing problems referable to Acrylamide, but that he did have a 5% to 10% disability, based on a recommendation that ROY not work in a job requiring contact with chemicals. (R 444, 445-50).

When Dr. Simonson saw ROY again in 1979, he found that ROY had no skin condition related to the 1975-76 problems. (R 462).

ROY was also examined by three Board certified dermatologists, in 1975, 1976 and 1979. Their conclusions, after testing and examination, were that he had no reaction or allergy to Acrylamide and that he had no permanent impairment or disability from a dermatological standpoint. (R 634-35, 670, 817, 825-28).

The Plaintiff's medical expert, a Dr. Fichtelman (a pathologist) who had had no prior familiarity with Acrylamide, testified that he felt that the dermatological complaints were related to Acrylamide. (R 1406-07).

The Defendant's medical expert, Dr. Schaumberg, a neurologist who had specialized in Acrylamide intoxication for over ten years, concluded that there was a classic pattern for Acrylamide

dermatological reaction and that it was not consistent with the dermatitis described by Dr. Simonson. This Acrylamide skin reaction is almost unique in the field of dermatology and was described to be a reddish-purplish mottled skin that cracks and is soaking wet. (R 888-89). This was not the condition exhibited by ROY.

B. ROY's Other Medical Complaints.

No other treating or examining physician found ROY to have any medical condition related to any exposure to AM-9. ROY himself sought no further treatment, nor was he examined by any other physician until 1979 (more than four years after his last exposure to AM-9. At that time, he went to a VA hospital in Gainesville, where he received an extensive neurological work-up. (R 275-310). The neurologist there concluded that, although some of his complaints were "compatible" with Acrylamide (e.g., R 285), others were inconsistent. (E.g., R 286). Thus, he could not determine the etiology of the complaints. (R 298, 301). His final opinion, however, was that there was a very high probability that something else was involved. (R 304-05). He was discharged as being able to go back to work immediately. (R 278).

ROY was also examined three months after his discharge from the VA hospital by Dr. Flaten, a Board certified neurologist in Fort Lauderdale. (R 566-68). He was given both a vascular and a neurological work-up (R 570-80), and was found to have no evidence of any neurological impairment. (R 590). Specifically, ROY was found to have excellent vibratory sensation (the absence of which is a key test for Acrylamide intoxication. (R 577-78, 589). ROY was also found to have an extensive and advanced

vascular disease condition, and his complaints in his extremities were related to that condition, not a neurological effect of Acrylamide.

The Plaintiff's expert, Dr. Fichtelman, did not examine the Plaintiff and had no experience in the field of Acrylamide exposure. (R 1390-91). Nevertheless, based upon his review of the records, he concluded that ROY did have effects of Acrylamide exposure, but he also acknowledged the existence of a significant vascular component, which was increasing in nature. (R 1399, 1401, 1411). Believing that the VA hospitalization was in 1975 and further believing that there was no evidence of vascular involvement at that time, Dr. Fichtelman concluded that the vascular problems discovered by Dr. Flaten were of recent origin and could not explain earlier complaints of ROY. (R 1396-99).

In fact, the VA hospitalization was only a few months before Dr. Flaten's 1979 examination. (R 275). Further, Dr. Fichtelman acknowledged that, upon close review, there were signs of vascular difficulties in the VA hospitalization. (R 1444).

Finally, Dr. Schaumberg addressed ROY's other complaints. Dr. Schaumberg is a full professor and Vice Chairman in the Department of Neurology at the Albert Einstein College of Medicine in New York, is the Medical Director of the Institute of Neurotoxicology at that institution, and is the head of a specialty neurotoxicology clinic at that hospital. Since 1972, his principal research activity has been in the field of Acrylamide exposure and

he has written numerous articles and examined numerous individuals in that field. (R 838-52).

Most specifically, he was the individual that developed the simple vibratory sensation test to determine whether an individual has, or has had in the past, an impairment because of exposure to Acrylamide.

Based on his review of the records, Dr. Schaumberg concluded that ROY did not suffer from Acrylamide neurotoxicity, but that he suffered from diffuse arteriosclerosis or vascular occlusion of the extremities. (R 853). His conclusion was centered on the following primary findings:

a. A person who has Acrylamide exposure has fewer symptoms with the passage of time since the last exposure; whereas, ROY's problems were increasing. (R 854, 857-58).

b. ROY's pins and needles description is inconsistent with Acrylamide exposure. A stocking-glove anesthesia is the classic symptom. (R 854-55).

c. ROY's complaints of weakness increased upon exercise (consistent with vascular insufficiency or claudication); whereas, individuals suffering from Acrylamide exposure have consistent weakness. (R 855, 861-62).

d. Tendon reflexes are generally lost early in Acrylamide exposure; whereas, ROY's were actually found to be increased in his first neurological examination. (R 890).

e. Those persons who do suffer a reaction from Acrylamide exposure lose the ability to detect certain vibrations. ROY's vibratory perceptions were normal. (R 857).

C. Medical Bills and Employment.

ROY's total medical expenses for treatment were $377.00 (skin problems), along with a bill of $1,932.00 for the VA examination. ROY also testified that he had not worked since 1975, although no doctor testified that he was unable to work. Dr. Fichtelman called ROY "disabled" but did not testify as to degree or cause. Dr. Simonson did testify that he should not work in a job that required chemical exposure. The VA hospital discharged him to go back to work.

