IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,124

AMERICAN CYANAMID COMPANY,

Defendant/Petitioner/Cross-Respondent,

vs.

LESTER K. ROY,

Plaintiff/Respondent/Cross-Petitioner.

ROY'S BRIEF ON JURISDICTION

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POINT I

WHETHER THE DECISION BELOW IS IN 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)

Summary of argument

There is no conflict. The court below specifically followed the principles involved in those cases. The jury specifically found that the defendant has committed a fraud and misrepresentation. This is a case where the defendant hid, concealed, and refused to acknowledge the dangerousness of its product to the ultimate user.

Argument

As noted by the Fourth District Court of Appeal:

> "The jury found that American Cyanamid had marketed its product,

> AM-9, a chemical grout, used in sealing sewer lines and with which Roy had worked, with a defect, by reason of a defective warning, and that the defect was a legal cause of damage to the Roys. They found American Cyanamide had negligently caused the damage, had also committed a fraud or misrepresentation and had acted with malice, moral turpitude, wantonness or with reckless indifference to the rights of others." American Cyanamide v. Roy, 466 So. 2d 1079 (Fla. 4 DCA 1984), at page 1081

The deception practiced by defendant continued right up through the trial of this cause, and that no doubt was important to the jury. For example, the defendant put on an expert witness who told the jury that laboratory rats did not die from the central nervous system effect of their contact with AM-9. Then, on cross-examination by plaintiff, this defense witness was forced to admit that what happened to the rats was that they were unable to crawl to their food, and they therefore actually died from starvation!

Florida has always allowed punitive damages when the defendant is guilty of fraud, malice, and willfully commits a wrong which injures the plaintiff. In this cause, the warning was not adequate because it did not make apparent the potential harmful consequences such that it would cause a reasonable man to exercise caution commensurate with the potential danger. The jury properly decided that the defendant manufacturer recklessly and willfully disregarded the danger to plaintiff when its warning persisted in understating the risks attached to the use of AM-9. Given the specific interrogatory jury verdict, punitive damages must follow as a matter of law. Petitioner is really arguing with the jury finding of fact, and has totally failed to demonstrate any jurisdictional conflict.

POINT II

WHETHER THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS IN SUCH CASES AS FLORIDA SOUTHERN RAILWAY COMPANY V. HIRST, 30 FLA. 1, 11 SO. 506 (1892) AND NATIONAL CAR RENTAL SYSTEM, INC. V. HOLLAND 269 SO. 2D 407 (FLA. 4TH DCA 1972), CERT. DEN., 273 SO. 2D 768 (FLA. 1973)

Summary of argument

In the instant case, 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 no defense to an intentional tort nor to gross negligence. In affirming the trial court on this issue, the Fourth District

Court of Appeal has created conflict with a long line of Florida cases.

Argument

Since the instant jury found defendant guilty of willful and wanton misconduct, the court should not have reduced plaintiff's recovery by the percentage of his ordinary negligence.

Prior to the adoption of comparative negligence by the Florida Supreme Court in Hoffman v. Jones, 280 So. 2d 431 (Fla. S. Ct. 1973), Florida courts had held that a plaintiff's own contributory negligence would not bar his recovery from a defendant who was guilty of willful 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)

The question now becomes whether the comparative negligence doctrine is applicable where a

defendant's conduct is willful and wanton and the plaintiff is guilty of only ordinary negligence. In other words, can the ordinary negligence of a plaintiff be used to reduce the plaintiff's damages that were caused by the willful and wanton misconduct of a defendant? If the comparative negligence doctrine encompasses willful and wanton misconduct, and therefore compares such conduct with negligence (ordinary or gross), then there would be a reduction of plaintiff's recovery. On the other hand, if the Supreme Court intended to leave willful and wanton misconduct outside the purview of its judicially adopted comparative negligence doctrine, there would be no reduction of plaintiff's recovery.

In Florida, willful 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 willful and wanton misconduct. This is 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 willful and wanton misconduct. National

Car Rental, supra; Boyce, supra; Johnson, supra; and Florida Railway, supra.

In Johnson v. Rinesmith, supra, the court adopted the restatement of Torts 2d, §482(1) which provides that the plaintiff's recovery should be for his full damages where a defendant is guilty of willful and wanton misconduct:

> "(1) * * * a plaintiff's contributory negligence does not bar recovery for harm caused by the defendant's reckless disregard for the plaintiff's safety."

Further evidence that Florida courts have held wanton and willful 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.

And finally, in 1975 Florida adopted the Uniform Contribution Among Tortfeasor's Act, F. A. 768.31, which provides for a right of contribution between joint tortfeasors if one of them pays more than his pro rata share of their common liability. Subsection 2 (c), however, disallows recovery of contribution to a defendant who is guilty of willful and wanton misconduct:

> "There is no right of contribution in favor of any tortfeasor who has intentionally (willfully or wantonly) caused or contributed to the injury or wrongful death."

The comments to the Uniform Act, in explaining why willful and wanton acts are excluded, state:

> " * * * willful and wanton acts seem naturally to belong in the same class with intentional wrongs and to imply moral turpitude on the part of the wrongdoer. The policy of the section as drafted adopts the law of those

> states which do not recognize classification of negligence into degrees. It is intended to convey the idea that there is a difference between negligence and willful or wanton misconduct."

To permit 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 under Point I, raised by Petitioner. There is jurisdiction under Point II, raised by Cross-Petitioner. This court should accept jurisdiction of this Cross-Petition, and make a clear prouncement again regarding the distinction between ordinary negligence and willfull/wanton misconduct in the wake of comparative concepts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 15th day of July 1985 to:

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