IN THE SUPREME COURT OF FLORIDA

TERRI LYNN CONLEY.

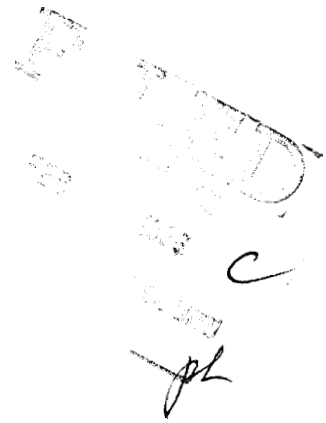
petitioner.

vs.

CASE NO. 67,626

BOYLE DRUG COMPANY,
etc.. et al.

Respondents. /



BRIEF OF AMICUS CURIAE
FLORIDA DEFENSE LAWYERS ASSOCIATION
SUPPORTING POSITION OF RESPONDENTS

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On Behalf of Amicus Curiae
Florida Defense Lawyers Association

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NARY STATEMENT

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STATEMENT OF THE CASE AND FACTS

This cause is before the Cour to rt V, (3 , Fla. Const., ar l)(2) F R A , the D Court havi tif th its dec s passes p r a question of great ub concern l tiff having fi ed a Notice oking Discretionary t

he n al facts s set fo in h Distric Court's or are t at Plaintiff all that she was r as r of her g o i bestrol here "I l lainti was in tero (R-371, ; R- O ha endants ar e u d se ers o a l share of the ES sold at th t time for p of gnan (R-372, 13; R-376, l R-3 53), that P is u to prove who cau r r ury (R 5; R-379, 58)

SUMMARY OF ARGUMENT

Individual responsibility is the bedrock supporting the foundations of our tort jurisprudence. Plaintiff seeks to undermine the fundamental requirement that a plaintiff, as the party seeking to

change the status quo, must prove that the defendant was the cause of the injury complained of. Plaintiff asks this Court to chip away at the requirement that she must show that the defendant, rather than some other entity, caused her injury. This Court should refuse to do so, and should reaffirm the long-standing rule of law.

The various theories Plaintiff advances have justifiably met with widespread rejection by the courts. Alternative liability is available only when all potential tortfeasors are defendants, a fact situation not present here. The market share liability theory, in addition to being antithetical to fundamental principles of our jurisprudence in imposing liability on defendants who caused plaintiff no harm, creates severe problems in defining the relevant market, ensures an unjust allocation of damages, and creates enormous trial management problems. The market-share alternate liability theory suffers from the same flaws as the market share theory. Industry-wide liability, where it is accepted at all, is limited to situations where a few companies form the industry and jointly control an insufficient standard of safety; neither element is present here. Concert of action depends on an agreement to conduct tortious activity, and is intended to expand the scope of liability to those acting in concert with a known tortfeasor; here, the identity of the tortfeasor is unknown, and the theoretical basis for applying this theory is absent.

Because of the inherent flaws in the theories advanced by Plaintiff, and because they necessitate a radical departure from sound and well-settled tenets of Florida's jurisprudence, they should

be rejected, and this Court should reaffirm the basic principle that a plaintiff cannot recover unless it is proven that defendant caused the injury. The certified question should be answered in the negative.

ARGUMENT

THE TRIAL COURT CORRECTLY DISMISSED THE PLAINTIFF'S COMPLAINT FOR DAMAGES CAUSED BY HER MOTHER'S INGESTION OF A DEFECTIVE DRUG BASED ON PLAINTIFF'S INABILITY TO ALLEGE WHICH, IF ANY. OF THE DEFENDANT MANUFACTURERS PRODUCED THE SPECIFIC DOSES INGESTED.

Under current principles of Florida jurisprudence, Plaintiff's Second Amended Complaint fails to state a cause of action against the Defendants, as the District Court held. Indeed, Plaintiff apparently recognizes that fact, asserting that the Second Amended Complaint states a cause of action under one or more of five theories never before recognized in Florida. In order to evaluate those proposed theories, a brief overview of basic principles is necessary.

A. The Requirements of Current Florida Law

It is fundamental that the plaintiff in a negligence action must prove not only the extent of his injuries, but also that they were proximately caused by the defendant's negligence.[1] Even if defendant was negligent, the plaintiff may not recover unless he demonstrates that defendant's negligence in fact caused injury to

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[1] University Community Hospital v. Martin. 328 So.2d 858 (Fla. 2d DCA 1976); Washewich v. LeFave, 248 So.2d 670 (Fla. 4th DCA 1971).

him.[2] Failure to establish that the defendant was the negligent party requires the direction of a verdict in defendant's favor.[3]

Likewise. recovery may not be had on an implied warranty theory unless plaintiff demonstrates that defendant manufactured[4] the product which caused the injury.[5]

Even under strict tort liability, a plaintiff cannot prevail unless defendant's relationship to the product in question is first proven.[6] As this Court stated in West V. Caterpillar Tractor Co., Inc., 336 So.2d 80, 87 (Fla. 1976):

> In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in question, the defect and unreasonably dangerous condition of the product, and the existence of the proximate causal connection between such condition and the user's injuries or damages.