VIII. Expert Testimony on Labeling.

A. ROY's Expert - Dr. Robert Cunitz.

ROY presented Dr. Cunitz, an industrial psychologist, who, although passing upon some of the placards, posters and pamphlets, primarily attacked the adequacy of the warning quoted above. He felt that the instructions would make it difficult, if not impossible, to prevent all exposure to AM-9 and to comply with all of the instructions. (R 1312, 1325-26). His inadequacy attack, however, focused upon the initial "warning" language extracted from the complete label. That portion of the label stated:

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

Dr. Cunitz's criticism of this label was as follows:

1. He felt that the color of the printing was improper, since it did not stand out or indicate dangers. (R 1324).

2. He testified that the wrong "signal" word had been used and that the label should have said "Danger," as opposed to "Warning." (R 1324-25). He felt Acrylamide was a poison and a neurotoxin and, as such, should be labeled in a fashion to motivate people to treat the chemical with respect. (R 1325). He found one isolated CYANAMID publication, which mistakenly termed Acrylamide "highly toxic," and this led him to believe that the product was a "poison" and should be so labeled. He felt that evidently the product could kill or permanently injure. Finally, and most importantly, his testimony was that the CYANAMID label was a "terrible misrepresentation," presumably because the label did not say that Acrylamide will cause nervous system disturbances. (R 1345).

3. Dr. Cunitz also reviewed the minutes of the CYANAMID Label Committee and testified that, in his opinion, CYANAMID's warnings got weaker to some extent over time. (R 1335). He did acknowledge that the recommended labeling standard for highly toxic chemicals requires a skull and crossbones and the use of the word danger; whereas, the labeling standard in the industry for toxic chemicals does not allow the use of either and directs instead the signal word "Warning." (R 1362). Cunitz agrees that you can over-label, but would prefer over-labeling to under-labeling. (R 1371, 1374).

B. CYANAMID's Labeling Expert - Dr. C. Boyd Shaffer.

Dr. Shaffer has a Ph.D. in chemistry and biology and worked for eleven years for the Mellon Institute in the field of chemical toxicity. He then joined CYANAMID, where he worked from 1952 to 1980. Dr. Shaffer was the Director of Toxicology and, from 1957 through 1980, was on the CYANAMID Label Committee. (R 737-41). During that time, he was in charge of designing toxicity studies for products and reviewing available scientific literature on the company's products.

Dr. Shaffer testified, without contradiction, that, according to the industry and government standards, Acrylamide was a toxic, as opposed to highly toxic, substance.[2] (R 753-60).

Dr. Shaffer reviewed the system of labeling substances in the united States and then related that system to the development of the company's AM-9 label. He described how the warning changed from the word "neurotoxic" to its present language because it was felt that it would be understandable in that form. (R 772). Similarly, the warning "may cause paralysis of legs and arms" was deleted, because the company was concerned about potential neurological problems that could arise before a reaction reached the

[2] The Manufacturing Chemists Association has established guidelines for chemicals that may adversely affect humans. Their toxicity is keyed to the quantity of a chemical needed to kill a certain percentage of laboratory rats. Although incorrectly referred to in the text of one CYANAMID publication as "highly toxic," the record was uncontradicted that, whether evaluated according to ingestion, inhalation or absorption standards, Acrylamide was not highly toxic. It is only those highly toxic substances which are allowed to carry the "Poison" and "Danger" labels, as well as the skull and crossbones symbol.

level of paralysis. Accordingly, the warning was changed to read that repeated contact "may cause nervous system disturbances."

Dr. Shaffer then testified that not every human being who comes in contact with Acrylamide reacts adversely, nor are neurological problems a necessary result of exposure in people who do react. (R 778-79, 781-82, see also R 851, 844). Further, the record was uncontradicted that no one had died as a result of Acrylamide exposure and that most exposed workers who suffered adverse effects recovered substantially, if not completely. (R 793, 1450, 914, 890, 851). Because of these facts and because of the applicable standards, Dr. Shaffer concluded that the AM-9 labeling was proper in all respects and that the use of the words "Danger" or "Poison" or the skull and crossbones symbol would be contrary to good labeling practices and would not result in a "better" or a "stronger" warning label.

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.

SUMMARY OF ARGUMENT

This case is different than most reported products liability decisions in Florida and is different than every reported decision on punitive damages in products liability cases in Florida. 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 (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.

To the extent that Florida law allows punitive damages in a products case, it is based upon actual (as opposed to constructive) knowledge of a defect in the product and flagrant oppressive marketing of the product thereafter. Contrary to the Fourth District's decision in this case, the "defect" of which CYANAMID must have been aware as a prelude to punitive damages is not the inherently dangerous characteristic of the product, but is the alleged inadequacy of the warning. CYANAMID must further have been shown to have thereafter marketed AM-9, fully aware that a simple change in the warning could have corrected the problem.

In fact, the record in this case shows meticulous attention to the safety of its workers and the public who might come in contact with AM-9. The label which was reviewed periodically reasonably portrayed the risks of excessive exposure to AM-9 without "over-warning" the public and, thereby destroying the efficacy of the

warning system in the United States.

With the punitive damage award stricken, two other factors need to be addressed. The first is that a system which allows a manufacturer such as this to have punitive damages assessed against it and to have that punitive damage award affirmed (two to one) by an intermediate appellate court obviously has insufficient or incorrect guidelines for courts and juries to use. Therefore, as evidenced in the White and Como cases, a strict adherence to the criminal manslaughter standard should be imposed in warning and all other possible punitive damage cases.

Secondly, because the trial was tainted with the introduction of CYANAMID's net worth and related punitive damage arguments, the reversal of the punitive damage award will not undo the wrong created by the Plaintiff's claim for punitive damages in the trial court. Accordingly, a new trial on liability and compensatory damages is mandated.

Similarly, the grossly excessive award to ROY in light of the marginal evidence of any effect caused by his exposure to AM-9 requires a new trial on liability and compensatory damages.

A R G U M E N T

POINT I ON APPEAL/REVIEW

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 THE FOURTH DISTRICT ERRED IN AFFIRMING THOSE DECISIONS.

A. Introduction.

At the outset, it is essential to note what this case is and what this case is not. In the vernacular of products liability law, this is a "warning" case and is not the more ordinary case in which the product itself is alleged to be defective.

