IN THE SUPREME COURT OF FLORIDA.

CASE NO. 67,124

AMERICAN CYANAMID COMPANY,

Appellant/Petitioner,

vs.

LESTER K. ROY,

Appellee/Respondent.

REPLY BRIEF OF APPELLANT/PETITIONER, AMERICAN CYANAMID COMPANY

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STATEMENT OF THE CASE

LESTER ROY (ROY) begins his Statement of the Case with the first of several disturbing misstatements of Florida law. ROY contends that this Court, having exercised its discretionary jurisdiction, has no authority -- as a matter of law -- to consider any broader issues than the issue which created conflict jurisdiction to begin with. ROY's Brief at 3-5. In fact, at Pages 32 and 41 of his brief, ROY somewhat contemptuously suggests that AMERICAN CYANAMID COMPANY (CYANAMID) is treating this "just like another appeal." He is correct in that regard.

In Bould v. Touchette, 349 So.2d 1181, 1183 (Fla. 1977), citing Tyus v. Apalachicola Northern Railroad Co., 130 So.2d 580, 585 (Fla. 1961), this Court stated, after granting certiorari on conflict jurisdiction, that the Court may then proceed to other issues raised in the cause "as though such case had come originally to this court on appeal." Except for ROY's defective cross-petition dealing with comparative negligence which this Court has expressly rejected in the order accepting discretionary jurisdiction, this Court has the duty and responsibility to fully consider the case on the merits as though (in ROY's words), it was "just another appeal." Bould, supra; Bankers Multiple Line Insurance Co. v. Farish, 464 So.2d 530 (Fla. 1985); Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984).

Otherwise, CYANAMID relies in all respects upon the Statement of the Case presented in its Initial Brief.

STATEMENT OF THE FACTS

CYANAMID reiterates and relies upon each and every portion of its Statement of the Facts as being the appropriate factual background for this Court, pursuant to and consistent with Rule 9.210(b) of the Florida Rules of Appellate Procedure.

ROY has totally failed, or refused, to specify what portions of CYANAMID's Statement he takes issue with, notwithstanding his requirement to do so, pursuant to Rule 9.210(c) and Dania Jai-Alai Palace, Inc. v. Sykes, supra. Instead, he has issued a wide-ranging statement of "facts," heavily laden with argument. To the extent possible, consistent with this Court's limitation on the length and magnitude of a reply brief, CYANAMID makes this reply to certain portions of ROY's Statement.

ROY does not dispute the usefulness of the product, AM-9, or the fact that CYANAMID was not involved in designing the system which applied its product as a sewer grout. As will be discussed below, CYANAMID was extensively involved in disseminating a variety of literature and information on the safe handling and use of its product.

With respect to toxicity studies and labeling, ROY has in no way attacked the proposition contained in CYANAMID's Initial Brief that, during all times relevant to this case:

> 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 the 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.

CYANAMID's Initial Brief at 5-6.

Even though CYANAMID was not ROY's employer at any time and was not the direct supplier to ROY's employer, there has been no contradiction to the record facts that CYANAMID, throughout the relevant period, distributed a host of materials and information, both narrative and pictorial, for the sophisticated and unsophisticated user -- warnings on bags, narrative and pictographic use restrictions on bags, signs, posters, and placards, manuals, booklets of all types, slide shows, etc. Although ROY doesn't "remember" the presence of some of these items, his co-workers, who suffered no adverse reaction to Acrylamide, testified in detail about their presence and availability. Id. at 11.

ROY has attached to his brief an article by Drs. Spencer and Schaumberg as the only apparent support for his suggestion that CYANAMID was in some way flagrantly reckless in designing its labels. Not so.

A. It should first be noted that the article in question was not even published until June of 1975, one month after Plaintiff quit his job. As such, it could have had no effect whatsoever on this case. (The second article attached to ROY's brief was published no earlier than 1978).

B. Secondly, although Dr. Schaumberg in his June 1975 article refers to Acrylamide as a contact "poison," it is important to note that the definition to him as a doctor (something which can damage or cause a

disturbance)[1] is far different than the public's perception as something which can easily kill. It is just this key distinction that the voluntary and mandatory labeling system in the United States carefully tries to preserve so that the effect of the use of the word "poison" or the skull and crossbones symbol is not diluted in the public's perception by over use.

C. At least as importantly, ROY overlooks the last portion of the sentence he refers to on Page 131 of Dr. Schaumberg's article, in which he states that "repetitive exposure might result in brain and nerve damage." It can easily be recognized that this June 1975 article in fact had almost exactly the same proposed warning language as was challenged by the Plaintiff in this case.[2]

Two other points are interesting with respect to the articles attached to ROY's brief. They do, in fact, give this Court a much more detailed scientific and technical treatment of the product in question. What ROY ignores is that the articles' reference to nerve damage, and specifically damage to the Pacinian corpuscles is a

[1] The medical definition of poison at this time was "any substance which, when ingested, inhaled or absorbed, or when applied to, injected into, or developed within the body, in relatively small amounts, by its chemical action may cause damage to structure or disturbance of function. Dorland's Illustrated Medical Dictionary, 25th Edition (1974), at 1227.