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[2]Gooding V. University Hospital Building, Inc., 445 So.2d 1015 (Fla. 1984): Asgrow-Kilgore Co. V. Mulford Hickerson Corp., 301 So.2d 441 (Fla. 1974): Vecta Contract, Inc. V. Lynch, 444 So.2d 1093 (Fla. 4th DCA 1984), rev. den., 453 So.2d 44 (Fla. 1984); Fellows V. Citizens Federal Savings & Loan Assoc., 383 So.2d 1140 (Fla. 4th DCA 1980).

[3]Vecta Contract, Inc. V. Lynch, supra (plaintiff's failure to prove injury-causing chair was manufactured by defendant, rather than predecessor corporation, required directed verdict in defendant's favor); Matthews V. GSP Corp.. 368 So.2d 391 (Fla. 1st DCA 1979) (plaintiff's failure to establish that injury-causing cable was sold or manufactured by defendants required directed verdict in defendants' favor).

[4]Or was otherwise responsible for the product. For simplicity, we will refer to "manufacturers" herein, including within that term other parties in the distributive chain.

[5]Sansing V. Firestone Tire & Rubber Co., 354 So.2d 895 (Fla. 4th DCA 1978). cert. den., 360 So.2d 1250 (Fla. 1978): McCarthy V. Florida Ladder Co., 295 So.2d 707 (Fla. 2d DCA 1974); Serksnas V. Engine Support, Inc., 392 F.Supp. 392 (S.D. Fla. 1975).

[6]Clark V. Boeing Co., 395 So.2d 1226 (Fla. 3d DCA 1981): Sansing V. Firestone Tire & Rubber Co., supra.

The reason for this fundamental requirement of proving causation-in-fact goes to the very bedrock of our system of jurisprudence; just as it is the function of the courts to provide redress to an injured plaintiff, it is likewise a basic function of the courts to ensure that a defendant is not held liable in money damages unless there is a satisfactory showing that the defendant's acts or omissions in fact caused some injury to the plaintiff.[7]

Thus, for instance, in Asgrow-Kilgore Co. V. Mulford Hickerson Corp., supra, the trial court had found defendant negligent in spraying herbicide which had come into contact with plaintiff's crop, but further found that plaintiff had not established that this negligence caused any damage, and accordingly held for the defendant. This Court, reversing the District Court, upheld the trial court, observing that there can be a negligent act which is not a cause of damages and therefore is not actionable, and specifically noting that the sine qua non of a negligence action is an actual causal connection between the negligent act and the injury.

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[7]Both the Academy and Plaintiff strongly rely on a purported distinction between proving causation (i.e., that DES caused Plaintiff's injury) and proving identity (i.e., that one of the present Defendants is responsible for the DES Plaintiff's mother ingested), claiming that they are **"only"** seeking to avoid proving identity. By analogy, a pedestrian injured by a hit-and-run driver who cannot be identified could prove causation (injury from the accident), but not identity (of the owner and/or driver). Florida law does not permit recovery in this situation. Vance V. Miller, 360 So.2d 1150 (Fla. 3d DCA 1978), cert. den., 368 So.2d 1375 (Fla. 1979). Just as this hypothetical pedestrian may not hold every vehicle owner and driver (or some selection of them) individually liable in damages for the acts of one unknown hit-and-run driver, it is equally improper for Plaintiff to hold these Defendants liable without any proof that any of them were responsible for the DES her mother ingested.

that defendant in fact harmed plaintiff, there is neither equity nor justice in requiring any defendant to compensate plaintiff for damages sustained because of the acts or omissions of some other party.[9]

[8] As Voltaire phrased the essential concept: "It is better to risk saving a guilty person than to condemn an innocent one." Zadig, Chap. 6.

[9] Indeed, as noted in Tidler V. Eli Lilly and Co., 95 F.R.D. 332, 334 n.5 (D. D.C. 1982), substantial questions exist as to whether a liability theory permitting recovery notwithstanding the absence of any showing of a causal connection between defendant and the injury

In adopting strict liability in West, this Court took pains to point out that it did not make the manufacturer an insurer, and that the ordinary rules of causation still applied. 336 So.2d at 90.[10] Regardless of whether a products liability action is brought in negligence, breach of implied warranty, or strict tort liability, the fundamental requirement remains that plaintiff demonstrate defendant's relationship to the product before any recovery is possible.