The product in this case, AM-9, was not incorrectly designed or manufactured. The difficulty is that this valuable and useful product is one which has some risks inherent in its chemical makeup, which make some people exposed to it suffer some reaction and make some portion of those people who do react suffer some neurological disturbances.

CYANAMID has, at all times, acknowledged that it knew -- had actual knowledge -- of the "dangerous" character of AM-9. After all, it was CYANAMID that discovered and explored the nature of Acrylamide and then insured that that information was published for the scientific and medical communities. In a "warning" case, however, that acknowledgment -- knowledge of an inherently dangerous condition -- does not end the inquiry, but merely begins it.

B. Liability for Compensatory Damages -- Standard in a Warning Case.

The Florida standard to use in determining whether there is liability for compensatory damages in a warning case was succinctly set forth in this Court's seminal decision in Tampa Drug Co. v. Wait, 103 So.2d 603, 609 (Fla. 1958):

> The burden remains on one who claims a negligent failure to warn of an inherent danger to prove that the distributor knew, or by the exercise of reasonable care, should have known, of the potential danger and in the reasonable course of his business should be able to foresee the possible uses of the commodity, as well as the potential damage or injury that might result from such use.

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).

C. Liability for Punitive Damages - Standards in Products Liability Cases.

In the ordinary products liability case where a punitive damage issue arises, the focus is, and should be, (1) on the manufacturer's actual knowledge of the defect in the product, and (2) on an analysis of what, if any, positive action (or negative con-

cealment) occurs because of that knowledge. See Atlas Properties, Inc. v. Didich, 213 So.2d 278 (Fla. 3d DCA 1968), writ disch. 226 So.2d 684 (Fla. 1969); American Motors Corp. v. Ellis, 403 So.2d 459 (Fla. 4th DCA 1981); Piper Aircraft Corp. v. Coulter, 426 So.2d 1108 (Fla. 4th DCA 1983). See also Sparks v. Consolidated Aluminum Co., 679 S.W.2d 348 (Mo. App. 1984); Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322 (8th Cir. 1985) (applying Missouri law).

In a warning case, however, if punitive damages are to be considered, the focus must also be (1) on the manufacturer's actual knowledge of the defect -- the warning itself -- (as opposed to the manufacturer's actual knowledge of the nature of the product), and (2) on the manufacturer's action or inaction which follows the receipt of that knowledge. From this perspective, a review of the standard created by the Fourth District below is imperative. The court there stated:

> When it comes to punitive damages, however, as contrasted with mere liability, we cannot envisage the level of intent or conscious indifference required to impose punitive damages, absent knowledge or opportunity to know.

American Cyanamid Co. v. Roy, 466 So.2d 1079, 1083 (Fla. 4th DCA 1984).

This test of "knowledge" must be compared with a similar reference in the case of Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242, 249 (Fla. 1st DCA 1984), review denied 467 So.2d 999 (Fla. 1985). The court there stated:

> A legal basis for punitive damages is established in products liability cases where the manufacturer is shown to have knowledge that its product is inherently dangerous to persons or property and that its continued use is likely to cause injury or death, but nevertheless continues to market the product without making feasible modifications to eliminate the danger or making adequate disclosure and warning of such danger.

That standard and the Fourth District's below is correct in the traditional defect case, but in a warning case, knowledge of the product's inherent danger (Let alone mere "opportunity to know") simply creates the obligation to warn. To punish a warning case defendant, it must be established that that manufacturer knew the warning was defective and did nothing about it! To hold otherwise would change every warning case into a punitive damage case by virtue of the knowledge (or constructive knowledge) of the product's inherent characteristics.[3]

D. Present State of Florida's Punitive Damage Law in Products Liability Cases.

Although not products liability cases themselves, any inquiry into the appropriate standard to be used in a punitive damage case in Florida has to begin with this Court's two recent decisions in White Construction Co. v. DuPont, 455 So.2d 1026 (Fla.

[3]To give the Johns-Manville court its due, although the quoted language was technically from a warning case, it was a case in which the manufacturer gave absolutely no warning and tried to hide its knowledge of the danger. Thus, although Johns-Manville's knowledge of the danger was a preliminary step in establishing compensatory damage liability, it was actually Johns-Manville's actual knowledge that its warning was inadequate (because there was none) that gave rise to the jury issue on punitive damage claim.

1984), and Como Oil Co. v. O'Loughlin, 466 So.2d 1061 (Fla. 1985). In White, this Court either changed the tone and direction of punitive damage law in Florida, or at least returned to the compass heading established by this Court in Carraway v. Revell, 116 So.2d 16 (Fla. 1959). Each of these three cases rejects the concept that gross negligence by itself is sufficient to justify the imposition of punitive damages. They focus instead upon a standard that is equivalent to that necessary to sustain a conviction for manslaughter. As White noted, quoting from footnote 12 in the Carraway decision, this standard requires flagrant conduct, an entire want of care which would raise the presumption of a conscious indifference, or wantonness or reckless indifference to the rights of others. See also U. S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983).

Although it is perhaps a somewhat semantic argument, this Court in Como interpreted White as holding "that the degree of negligence necessary for punitive damages is willful and wanton misconduct equivalent to criminal manslaughter." 466 So.2d at 1062.

These two decisions, Como and White, may not be immediately translatable into a standard applicable to products liability cases, because both Como and White deal primarily with "one-shot" accidents rather than a long course of dealing. On the other hand, Como, and to a lesser extent, White did address factual situations in which the plaintiff unsuccessfully based the punitive damage claim on a pattern of corporate activity prior to the

incident in question, suggesting a "shabby" operation worthy of punishment. Id. With that in mind, it is appropriate now to look at the primary district court decisions in Florida which have considered and imposed punitive damages in products liability settings.[4]

The six cases which most extensively discuss the question of punitive damages in products liability cases are Wolmer v. Chrysler Corp., 474 So.3d 834 (Fla. 4th DCA 1985); Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242 (Fla. 1st DCA 1984); Toyota Motor Co. v. Moll, 438 So.2d 192 (Fla. 4th DCA 1983); Piper Aircraft Corp. v. Coulter, 426 So.2d 1108 (Fla. 4th DCA 1983); American Motors Corp. v. Ellis, 403 So.2d 459 (Fla. 5th DCA 1981); and Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981) (applying Florida law). With the exception of the Johns-Manville case, the other five cases are, by their principal nature, not "warning" cases. Nevertheless, there runs through these five cases a common thread which is helpful in applying the White/Como rule to a warning case such as that before this Court.