[2] Although most of the semantic debate has focused on one or two sentences of the warning, photographs in evidence (Exhibits 1 through 6) set forth the complete warning label on the bags of AM-9 and the precautions on the posters, etc. See also CYANAMID's Initial Brief at 9.

unique effect of Acrylamide intoxication. The presence of this damage can be simply and reliably detected through the use of a vibratory test. What ROY failed to inform this Court of is that he at no time ever demonstrated any positive findings on the vibratory test. (R 849-51, 857). Similarly, Exhibits A and B to ROY's brief make reference to a unique pattern of dermatological complaints, which is a classic diagnostic tool in determining the occurrence of Acrylamide intoxication. Again, the dermatitis for which Mr. ROY was treated in 1975 did not exhibit the symptoms of an Acrylamide reaction. In short, the two unique and sophisticated indicia of Acrylamide reaction were absent in Mr. ROY. (R 888).

Finally, ROY has made certain references to the record in his brief and in other circumstances has referred to portions of the transcript without record citations. Careful cross reference to those non-record citations is essential because it is respectfully believed that through transposition or erroneous construction of the record, at least several record citations do not support major points asserted in ROY's brief:

A. For example, on Page 20 of ROY's brief, he alleges that the Defendant admits that AM-9 was a poison and should have been labeled as such. In fact, the record citation is from his own expert who refers back to the article of Dr. Schaumberg (1) not a CYANAMID employee, and (2) written after the relevant period of this case.

B. On Page 28 of their brief, they state flatly that Dr. Heilman at the VA concluded that the cause of Mr. ROY's problem was Acrylamide intoxication. In fact, what Dr.

Heilman testified about on Pages 303 to 305 of the record is that a major component of ROY's complaints were inconsistent with Acrylamide intoxication. As such, although he acknowledged that there was a possibility or a small possibility of an Acrylamide neuropathy and that that increases slightly as other things are ruled out, his final opinion is that there was a very high probability that something else might be going on. (R 303-05).

C. ROY concludes his Statement of the Facts on Page 31 with a discussion of two photographs which he has included in his Appendix. There is a stark absence of any record citation to either of these photographs for an obvious reason. They were not present in the evidence in the trial court. The Plaintiff attempted to elicit testimony and offer these photographs in evidence during the trial, but was rebuffed by the trial court. The trial court struck all testimony with respect to the photographs and excluded them from evidence. To surmise why ROY would attempt to insert these non-record materials into his argument before this Court at this time would be rank speculation. (R 1352-57).

After having made the foregoing comments concerning ROY's Statement of the Facts, CYANAMID again reiterates and stands by the Statement of the Facts contained in its Initial Brief at Pages 3 to 19.

A R G U M E N T

POINT I ON APPEAL

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 DAMAGE ISSUE TO THE JURY AND THE FOURTH DISTRICT ERRED IN AFFIRMING THOSE DECISIONS.

The argument on this first point on appeal can be distilled to three rather precise questions:

1. What is the appropriate standard to be used in considering the imposition of punitive damages in a product liability case, and more particularly in a "warning" case?
2. Is there substantial competent evidence in this record to have warranted the punitive damage issue going to the jury?
3. If this Court concludes that CYANAMID has not been shown to have acted in a manner consistent with punitive damages, what action should this Court take to remedy that situation?

1. What is the appropriate standard to be used in considering the imposition of punitive damages in a product liability case, and more particularly in a "warning" case?

The briefs of the parties and of the amicus curiae in this Court have struggled with the standard to be used if punitive damages are to be allowed in Florida in products liability cases. It would appear that when all of the dust has settled, the appropriate standard is that announced or repeated in White Construction Co. v. duPont, 455 So.2d 1026 (Fla. 1984); Como Oil Co. v. O'Loughlin, 466

So.2d 1061 (Fla. 1985); Carraway v. Revell, 116 So.2d 16 (Fla. 1959). This "equivalent to criminal manslaughter" standard found to be applicable in some personal injury tort contexts, has already been at least implicitly applied to a products liability case by one district court of appeal. See Diaz v. Sears, Roebuck & Co., 475 So.2d 932 (Fla. 3d DCA 1985). No persuasive (or frankly other) reason has been suggested for any lesser standard in a products liability context, since the goals to be furthered are the same principles of punishment and deterrence.