Plaintiff's failure to show that he sustained any damage by virtue of defendant's acts or omissions defeats recovery.[11] Causation-in-fact is an essential element of proximate causation.[12] To establish proximate causation, plaintiff must show a natural, direct and continuous sequence between defendant's act and plaintiff's injury so that it may be said that but for the act, the injury would not have occurred.[13] A possibility of causation is not

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(Footnote 9 continued from previous page).
sustained by plaintiff can be consistent with constitutional requirements of due process. See, e.g., Armstrong V. Manzo, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); Mullane V. Central Hanover Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Marchwinski V. Oliver Tyrone Corp., 81 F.R.D. 487 (W.D. Pa. 1979).

[10]To like effect, see Clark V. Boeing Co., supra.

[11]Asgrow-Kilgore Co. V. Mulford Hickerson Corp., supra; Twyman V. Roell, 123 Fla. 2, 166 So. 215 (1936).

[12]City of Green Cove Springs V. Donaldson, 348 F.2d 197 (5th Cir. 1965, applying Florida law).

[13]Sardell V. Malanio, 202 So.2d 746 (Fla. 1967); General Telephone Co. of Florida V. Choate, 409 So.2d 1101 (Fla. 2d DCA 1982); Cassel V. Price, 396 So.2d 258 (Fla. 1st DCA 1981); Fellows V. Citizens Federal Savings & Loan Assoc., supra; Pope v. Pinkerton-Hays Lumber Co., 120 So.2d 227 (Fla. 1st DCA 1960).

enough; if the question of causation remains a matter of speculation or conjecture, the court must direct a verdict for defendant.[14] Where, as in this case, there is a missing link in the chain of events tying plaintiff's injury to some act or omission of defendant, there can be no recovery.

Plaintiff must prove each and every element of her case.[15] As part of that burden, plaintiff must show that a causal relationship between defendant's acts and plaintiff's injuries is "more likely than not."[16] As this Court stated in Gooding, "In negligence actions Florida courts follow the more likely than not standard of causation and require proof that the negligence probably caused the plaintiff's injury. (citations omitted)." 445 So.2d at 1018.

Plaintiff's burden in this case is to prove that her injuries are due to the acts of the Defendants she has selected to bring before the court. Plaintiff has specifically alleged that she cannot do so.[17] Assuming, as we must, that Plaintiff's injury was

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[14] Vecta Contract, Inc. v. Lynch, supra; Cassel V. Price, supra; Greene V. Flewelling, 366 So.2d 777 (Fla. 2d DCA 1978); Conda v. Plain, 215 So.2d 13 (Fla. 2d DCA 1968); McNamara v. American Motors Corp., 247 F.2d 445 (5th Cir. 1957, applying Florida law).

[15] Conda v. Plain, supra; Smith's Bakery, Inc. v. Jernigan. 134 So.2d 519 (Fla. 1st DCA 1961).

[16] Gooding v. University Hospital Building, Inc., supra; Cassel v. Price, supra.

[17] In a number of DES cases, plaintiff has in fact been able to identify the individual manufacturer responsible. See, for instance, Lyons V. Premo Pharmaceutical Labs, Inc., 170 N.J. Super. 183, 406 A.2d 185 (1979), certification den., 82 N.J. 267, 412 A.2d 774 (1979); Abel V. Eli Lilly and Co., 418 Mich. 311, 343 N.W.2d 164 (1984) (approximately 70 out of 183 plaintiffs involved in case able
(Footnote 17 continued on next page).

caused by her mother's ingestion of DES, and that each Defendant she has brought before this court manufactured DES, the critical link absent in this case is a showing that any Defendant manufactured the DES her mother ingested. In order for Plaintiff to state a cause of action, she must show causation-in-fact -- that the Defendant before the court was the cause of her injury.[18] Plaintiff states that she

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(Footnote 17 continued from previous page).
to identify individual manufacturer involved); Ryan V. Eli Lilly & Co., 514 F.Supp. 1004 (D.S.C. 1981). In other cases, at least some of the plaintiffs were able to determine the identity of the manufacturer through discovery, notwithstanding express allegations that they would be unable to do so. See, for instance, Sindell V. Abbott Laboratories, 26 Cal.3d 588, 163 Cal.Rptr. 132, 607 P.2d 924, 927 (1980), cert. den., 449 U.S. 912, 101 S.Ct. 285, 66 L.Ed. 2d 140 (1980) and Ferrigno v. Eli Lilly and Co., 175 N.J. Super. 551, 420 A.2d 1305, 1310 (1980). In one case, a pharmaceutical company admitted, subsequent to the trial court's ruling on a summary judgment motion, that it manufactured and marketed the DES which plaintiff's mother ingested. McElhaney V. Eli Lilly & Co., 575 F.Supp. 228 (D.S.D. 1983). In still other cases, plaintiff, although unable to identify the particular manufacturer, was able to describe the form and dosage of DES involved, so as to eliminate some manufacturers as potential tortfeasors. See, for instance, Erlich V. Abbott Laboratories, Case No. 4331, Philadelphia Court of Common Pleas (1981); Martin V. Abbott Laboratories, 102 Wash.2d 581, 689 P.2d 368 (1984); Collins V. Eli Lilly Co., 116 Wis.2d 166, 342 N.W.2d 37 (1984), cert. den., ___ U.S. ___, 105 S.Ct. 107, 83 L.Ed.2d 51 (1984). Although Plaintiff's admission of inability to identify the particular manufacturer in this case may be premature, we recognize that it is binding for purposes of this appeal.