In each of the five traditional "defect" cases, there was a precisely defined defect that was said to cause or contribute to the causation of the damages in question. More significantly, in each case, there was direct evidence that the defendant had

[4] There are reported decisions in Florida rejecting punitive damages in certain cases. None of these, however, contains any generally applicable principles useful in guiding the conduct of manufacturers or of other courts. See Detroit Marine Engineering, Inc. v. Maloy, 419 So.2d 687 (Fla. 1st DCA 1982); Auto Specialties Mfg. Co. v. Boutwell, 335 So.2d 291 (Fla. 1st DCA 1976); Consolidated Aluminum Corp. v. Huntt, 425 So.2d 1156 (Fla. 3d DCA 1982).

actual knowledge (as opposed to should have known/constructive knowledge) of the precise defect that caused the accident.

In Wolmer, Chrysler's crash testing gave it actual knowledge of contact problems between the fuel tank and the shock absorber and of fuel leakage from the filler tube, all of which caused it to state in an inter-office memorandum that the model only "marginally" met fuel system requirements. In Moll, Toyota's own research convinced the company where the safest place for a fuel tank was; whereupon the company corrected the location of the tank for one 1972 model and for all 1973 models, except the one in question.[5] In Piper, the company learned from its own test pilot that it had a defectively designed door requiring modification. In Ellis, AMC's own engineers recommended that the gas tank be relocated to a feasible location for safety reasons. Finally, in Dorsey, Honda's own engineers had recommended practical ways of improving the vehicle's crashworthiness, which were consistent with Honda's goal of keeping the car small.

Coupled with this consistent thread of actual and definitive knowledge of the existence of the defect was no evidence in any case of any corporate action to eliminate or at least ameliorate the magnitude of the problem that the known defect caused. Similarly, no defendant made any effort to issue a warning of these problems. Indeed, in the Ellis case, the engineers' recommendations were specifically rejected in favor of maximizing profits (in the face of a

[5]Toyota also learned in its 1966 to 1967 crash tests that it had problems with a rigid filler pipe.

remediable problem), while in Piper, the pilot's recommendation about the door was not only overridden, but he was directed to destroy all written test reports, so as to eliminate the evidence of his recommendation.

The Johns-Manville case, the sixth of the primary punitive damage cases, is the only one that in a sense is a true "warning" case. There, Johns-Manville had actual knowledge, as early as the 1930's, that it was manufacturing a product which had an inherent danger. Rather than fostering the scientific community's further knowledge of the adverse effect of its product and publishing the results of those studies (as CYANAMID has consistently done), Johns-Manville coerced authors to change the results of "independent" studies in some cases and outright blocked the publication of other adverse studies to avoid the "word getting out." Additionally, unlike CYANAMID's program of industrial hygiene which was implemented so as to reduce the risk that CYANAMID's employees might be hurt by its Acrylamide product, Johns-Manville was deliberately withholding information from its employees as to the nature of the employees' own asbestosis. Finally, when the medical director of Johns-Manville specifically recommended the creation of warnings, the decision was rejected by management because it was anticipated that that would hurt the sales of the company.

From this, it can be seen that while Johns-Manville was a "warning" case, it was not a question of allegedly inadequate warning, but rather one of no warnings at all. Beyond that, it was

a case where the company knew it was supposed to have warnings on its product and deliberately attempted to change records and suppress information so that the information about the dangerous nature of the product would not become known.

E. Application of the White/Como Rule to These Facts.

Against the background of these six cases and interpreted in light of the White/Como rule, it is for this Court to assess whether the issue of punitive damages should have gone to the jury in this case.

Unlike each and every one of the six primary cases discussed above, there is no evidence, let alone direct and firsthand evidence, that CYANAMID had any actual knowledge that its carefully constructed label -- in accordance with all standards and frequently reviewed and tested against the latest research in the field -- was in anywise inadequate, let alone defective. While the plaintiff's "expert" might have created a liability jury question because he challenged the industry's and government's labeling system in use in the United States, no evidence of any type brought the knowledge of that alleged national labeling defect home to CYANAMID. Instead, all of CYANAMID's records and all of the witnesses consistently demonstrated a commitment to good faith, if not absolute, compliance with good engineering, chemical, and labeling practices.

Any reading of the Fourth District's decision below would suggest that that court had the impression, or was attempting to give the impression for some reason, that CYANAMID was running a

"shabby" operation akin to that unsuccessfully suggested in Como. As reflected in CYANAMID's unsuccessful motion for rehearing filed by CYANAMID in the Fourth District (A-7) and the Statement of the Facts in this Brief, the Fourth District was simply off base. CYANAMID not only provided warnings on all product packages, but also produced and disseminated a wealth of other explanatory information in pamphlet, manual, placard and other formats. Additionally, CYANAMID held three-day seminars, teaching people how to apply AM-9 in this system safely and created a slide production which allowed that seminar to be put on in the field. That slide seminar was sent to the intermediate supplier for its use since it -- not CYANAMID -- was the company supplying the product directly to the City of Hollywood. It not only furthered and funded research into the effects of AM-9, but was shown to have learned from that research and modified its warnings accordingly.