The one point that is crystal clear from all briefs is that there is no policy or other reason why the Tampa Drug Co. v. Wait, 103 So.2d 603, 609 (Fla. 1958) rule for the imposition of compensatory damages in a products liability warning case should be adopted as the self-same standard for punitive damage liability. If a manufacturer has actual or constructive knowledge of an inherently dangerous characteristic in a product, an obligation to reasonably warn expected users arises. To go further and punish such a manufacturer if that warning is found to be defective, however, requires some conduct beyond the simple negligence standard of knew or should have known of the dangerous condition.

In these circumstances, the defect is not the inherent condition of the product, but is the allegedly improper warning. Consistent with White, Como, and Carraway, it is suggested that the conduct of the manufacturer would have to be such that it had actual knowledge of the defective or inadequate warning coupled with flagrant activity thereafter in marketing the product without any effort to study or improve its warning. It would appear that some further

corporate misconduct (such as coercion, cover up, or other "smoking guns") would be required as well.

On Page 27 of CYANAMID's Initial Brief, it was suggested that White and Como either changed the tone and direction of punitive damage law in Florida, or at least returned it to the compass heading originally established by this Court in Carraway. The Fifth District in Gerber Childrens' Centers, Inc. v. Harris, ___ So.2d ___ (Fla. 5th DCA, March 6, 1986, 11 F.L.W. 581), has agreed by saying that the punitive damage law in Florida has significantly evolved since Griffith v. Shamrock Village, 94 So.2d 854 (Fla. 1957) and that the pendulum swing, having reached the end of its travel, has now begun its return to the center through the proper application of White, Como, and Carraway.

2. Is there substantial competent evidence in this record to have warranted the punitive damage issue going to the jury?

With the Fourth District's "knew or should have known" standard rejected as a punitive standard, this Court still must review CYANAMID's conduct in light of the proper White/Como/Carraway test. Much has been written in the briefs in this Court concerning CYANAMID's responsibility or lack thereof, but it is perhaps most appropriate to compare CYANAMID's actions with those of the Defendant in a case somewhat similar to this and one in which ROY apparently takes great solace. Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242 (Fla. 1st DCA 1984), rev. denied 467 So.2d 999 (Fla. 1985). In fact, at Page 37 of his brief, ROY suggests that his case for punitive damages is even stronger than the Johns-Manville case. Certainly, a party seeking to uphold a jury's verdict is

given broad sway with his construction of the facts, but even poetic license has its limits. The following is a brief comparison of the circumstances found to be the basis for punitive liability in Johns-Manville and the corresponding actions of CYANAMID in this case. See 463 So.2d at 249-50.

Johns-Manville	Cyanamid
Johns-Manville (JM) knew of the danger of asbestos for years.	Cyanamid knew of the dangers of Acrylamide because it did the first scientific research into the properties of this brand new chemical.
After a significant number of years, JM began its own research into asbestos.	Cyanamid instituted its research program at the inception of its development of AM-9.
The first JM research report on asbestos was altered because of JM pressure to make the report more favorable.	All Cyanamid research (whether in-house or funded by Cyanamid) has been published and disseminated to the scientific and medical communities freely for their comment and review.
One of the reasons for JM's altering its first report was that it wanted to hold down any worker's compensation payments it might have to pay.	Cyanamid's in-house research heavily focused on its own workers who had the most significant possibilities of exposure. The research was specifically directed to reducing worker problems and not to reducing worker payments.
JM suppressed other adverse foreign articles on asbestosis.	Cyanamid actively encouraged and funded independent research into the characteristics of AM-9 throughout the period of its development and marketing.
JM actively concealed from its own workers their development of asbestosis disclosed in medical examinations.	Cyanamid's industrial hygienists continuously worked to improve the conditions for its own workers and to reduce the risks of exposure.
JM's medical director finally recommended placing warning labels on JM's asbestos, but the company rejected the suggestion because it was feared that such labels would hurt sales.	Cyanamid, consistent with its labeling practices in all situations, put a precautionary warning label on Acrylamide while it was still a research chemical and before marketing, and upgraded that label continuously thereafter as the product went into production.

It is respectfully suggested that, whether CYANAMID's conduct is compared with Johns-Manville, some other defendant, or with an objective standard, CYANAMID's conduct with respect to AM-9 is not only not worthy of punishment, but is in fact, exemplary. Rather than showing reckless indifference to the rights of others, willfulness, wantonness, etc., the record before this Court, when viewed in the light most favorable to ROY, supports only the conclusion that a directed verdict on the issue of punitive damages should have been entered in favor of CYANAMID.

3. If this Court concludes that CYANAMID has not been shown to have acted in a manner consistent with punitive damages, what action should this Court take to remedy that situation?

There are three separate actions which this Court should take to remedy the errors of the court below. First, and most simply, the punitive damage award must be reversed and a directed verdict entered in favor of CYANAMID.