[18]One court felt compelled to devise a theory of recovery in order to satisfy a state constitutional requirement providing that: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character." Collins V. Eli Lilly Co., supra, quoting Art. I, §9, Wis. Const. Contrary to Plaintiff's assertions, Florida has no corresponding provision. Rather, Art. I, 521, Fla. Const., provides that: "The courts shall be open to every person for redress of any injury, ..." The Florida Constitution also provides that: "No person shall be deprived of life, liberty or property without due process of law, ..." Art. I, §9, Fla. Const. Both requirements are met without adopting any of the theories espoused by Plaintiff. Plaintiffs are given access to the courts to attempt to prove their
(Footnote 18 continued on next page).

is unable to do so, and it is because of this missing link in the causal chain that her Second Amended Complaint fails to state a cause of action.[19]

(Footnote 18 continued from previous page).
claim. while defendants may not be deprived of their property unless plaintiff can demonstrate a causal relationship between defendant and plaintiff's injury.

Plaintiff overreaches in claiming that the access-to-courts provision requires the courts to fashion a radical new theory of liability in order to permit Plaintiff to recover despite her inability to show which Defendant, if any, in fact caused harm to her. Inability to prove an essential element of liabilty precludes recovery. Gooding V. University Hospital Building, Inc., supra. This does not offend the constitutional provision, which requires only access, not a remedy regardless of proof problems. The provisions of Art. I, 521 do not create new causes of action. Kirkpatrick V. Parker, 136 Fla. 689, 187 So. 620, 624 (1939); Harrell V. State, Dept. of Health and Rehabilitative Services, 361 So.2d 715, 718 (Fla. 4th DCA 1978). Rather, they protect causes of action which existed at common law or by statute prior to the adoption of the Declaration of Rights. Caloosa Property Owners Ass'n., Inc. V. Palm Beach County Board of County Commissioners, 429 So.2d 1260 (Fla. 1st DCA 1983), rev. den., 438 So.2d 831 (Fla. 1983). Even so, the access provision does not invariably prohibit the abolition of a preexisting cause of action. Lasky V. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974); Rotwein V. Gersten. 36 So.2d 419 (Fla. 1948). If, as Plaintiff claims, the provision requires that an injured plaintiff be guaranteed a remedy, this Court could soon be required to conceive of remedies for plaintiffs injured by unknown hit-and-run drivers, by defendants not amenable to service of process, and by corporations which have become defunct. The absurdity of the result demonstrates the flaw in the premise. All that Art. I, 521, Fla. Const., requires is that a plaintiff be given the chance to present the evidence, not that the courts fill the gaps in the evidence presented.

[19]The Academy suggests (Brief at 9) that Plaintiff should be relieved of this basic requirement and the risk placed on the industry because this will "spread the risk" and the industry can either insure against the risk or pass it on to the consuming public. Leaving aside all issues of public policy regarding inflation and all questions of how to increase prices on a product sold many years ago, the fundamental point is that the Academy seeks to have liability determined not by the defectiveness of Defendants' products, but by the depth of Defendants' pockets.

If Plaintiff had brought her action solely against any **one** Defendant, alleging that the chosen defendant was the manufacturer, and had failed to prove (or admitted she could not prove) that the chosen defendant **was** the manufacturer, the result would be obvious: Plaintiff would have failed to establish her case and the chosen defendant would be entitled to a directed verdict. Vecta Contract, Inc. v. Lynch, supra: Matthews V. GSP Corp., supra. If Plaintiff brought a series of 11 such suits, each against a different manufacturer, and was unable to identify any defendant as the manufacturer, each defendant would be entitled to a dismissal or a judgment on the pleadings.

For the same reason, the same result must be reached where Plaintiff has joined the 11 Defendants in a single suit, as in the instant case, admitting that she cannot identify any of them as the manufacturer of the DES which caused her injuries. It is plaintiff's burden to prove that defendant caused harm, not defendant's burden to prove he did not. "Innocent until proven guilty" forms the very backbone of our legal system. Plaintiff has shown no reason to abandon that concept in favor of a system of "guilty until proven innocent" -- a system which would force defendants who have done her no harm to pay for injuries done by another, especially where it is extremely likely that the one who **has** harmed plaintiff is not even before the court!

Plaintiff's theories do not guarantee that the manufacturer which caused her injury will be held liable. They do guarantee that a number of companies which have done her no harm will be held liable.