On Page 1083 of the Fourth District's opinion, the court suggests that the industry guidelines were lagging behind "current knowledge" and that the AM-9 warning "understated" the risks attached to the use of AM-9. There was absolutely no evidence that either statement was true, and consequently there was no basis for any reasonable person to conclude that CYANAMID had demonstrated or evinced a reckless disregard for human life or an entire want of care, let alone "willful and wanton misconduct equivalent to criminal manslaughter."

If there is to be a continuing rationale for the existence of punitive damages in Florida's system of tort law, that rationale, whether in a warning case or not, has to be based upon society's interest in punishing a wrongdoer for its "flagrant" conduct, and deterring others from acting in a similar way. If this is to be Florida's continuing policy, then one must look at the facts of this case, properly viewed in their appellate perspective, and consider the following questions as to what conduct Florida law is trying to punish CYANAMID for or to deter others from repeating:

A. CYANAMID's development of a very useful product which unfortunately has some deleterious effects on some people who are exposed to it?

B. CYANAMID's sponsoring, funding, performing, and publishing extensive research into the nature of this product -- a research and publication program begun at the very outset of the product's development and continued consistently thereafter?

C. CYANAMID's rigid compliance with every standard which exists in this field -- voluntary industry standards and mandatory federal standards (U.S. DOT) -- regarding the proper labeling and warning information to be disseminated with toxic as opposed to highly toxic substances?[6]

[6] At least two courts applying Florida law have ruled, directly or indirectly, that compliance with standards is no per se protection from punitive damages. Wolmer, supra; Dorsey, supra. Assuming arguendo the correctness of those decisions, it should be noted that both standards in those cases were minimum standards. Here, CYANAMID would have violated voluntary and mandatory standards if it had created a label consistent with the plaintiff's expert's opinion. But see Monty v. Hayward, 451 So.2d 938 (Fla. 4th DCA 1984).

D. CYANAMID's refusal (failure ??) to say that repeated exposure to this product will cause neurological problems, when there is absolutely no evidence that it will and when the only evidence is that in some people it may cause these problems?

E. CYANAMID's refusal (failure ??) to say that repeated exposure to this product will poison you when, in fact, no human being has ever been killed by exposure to this product?

F. CYANAMID's refusal (failure ??) to give lectures at each worksite where AM-9 could potentially be used, even though no one has ever complained in this litigation about that "failure" and even though CYANAMID held three-day seminars at its factories and disseminated field copies of that seminar for use by independent distributors in the field and even though CYANAMID has otherwise distributed a host of hands-on publications, posters, signs, pamphlets, etc., describing in detail the nature and safe procedures to be used in applying AM-9?

Respectfully, the application of any semantic standard for punitive damages to the facts in this case compels a reversal of the punitive damage award. The total punitive award in this case is "only" $45,000.00 and, as such, it has not attracted the headlines that massive punitive awards in other cases have garnered. What it has triggered is the outrage of this Defendant, who respectfully suggests to this Court that any fair reading of the record in this case requires a directed verdict in its favor on the issue of whether it acted flagrantly, or with an entire want of care, or

with reckless indifference to the rights of others, or willfully, or wantonly, or maliciously. For these reasons, it is urged that this Court reverse the decision of the Fourth District and direct the trial court to direct a verdict in favor of CYANAMID on the issue of punitive damages.

F. Effect of Reversal of Punitive Damages Award.

Should this Court concur in the foregoing analysis which would compel the granting of a directed verdict on the punitive damage question, two further questions remain. The first is what effect did the introduction of certain evidence relevant solely to the punitive damage question (such as CYANAMID's substantial net worth) have on the jury's deliberations on the questions of liability and compensatory damages. That question will be discussed hereinafter in Point II on Appeal/Review.

The broader question, however, which this Court should address is whether Florida's system for assessing punitive damages in products liability cases (particularly in warning cases) should be modified if the system, in its present form, has improperly caught CYANAMID within its sweep. If a good faith application of the present rules allowed a jury to impose punitive damages (no matter how small the award) and allowed two out of three judges on the Fourth District to feel compelled to affirm that award, then the system needs to be rebuilt or the rules rewritten.

For whatever reason, this Court has decided to grant review in this case, but not to allow oral argument. As such, it is conceivable that the Court has focused to date more on the circum-

stances of this particular case and less on its relationship to the whole body of punitive damage law. Notwithstanding that possibility, it is believed appropriate that, at least in the field of products liability/punitive damages, the law in Florida would significantly benefit from guidance by this Court. At least six different appellate decisions have addressed in some factual (if not anecdotal) detail, particular circumstances which may authorize the award of punitive damages in a products liability decision. No appellate decision, and certainly no decision from this Court, has thoroughly addressed the non-recoverability of punitive damages in a products liability case when the facts were such that punitive damages were not justified. See footnote 4 supra. Courts in Florida, as well as manufacturers in general, can be definitely aided in their work by a decision such as that in this case.[7]

The nationwide concern with punitive damages and their apparent geometric growth is evident from the number of cases decided and articles written expressing concern with the state of punitive damage law. The reactions to this welter of activity and the various states' treatment of this question have been far from uniform.

Some states have simply recognized no cause of action for punitive damages at all. See Owen, supra, footnote 7, at 8. Al-

[7] Numerous commentators have decried the absence of such meaningful decisions in both products liability cases in general and warning cases specifically. See, e.g., Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 26-7 (1982); Barry & DeVito, The Evolution of Warnings: The Liberal Trend Toward Absolute Product Liability, 20 The Forum 38, 57-58 (1984).

though the rationales for these decisions vary, a central theme is the concept that punishment is to be meted out by the state on a prescribed and defined basis, and not turned over without precise guidelines to a jury who may punish, virtually without limit, in such a way that it benefits another individual in the state.

Other states have suggested a relationship, either mathematically defined, or "reasonable," between the amounts of a compensatory damage award and a punitive damage award. See, e.g., Conn. Gen. Stat. Ann. § 52-240b (West Supp. 1985). But see Lassitter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1977).