Secondly, if the law in existence at the time of the appellate decision in this matter allowed two of the three appellate court judges to sustain the imposition of punitive damages, then it is essential for this Court to redirect or return the pendulum swing in such product liability cases to a point consistent with White and Como, one which hopefully would prevent another case such as this having to get to the Supreme Court of Florida to be corrected.

Thirdly, and perhaps most importantly, the vestiges of the error in the trial court need to be removed and that can only be done through the granting of a new trial on all issues. This will be discussed more fully in the following point on appeal.

For all of the foregoing reasons, it is respectfully suggested that the Court reverse and remand for the direction of a verdict in favor of CYANAMID on the punitive damage issue.

POINT II ON APPEAL

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.

As previously mentioned above, the third action to be taken by this Court is the ordering of a new trial on all issues. Numerous commentators and courts have expressed concern that a consolidated trial on liability, compensatory damages, and punitive damages with net worth evidence being admissible, prejudices the defendants' (especially large corporate defendants') rights to fair trials on the fundamental issues of liability and damages. See, e.g., Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev., 1173, 1191 (1931); Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control, 52 Fordham L. Rev., 37, 41, 90 (1983); The Use of Evidence of Wealth in Assessing Punitive Damages in New York: Rupert v. Sellers, 44 Albany L. Rev. 422, 426, 437, 439 (1980); The Dubious Extension of Punitive Damage Recovery in Pennsylvania Products Liability Law, 23 Duquesne L. Rev., 680, 682, 705 (1985); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev., 1, 52-53 (1982).

Whatever prejudice a defendant suffers in a case in which punitive damages may ultimately be proper, that prejudice is insignificant when compared to the prejudice suffered by a defendant that is

charged with punitive conduct and has its financial worth and other such evidence displayed to the jury, even though any punitive damage award is ultimately stricken.

In those situations in which the jury ultimately does not return a punitive award, and particularly in those in which a punitive award is returned but later stricken, the analysis then reverts to a simple one dealing with the prejudicial effect on issues of liability and compensatory damages that the introduction of substantial net worth evidence has to a trial. Such evidence is anathema in Florida's system of justice, where the wealth of a defendant or the impecuniousness of a plaintiff is irrelevant to the issues of liability and compensatory damages and prejudicial to their resolution.

In short, until such time as Florida implements a bifurcated trial system on punitive damages, or other comparable reforms, a plaintiff's attorney proceeds at his own risk when he determines to introduce evidence of extensive net worth in a case seeking punitive damages. If he prevails on punitive damages, the gamble has been won, but if he receives no award or if an award is later stricken, then he should not be allowed to "win" nonetheless by getting the benefit of the obvious prejudicial effect of a defendant's net worth on the jury's deliberations concerning liability and damages. To allow the jury's verdict on liability and damages to stand here would be to reward the Plaintiff for the overzealousness of his trial counsel. The only remedy presently available then to CYANAMID is for this Court to grant a new trial on all issues, a trial free from all taint with respect to CYANAMID's financial resources. See Campen v. Stone, 635 P.2d 1121 (Wyo. 1981) for an in depth analysis of the necessity of a new trial on all issues in such cases.

ROY has totally failed to respond to this argument in any fashion, suggesting instead that CYANAMID is arguing that the $45,000 punitive award is itself excessive. CYANAMID has never made that argument and does not make that argument before this Court. CYANAMID does, independently of the foregoing reasons for seeking a new trial on all issues, reassert the position it has detailed on Pages 43 through 49 of its original brief to the effect that the issues of liability and compensatory damages were closely intertwined in the trial of this cause and that the resulting compensatory damage award was excessive in its own right and considered in light of the standards set forth by this Court in Lassitter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1977).[3]

[3] Notwithstanding this Court's order specifically rejecting ROY's comparative negligence argument on cross-petition, he reiterates an abbreviated form of that argument in the closing pages of his brief. For the reasons set forth in CYANAMID's brief on "cross petition," for the reasons set forth in this Court's decision in Hoffman v. Jones, 280 So.2d 431, 437 (Fla. 1973), and for the reasons discussed in Tampa Electric Co. v. Stone & Webster Engineering Corp., 367 F.Supp. 27 (M.D. Fla. 1973), his argument is without merit.

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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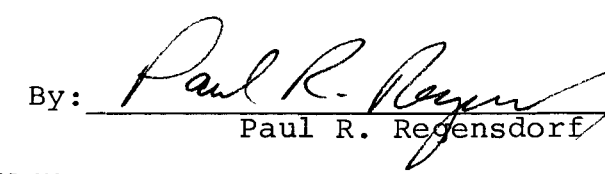
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished, by mail, this 27th day of March, 1986, to all COUNSEL OF RECORD ON ATTACHED LIST.

FLEMING, O'BRYAN & FLEMING

By: 
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