In this situation, any verdict against any Defendant necessarily rests on speculation and conjecture that it was the manufacturer of the DES her mother ingested. A verdict against all of them is even less defensible, since it imposes liability on at least 10 Defendants none of whom caused Plaintiff any harm, in hopes that the remaining Defendant, and not some other manufacturer not before the court, is the guilty party. A verdict cannot rest on speculation and conjecture, but must be based on reasonable probability that the act of the defendant before the court was the cause-in-fact of plaintiff's injury.[20] Here, by contrast, it is a certainty that some, and perhaps all, of the Defendants never harmed Plaintiff in any way.

Plaintiff has not alleged that the Defendants she has chosen constitute all potential manufacturers of DES during the relevant time frame; instead. she has merely alleged that they are the

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[20] Indeed, permitting Plaintiff to recover against multiple Defendants where she is unable to identify which, if any, of them was the cause-in-fact of her injury presents the anomalous situation of permitting recovery despite failure to prove an element of causation in instances where proof of that very element would prevent recovery. Assume that the DES ingested by Plaintiff's mother was manufactured by Company X, and that this is proven beyond doubt. If Company X is not among the defendants sued, or is now defunct, or is not amenable to service of process, or is simply judgment-proof, Plaintiff's proof of identity will prevent recovery against any manufacturer. By eliminating the identification requirement, however, Plaintiff would be permitted to recover against a number of other companies which did her no harm at all, simply because they cannot prove that fact. Because adoption of these theories could result in recovery because of inability to prove an element which plaintiff is required to prove in all other cases, it would be necessary to incorporate into the adoption of any such theory sufficient safeguards to ensure that a thorough good-faith effort was made in each case to identify the true tortfeasor before a plaintiff could resort to these theories. Plaintiff has not suggested any safeguards in this respect, and this Amicus has been unable to envision any means to adequately protect against the possibility of a plaintiff not fully endeavoring (possibly against her own economic interests) to make such an identification.

manufacturers of "a substantial share" of the product (R-372, ¶ 13; R-379, ¶ 55) or "accounted for a high percentage of the DES on the market at the time Plaintiff's mother ingested it." (R-376-377, ¶ 41; R-378. ¶ 53). It must be noted that only 11 DES manufacturers have been joined in this suit; the record reflects that at least 149 companies manufactured or distributed DES when Plaintiff was in utero. (Maas Affidavit, ¶16).[21] Plaintiff having joined only 11 of them, any verdict against any Defendant, absent evidence tying it to the DES ingested by Plaintiff's mother, necessarily rests on speculation, guess and conjecture as to whether that manufacturer was responsible for the DES ingested by Plaintiff's mother. Accordingly, Plaintiff has failed to state a cause of action under existing Florida law, as the District Court correctly observed.

Plaintiff seeks solace in a line of Florida cases involving defendants who successively caused an indivisible injury to plaintiff.[22] In such cases, each negligent defendant must answer for all damages sustained by plaintiff. The point that must be noted, however is that <u>in every single instance</u>, it has been demonstrated that the "second" defendant in fact caused <u>some</u> injury to plaintiff.[23]

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[21] Based on the partial record available to this Amicus. it appears that this affidavit is found at R-511.

[22] Examples are <u>Mack v. Garcia</u>, 433 So.2d 17 (Fla. 4th DCA 1983); <u>Schwab v. Tolley</u>, 345 So.2d 747 (Fla. 4th DCA 1977); and <u>Washewich v. LeFave</u>, <u>supra</u>.

[23] <u>See</u>, <u>e.g.</u>, <u>Mack v. Garcia</u>, <u>supra</u>, at 18, ("It is clear from the evidence that appellee's treatment of appellant contributed to her injuries (damages)."); <u>Schwab v. Tolley</u>, <u>supra</u>, at 750 ("There was ample testimony from which the jury properly could conclude that there was aggravation by the surgery of an existing physical condition caused by the collision, . . .").

This Court made specific note of the necessity, in such cases, of showing causation-in-fact, in Asgrow-Kilgore Co. V. Mulford Hickerson Corp., supra, at 445, stating:

> Despite the rule that where the extent of damage from several causes is inseparable and cannot be exactly distinguished, then a negligent defendant must answer for all damages, (footnote omitted) such rule presupposes valid proof of a negligent act of the defendant as being a direct cause of damage. Essential to recovery, is initial proof of the fact that damage occurred from defendant's act, not just that it is not exact as to amount. Where proof that damage occurred from defendant's negligence is speculative, then the above initial rule of liability for all inseparable damages cannot apply for lack of foundation to invoke it.

Thus, the very cases on which Plaintiff relies recognize that the initial burden remains with plaintiff to prove causation-in-fact by defendant. The successive negligence cases deal with apportionment of damages, not with liability: before the damage rule of these cases come into play, a plaintiff must first prove that each defendant was a cause of some injury to plaintiff. Plaintiff in this case states that she cannot make that initial showing.