Still others have required that the standard of proof to support a punitive damage award must be by clear and convincing evidence or beyond a reasonable doubt, and not merely by greater weight of the evidence.[8]

Other courts and commentators have suggested or adopted lists of factors which judges and juries should consider deciding whether to assess and, if so, the amount of punitive damages. See Owen, supra, footnote 7, at nn. 120 and 242). Finally, a variety of commentators have addressed serious questions to such issues as the role judges (trial and appellate) should be playing in cases

[8] See, e.g., Hamilton County Bank v. Hinkle Creek Friends Church, 478 N.E.2d 689 (Ind. App. 1985); Brown v. Maxey, 369 N.W.2d 677 (Wis. 1985); Tuttle v. Raymond, 494 A.2d 1353 (Me. 1985); Hawkinson v. Geyer, 352 N.W. 2d 784 (Minn. 1984). See also Colo. Rev. Stat. § 13-25-127 (1973), Oregon Rev. Stat. § 30.925(1) (1983). This enhanced proof standard would at least be consistent with the White/Como rule equating punitive damages with criminal manslaughter.

where punitive damages are claimed and the possibility that punitive awards should be paid to the state. See, e.g., Sales & Cole, Punitive Damages: A Relic That Has Outlived Its Origins, 37 Vand. L. Rev. 1117, 1166-1171 (1984) and authorities cited therein.

These approaches, as well as a variety of others, are certainly worthy of consideration, but still must be applied in a system where a jury determines questions of punitive damages based on the "guidelines" of Florida Standard Jury Instruction 6.12. The vagaries of that process are compounded by a judicial system in which courts are, at the very least, hesitant to remove an issue from a jury's consideration before a verdict and no less reluctant to do so afterwards.

It may be that the White/Como rule, requiring "willful and wanton misconduct equivalent to criminal manslaughter" will add some needed precision to a series of semantic terms presently in use, which are capable of widely varied interpretations. It is somewhat less clear as to whether such a narrowing of the standard (without further explanation by this Court, without rewriting of Standard Jury Instruction 6.12, and without reinvigorating trial court control over the submission of the punitive damages issues to juries) will have any appreciable effect on the burgeoning practice of including a punitive damage claim in virtually every complaint, tort or otherwise.

Regardless of the Court's ultimate decision on whether to use this case as a vehicle to achieve broad reform in the field of punitive damages, this Court is urged to go further than a simple

reversal of the punitive award below. If applicable to no more general a series of cases than warning product liability cases, it is requested that the Court delineate the difference between the Wait rule which requires actual or constructive knowledge of the dangerousness of the product before a warning requirement is imposed, and the standard of actual knowledge of the alleged defect in question (here, the warning itself) and subsequent misconduct in the face of that knowledge, which is, or should be, the test for punitive damages in a warning case.

For all of the foregoing reasons, it is respectfully urged that this Court reverse the decision and judgment imposing punitive damages in this case, redirect the punitive law in Florida at least on this issue in a warning case, and then, as requested in Point II on this Appeal, redress fully the effect done by the submission of this issue to the jury.

POINT II ON APPEAL/REVIEW

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.

A. Introduction.

CYANAMID, with full knowledge and appreciation of the appropriate standard of review, requests that this Court order a new trial on liability and compensatory damages in this cause or, in the alternative, remit the substantial compensatory damage award given by the jury to ROY.

Two different but interrelated points are presented. First, as set forth in Point I on Appeal/Review, the trial court improperly allowed the injection of punitive damages into the case, which carried with it both the inflammatory arguments associated with punitive damages and, more particularly, the introduction of CYANAMID's net worth, shown to be in excess of $1.5 billion. Assuming arguendo that the punitive damage award will be stricken, the jury had, as a matter of law, forces brought to bear upon it, which caused the final award to be based on passion, prejudice, or improper motive.

Secondly, the verdict of $292,000.00 for ROY's compensatory claim was clearly contrary to the manifest weight of the evidence and was just as clearly arbitrary and excessive.

B. Improper Effect of Punitive Damage Claim and Evidence.

CYANAMID is confident that the punitive award will be stricken in this cause, but that action, as a matter of law, will not purge the effects of its presence before the jury during its deliberations on liability and compensatory damages.

The law in Florida is clear. References to the wealth or financial resources of a defendant are improper and prejudicial, and will result in a new trial for the defendant when such conduct occurs. See Baggett v. Davis, 169 So. 372 (Fla. 1936); Deese v. White Belt Dairy Farms, Inc., 160 So.2d 543 (Fla. 2d DCA 1964); Pierce v. Smith, 301 So.2d 805 (Fla. 3d DCA 1974).

ROY, over strenuous objections by CYANAMID's trial counsel, was successful in introducing the extensive financial net worth ($1.5 billion) of the defendant corporation. While the law in Florida clearly allows such evidence in a proper case for punitive damages (see Rinaldi v. Aaron, 314 So.2d 762 (Fla. 1975)), that same decision sets forth the universal law that a defendant's wealth is wholly irrelevant when it comes to the issue of compensatory damages.

There is absolutely no question that the introduction of a defendant's net worth in excess of $1.5 billion in a case where only liability and compensatory damages were at issue would result in an automatic mistrial or new trial, and conceivably disciplinary action as well. When a plaintiff's attorney decides to introduce such testimony in a possible punitive damage case, he does so at his peril and must realize that the jury will be prejudiced if the

punitive damage claim is at any time thereafter stricken.

The Supreme Court of Wyoming has recently made an intensive analysis of punitive damages and faced a procedural situation identical to this. Campen v. Stone, 635 P.2d 1121 (Wyo. 1981). After striking a punitive damage award because of a failure of proof akin to that required in Florida by the case of Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981), the Wyoming court was faced with the question of what to do with the remaining compensatory award. The issue was whether the financial resources evidence, otherwise properly admitted for the punitive case, fatally affected the compensatory verdict with the punitive award now stricken.