Faced with her inability to recover under existing Florida law, Plaintiff asks this Court to accept one or more theories never previously accepted in this state-theories which this Court recently noted as requiring a major policy change in our jurisprudence.[24]

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[24] Celotex Corp. V. Copeland, 471 So.2d 533, 539 (Fla. 1985).

B. Alternative Liability

The alternative liability theory is an outgrowth of the decisions in Ybarra V. Spangard, 25 Cal.2d 486, 154 P.2d 687 (1944) (patient injured while unconscious during operation permitted recovery despite inability to prove tortfeasor's identity, where all operating room personnel joined as defendants) and Summers V. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948) (plaintiff, injured when two other hunters fired in his direction, permitted recovery despite inability to prove which of them fired shot which struck plaintiff, both hunters having been joined as defendants). In both cases, and in the alternative liability cases which followed, two essential elements were present: (1) it was certain that at least one of the defendants had caused plaintiff's injury; and (2) no one other than the defendants before the court could have caused the injury.

Florida has approved the Ybarra concept, applying it in several cases.[25] So far as we are aware, however, Florida has not accepted the alternative liability theory. Although that theory represents an outgrowth of res ipsa loquitur in a group defendant situation, there are significant differences: in the res ipsa situation, the defendants are closely connected and have superior knowledge as to the identity of the true tortfeasor; the alternative liability cases do not involve those requirements.

Alternative liability necessarily involves imposing liability on defendants who were not in fact causes of injury to

[25] See for instance, Marrero V. Goldsmith, 11 F.L.W. 35 (Fla. 1986); Davis V. Sobik's Sandwich Shops, Inc., 351 So.2d 17 (Fla. 1977); Troupe V. Evans, 366 So.2d 139 (Fla. 1st DCA 1979).

plaintiff, simply because they are unable to establish that fact or to prove causation-in-fact on the part of some other entity. As this Court noted in Celotex Corp. v. Copeland, 471 So.2d 533 (Fla. 1985), the principle of causation-in-fact is deeply rooted in our law. Thus, this Court should reject alternative liability on principle. But, even assuming arguendo that the Court would accept alternative liability in an appropriate case, this case is simply not appropriate for that theory.

Application of alternative liability requires that all those who might have caused plaintiff's injury be joined as defendants. As stated in Starling v. Seaboard Coast Line R.R. Co., 533 F.Supp. 183, 188 (S.D. Ga. 1982). an asbestos case: "Under alternative liability, however, all the possible wrongdoers responsible for the injury must be before the court, ... (citation omitted)." In cases in which not all potential tortfeasors were joined as defendants, alternative liability has repeatedly been rejected for precisely that reason.[26]

Plaintiff relies on the provisions of Restatement (Second) of Torts, §433B(3), setting forth the alternative liability theory. Comment h to that subsection, however, notes that in all cases decided under that rule all of the actors have been joined as defendants. Although noting that some modification might be necessary where all

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[26] Tidler v. Eli Lilly and Co., supra; Sindell v. Abbott Laboratories, supra; Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983, applying Louisiana law), cert. den., ___ U.S. ___, 104 S.Ct. 1598, 80 L.Ed. 2d 129 (1984)); Spannaus v. Otolaryngology Clinic, 308 Minn. 334, 242 N.W.2d 594 (1976); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984); Namm v. Charles E. Frosst and Co., Inc., 178 N.J.Super. 19, 427 A.2d 1121 (1981); Bichler v. Eli Lilly and Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981); Martin v. Abbott Laboratories, supra; Collins v. Eli Lilly Co., supra.

the actors could not[27] be joined, the comment specifically observes that ". . . no attempt is made to deal with such problems in this Section."

The courts, however, have considered this very issue. In Ryan V. Eli Lilly & Co., supra, a DES case in which 18 DES manufacturers were joined as defendants and the alternative liability theory was advanced, the court specifically rejected that theory, stating (514 F.Supp. at 1016):

> The theory embodied in §433B(3) clearly requires (1) that all possible suppliers of the product be before the court as parties defendant, and (2) that defendants be either (a) in a superior position to offer evidence of identification, or (b) responsible for plaintiff's inability to identify the supplier of the drug. The record negates those prerequisites.

Only one reported case involving Florida law, to our knowledge, has dealt with alternative liability in the present context. In Morton V. Abbott Laboratories, 538 F.Supp. 593 (M.D. Fla. 1982), plaintiff sued eight DES manufacturers, and the same theories of liability espoused by Plaintiff were advanced. In rejecting applicability of alternative liability, the court observed (538 F.Supp. at 598-599):

> The theory cannot apply in this DES case because plaintiffs, by their own admission, cannot show that one of the defendants caused the injury. See Amended Complaint ¶ 32. Indeed, the very court that developed this often useful theory has recognized that

[27] No showing has been made, to our knowledge, that all relevant DES manufacturers could not be joined. Plaintiff's reasons for picking only 11 of them are known only to Plaintiff.

it cannot apply in a DES case in which all possible manufacturers of the pills in question are not joined. (citation omitted).

Alternative liability has been recognized as a possible basis of recovery in the DES context[28] in only three cases. In Abel v. Eli Lilly and Co., supra, the court tentatively approved a modified form of alternative liability as a basis for recovery.[29] In that case, however, the complaint specifically alleged that the named defendants constituted **all** the known DES manufacturers whose products were distributed in Michigan during the relevant time period. **343** N.W.2d at **167,** 168. Thus, the fundamental requisite of alternative liability, that all possible tortfeasors be joined as defendants, was met. In spelling out the requirements a plaintiff must meet to use this modified form of alternative liability, the court specifically required that plaintiff "bring before the court all the actors who may have caused injury in fact" (343 N.W.2d at **173)** and required plaintiff to "make a genuine attempt to locate and identify the tortfeasor responsible for the individual injury" (id); a lack of due diligence in this regard would preclude resort to the modified alternative liability theory (id.), as would the plaintiff's

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[28]The theory has been recognized in other contexts where all potential tortfeasors have been joined as defendants. See, for instance. Greene V. Union Optical Center, Inc., 95 Mich.App. **167,** 290 N.W.2d **111** (1980). involving an optical lens manufactured by one of the two defendants, but in which the identity of the manufacturing defendant could not be determined.

[29]The Abel court apparently had misgivings about the alternative liability theory it adopted, since it explicitly reserved judgment concerning the validity of *any* verdict which might result from a trial of this cause of action and noted that the fairness of application of the theory remained to be seen. **343** N.W.2d at **177.**

ability to show at trial the identity of the offending manufacturer. 343 N.W.2d at 175.

In Ferrigno v. Eli Lilly and Co., supra, a New Jersey trial court accepted alternative liability even though all relevant DES manufacturers had not been joined as defendants. Ferrigno, however, no longer represents New Jersey law; the New Jersey appellate court in Namm v. Charles E. Frosst and Co., Inc., supra, specifically rejected alternative liability on principle where not all potential defendants were joined. In so doing, the court specifically noted Ferrigno (427 A.2d at 1127, n.3) and specifically disagreed with its reading of a prior New Jersey case[30] on which Ferrigno had relied. The appellate court in Namm pointed out (427 A.2d at 1128):

> The application of the principle of alternative liability to any one or all of the 44 defendants herein would impose liability without fault upon any one who manufactured a product manufactured by others as well. It would result in the taking of the property of all the named defendants in order to pay for harm which may have been caused by only one of the defendants, or even by one who is not a party to the lawsuit, who is unknown to the defendants, over whom they have no control or even any meaningful contact.

Ferrigno's reading of New Jersey precedent was also expressly rejected in Aarnes v. Merck and Co., 532 F.Supp. 148 (D. N.J. 1980), aff'd. sub nom. King v. Merck & Co., 672 F.2d 903 (3d Cir.1981), decided less than a week after Ferrigno, the District Court refusing to impose liability on defendant pharmaceutical manufacturers (in a case involving corticosteroids) because plaintiff failed to join all

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[30] Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1 (1975), cert. den., 423 U.S. 929, 96 S.Ct. 279, 46 L.Ed.2d 258 (1975).

potential tortfeasors. Subsequently, in Pipon V. Burroughs-Wellcome Co., 532 F.Supp. 637 (D.N.J. 1982). aff'd, 696 F.2d 984 (3d Cir. 1982). the same court reiterated that Namm, not Ferrigno, correctly stated New Jersey law.

The only other reported DES decision apparently[31] recognizing alternative liability as a potential basis for recovery is McElhaney V. Eli Lilly & Co., 564 F.Supp. 265 (D.S.D. 1983), in which the federal court, finding no relevant South Dakota authority, predicted that South Dakota would accept alternative liability notwithstanding the absence of all potential tortfeasors as defendants.[32] So far as we can determine, the South Dakota state courts have not yet ruled on this issue. This decision is, we submit, wrong in principle and ignores the overwhelming weight of authority requiring that all potential tortfeasors be joined as defendants before the alternative liability theory can be applied.

The alternative liability theory applies only where all potential tortfeasors are before the court, one of them was the cause-in-fact of plaintiff's injuries, and plaintiff cannot prove which of them was the guilty party. The theory makes absolutely no sense whatsoever unless all potential tortfeasors are joined, since

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[31]Although calling the theory of recovery alternative liability, it appears that the McElhaney court was in fact using a market share theory. See, in this regard, Martin V. Abbott Laboratories, supra, at 380. The same appears to be true of Erlich V. Abbott Laboratories, supra.