The Wyoming court first reiterated its adherence to two rules: one, that a defendant's financial condition is inadmissible where only compensatory damages are involved; and two, that such evidence is admissible when punitive damages are properly before the jury. With the punitive damages stricken because of a procedural insufficiency, the court concluded that it was impossible to say that the balance of the verdict was not affected by the net worth information. Accordingly, it reversed the compensatory damages as well for a new trial. 635 P.2d at 1132.[9]

Should this Court strike the punitive award, then it follows logically and necessarily that the net worth evidence, although "properly" addressed to an issue that was then before the

[9] The Wyoming Supreme Court also adopted, prospectively, a bifurcation approach to this problem that would eliminate the inherent problem of telling a jury a defendant's net worth before the compensatory damage and liability issues are determined.

court, it is just as prejudicial when, on appellate review, it is determined that the punitive damage issue should never have gone to the jury. A plaintiff should not be allowed to benefit by the erroneous ruling of a trial court induced by the plaintiff's own action, when that ruling is later corrected on appeal.

C. The Verdict for ROY was Clearly Excessive and Contrary to the Manifest Weight of the Evidence.

The legal standard to be used by a reviewing court has been stated in various ways, but perhaps the simplest is that found in the case of Lassitter v. International Union of Operating Engineers, 349 So.2d 622, 627 (Fla. 1977) (decision on rehearing):

> Although the verdict may be for considerably more or less than in the judgment of the court it ought to have been, still the court should decline to interfere, unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice, or gross mistake. In order to shock the sense of justice of the judicial mind, the verdict must be so excessive or so inadequate so as at least to imply an inference that the verdict evinces or carries an implication of passion or prejudice, corruption, partiality, improper influences, or the like.

In commenting upon that standard, the court also has stated (in an attempt to formulate a not totally subjective standard) that "the verdict should not be disturbed unless it is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." Bould v. Touchette, 349 So.2d 1181, 1185 (Fla. 1977). See also Smith v. Goodpasture, 179 So.2d 240 (Fla. 2d DCA 1965); Cloud v. Fallis, 110 So.2d 669 (Fla. 1959); Wackenhut v. Canty, 359 So.2d 430 (Fla. 1978).

D. Insufficiency of Factual Record.

The jury awarded ROY $292,000.00, which amount was subsequently reduced by his own comparative negligence. The test for excessiveness, however, must be made against the full award, since the jury was specifically instructed not to reduce the total award for any reason.

1. Medical Expenses.

A logical starting point is the medical expenses claimed by ROY in this case:

Dr. Blitt	$ 19.00
Dr. Simonson	358.00
Gainesville Hospital	1,932.00
Prescriptions	100.00
TOTAL . .	$2,409.00

(R 734-35).

Several points are important here.

a. Realizing that jury awards are to be measured, not by a slide rule, but rather by a yardstick (Food Fair Stores, Inc. v. Morgan, 338 So.2d 89 (Fla. 3d DCA 1976)), it is interesting to note that the medical expenses are only .8 of one percent of the total award for ROY.

b. Most of the $2,409.00 of medical expenses was not for any form of treatment, but was for a neurological evaluation in Gainesville.

c. Indeed, ROY presented no evidence of any treatment for anything except his 1975 skin disorder, the bills for which totaled $377.00, plus perhaps some prescriptions.

d. Finally, it is imperative to note that there was absolutely no evidence from any physician in this case that indicated that ROY would need any future medical treatment of any type. As such, the jury was not even instructed to include future medical expenses in its consideration of his award.

2. Lost Wages or Lost Earning Capacity.

When ROY last worked, the evidence established that his annual salary was $12,738.00. For all practical purposes, in the seven years between that date and the time of trial, ROY did not work.

The test, however, with respect to lost income or lost earning capacity is that before "a jury may assess damages for any permanent injury, it must appear to them that the injury is reasonably certain to impair the health and earning capacity of the injured person in the future." Baggett v. Davis, 169 So. 372, 377 (Fla. 1936); Allstate Insurance Co. v. Shilling, 374 So.2d 611 (Fla. 4th DCA 1979).

There was absolutely no evidence that ROY's earning capacity was impaired, or even significantly impaired so as to constitute an appreciable portion of any $292,000.00 award.

The only "definitive" disability determination, as high as 10%, came from Dr. Simonson with respect to his skin condition. This was based upon his conclusion that ROY should not work in a job that caused him to come in contact with Acrylamide. Dr. Simonson never instructed ROY not to work, but did suggest that ROY not work in the sun while being treated.

ROY did in fact stop working while he was seeing Dr. Simonson. Rather than being for medical reasons or pursuant to doctor's orders, the evidence demonstrated that "personal reasons" motivated his leaving (perhaps based on a planned move to the Gainesville area). (R 177, 211).

Dr. Fichtelman, the pathologist, testified from medical records that ROY was disabled or impaired somewhat, but could not tell how much the disability was, nor could he tell from what source that disability came, vascular or neurological, or other.

From this record, it can be seen that there was absolutely no evidence that ROY was totally disabled at any time, or even significantly impaired with respect to available work at any time (other than perhaps that which requires exposure to Acrylamide). Instead, as noted earlier, when discharged from the VA hospital in Gainesville, he was told that he could go to work immediately. Since no other doctor saw him during 1976, 1977, 1978, or the early part of 1979, there could have been no evidence from any treating physician to suggest that he could not work during those years. After 1979, no treating or examining physician found him to have any difficulty related to AM-9 that would in any way limit or impair his ability to work.

Since this is not an "aggravation of a previous condition" case, the burden of proof remains on ROY. As the Supreme Court has stated in what is clearly "black letter" law:

> The party seeking recovery must prove the extent of his injuries and that they were proximately caused by the negligence of his adversary. Two things combine to create the right of action. One is proof of negligence. The other is proof of injury and

damage proximately caused by the negligence proved.

Chomont v. Lord, 103 So.2d 635 (Fla. 1958).

3. Medical Condition.

a. Skin Complaints.

Although ROY's skin conditions were different than the classic (or perhaps even unique) symptoms which are evidenced by individuals who have suffered an Acrylamide reaction, there was evidence from which it could be concluded that ROY suffered contact dermatitis for approximately one year. That condition improved for the last seven months of his treatment and was gone by January of 1976. Thereafter, he had no further treatment of any kind for any dermatological condition allegedly related to AM-9, nor did any of the four dermatologists who testified say he had any continuing dermatological condition related to AM-9. For this treatment, he incurred medical bills of $358.00.

b. Nervous System.

The following points are evident from the manifest weight of the evidence with respect to ROY's claimed disturbance to his nervous system:

i. No treating or examining physician concluded that ROY had Acrylamide exposure which affected his nervous system.

ii. The VA physician could not ascribe any cause to the nervous system complaints, but concluded that there is a very high probability that something other than Acrylamide was the cause.

iii. Dr. Flaten found and identified the cause of ROY's complaints and concluded that it was a vascular condition unrelated to any Acrylamide exposure.

iv. Dr. Fichtelman agreed that there was a vascular component, but disagreed as to the absence of an Acrylamide involvement. His own key findings were based upon a confusion of the temporal relationship between the VA hospitalization and Dr. Flaten's examination and were further based upon the assumed (but incorrect) absence of vascular findings in the VA hospitalization.

v. Finally, Dr. Schaumberg, with vast Acrylamide experience, documented a host of direct contraindications of Acrylamide reaction, including the progression (as opposed to regression) of symptoms, ROY's intact vibratory senses (the key test for Acrylamide reaction), the pain and weakness upon exertion (consistent with arterial sclerosis, but inconsistent with Acrylamide reaction), and electromyographic studies showing no nerve impairment.

On this record, an award of $292,000.00 (even with a liberal dose of pain and suffering and loss of enjoyment of life) is a grossly excessive award not only not substantiated by the record, but in fact disproven by the manifest weight of the evidence.

The effect of the co-existence of the punitive damage claim, with its massive net worth evidence, cannot be ignored. The clamorous claims for punitive damages in the trial now sound the death knell for the verdict on liability and compensatory damages as well.[10] With the liability, causation and all damages issues being

[10] See generally Food Fair Stores, Inc. v. Morgan, 338 So.2d 89 (Fla. 2d DCA 1976); School Board of Broward County v. Taylor, 365 So.2d 1044 (Fla. 4th DCA 1978).

so closely intertwined, it cannot be said CYANAMID has received a fair trial on any issue.[11] A new trial should be ordered on liability and compensatory damages. Alternatively, a remittitur of the compensatory damages is requested.

[11] Obviously, the improper admission of evidence and argument on the issue of punitive damages cannot be said to have tainted the jury's basic neutrality on the compensatory damages issue without simultaneously leaving the jury tainted on the liability issues as well. Further, since this was a question of continuing exposure of ROY to AM-9, the reasonableness of his response thereto, and the effect upon him, the questions of damage causation and fault are linked. The evidence in the court below confirmed that ROY knew that Acrylamide was dangerous to the central nervous system, but basically didn't think it was going to happen to him. (R 1224, 1277-78). This awareness of danger, but failure to recognize the exact effect from a particular application has even been found by the First and Third Districts and the Eleventh Circuit to be the basis of a summary judgment for a defendant. See Talquin Electric Cooperative, Inc. v. Amchem Products, Inc., 427 So.2d 1032 (Fla. 1st DCA 1983); Wickham v. Baltimore Copper Paint Co., 327 So.2d 826 (Fla. 3d DCA 1976); May v. Allied Chlorine & Chemical Products, Inc., 168 So.2d 784 (Fla. 3d DCA 1964); Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519 (11th Cir. 1985) (applying Florida law).

CONCLUSION

For the reasons set forth in Point I of the foregoing Brief, CYANAMID respectfully urges that this Court reverse the decisions of the courts below on the issue of punitive damages and remand for the entry of a directed verdict in favor of CYANAMID on that issue.

For the reasons set forth in Point II, it is respectfully urged that this Court reverse the balance of the judgment in this cause for a new trial on the issues of liability, comparative negligence, and compensatory damages. Alternatively, it is requested that this Court enter a remittitur on the issue of compensatory damages.

Respectfully submitted,

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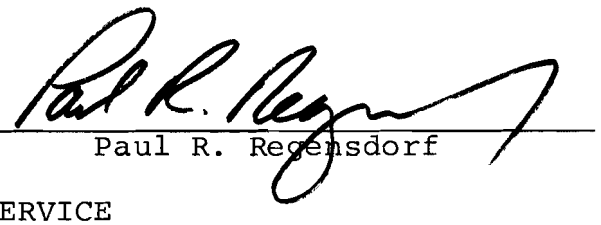
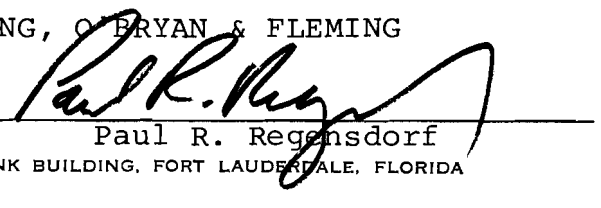
By: 
Paul R. Regensdorf

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, this 10th day of December, 1985, to EARLE LEE BUTLER, of Butler & Pettit, P.A., 1995 East Oakland Park Boulevard, Suite 100, Fort Lauderdale, FL 33306; DON LACY, 2916-B Battle Mountain Way, Tallahassee, FL 32301-3657; and to EDWARD T. O'DONNELL, of Mershon, Sawyer, Johnston, Dunwoody & Cole, 4500 Southeast Financial Center, Miami, FL 33131.

FLEMING, O'BRYAN & FLEMING

By: 
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