[32]Shortly thereafter, Defendant Eli Lilly admitted that it manufactured and marketed the DES which plaintiff's mother had ingested. McElhaney V. Eli Lilly & Co., 575 F.Supp. 228, 229 (D.S.D. 1983). Thus, the question was not addressed any further in the case.

it gives rise to the likelihood that a group of defendants, none of whom caused any harm to plaintiff, will nonetheless be forced to pay damages for injuries done by some other party not present in court.[33] In a similar context, the court in Clift V. Nelson, 25 Wash.App. **607, 608** P.2d **647, 649** (1980) observed:

> The fact that plaintiff has sustained an injury does not entitle him to put another party to the expense of trial unless there is evidence that the other party committed the wrong or caused the injury . . . . To allow a judgment against an innocent defendant would be as great an injustice as denying plaintiff **a** recovery.

To like effect, see Thompson V. Johns-Manville Sales Corp., supra. Application of alternative liability where not all potential tortfeasors are before the court presents precisely that situation: at least some (and perhaps all) of the defendants have caused plaintiff no harm, yet they are still held liable. For that reason, the overwhelming majority of those courts accepting alternative liability require that **all** potential tortfeasors be brought before the court as defendants. Here, it is patent that not all possible tortfeasors have been joined; rather, only eleven out of several hundred potential defendants are before the court. The theory is inapplicable, and must be rejected in the context of this case.

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[33] It also creates a certainty that some defendants who did not harm plaintiff will be held liable, even if the guilty defendant is also held liable.

c. Market Share Liability

The second theory espoused by Plaintiff is the "market share" theory created by a 4-3 decision in Sindell v. Abbott Laboratories, supra. In Sindell, the California court recognized that traditional theories precluded imposition of liability in a DES case where the manufacturer whose DES caused plaintiff's injury could not be identified. In an effort to permit recovery, the court adopted the "market share" theory, based on a "modification"[34] of its prior ruling in Summers v. Tice, supra. Under the "market share" theory, the DES plaintiff is require to prove that (1) her injuries were caused by DES, (2) the defendants were manufacturers of DES, and (3) the manufacturers of "a substantial share" of the DES which plaintiff's mother might have taken had been joined as defendants. The probability that any given defendant supplied the DES ingested by plaintiff's mother is measured by that defendant's share of the market, and each defendant unable to exculpate himself is liable for the proportion of the judgment equal to its market share. A defendant can escape liability only by showing that its particular product could not have been the cause of plaintiff's injury.

Other than the California courts following Sindell, only four reported cases from other jurisdictions[35] recognize this

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[34]The "modification" consisted of eliminating the requirement that the actual wrongdoer be before the court.

[35]The market share theory was adopted by the Third District in Copeland v. Celotex Corp., 447 So.2d 908 (Fla. 3d DCA 1984) and Copeland v. Armstrong Cork Co., 447 So.2d 922 (Fla. 3d DCA 1984), but this Court quashed those decisions as to this issue, holding that the issue need not be reached in the circumstances of those cases. Celotex Corp. v. Copeland, supra.

"market shar " theory. Hardy V. Johns Manville Sales Corp., 509 F.Supp. 1353 (E.D. Tex. 1981). rev'd. on other grounds, 681 F.2d 334 (5th Cir. 1982),[36] tentatively accepted the market share theory in an asbestos case. Several points should be noted concerning Hardy, however. Initially, the court specified that it was not making a final adjudication of whether the "market share" theory was applicable, but only a preliminary decision for purposes of permitting discovery, reserving final determination until trial. 509 F.Supp. at 1355. Secondly, the court specifically observed that it was "important to note that the motions before the Court which relate to market share are not filed on behalf of a plaintiff; these are defense motions." 509 F.Supp. at 1356. The court further noted (509 F.Supp. at 1356) that it was venturing into uncharted territory without the benefit of guidance by the Texas state courts. Finally. following the remand, the trial court which had tentatively accepted "market share" vacated and set aside that order, stating that the "market share" theory "departs from traditional tort theories of recovery in Texas to an extent that the prospect of its being approved by the Fifth Circuit is not great enough to justify the expense to the litigants and the time that of necessity would be involved by the Court." Hardy V. Johns-Manville Sales Corp., No.M-79-145-CA (E.D. Tex., Sept. 24, 1982).[37] Thus, the

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[36] In reversing, the Fifth Circuit specifically commented that the trial court's acceptance of the Sindell theory was not involved in the appeal. 681 F.2d at 336.

[37] For the Court's convenient reference, a copy of this Order is appended hereto.

"acceptance" of the theory in Hardy, supra, must be viewed with extreme caution.

In McElhaney V. Eli Lilly & Co., 564 F.Supp. 265 (D.S.D. 1983), a federal district court appears to have accepted a market share theory, although referring to its theory as alternative liability. The court's decision was based on an "Erie guess" that South Dakota would adopt the theory. To our knowledge, South Dakota's state courts have not ruled on the issue and, as noted infra, the vast majority of courts which have considered the market share theory have rejected it. McElhaney's "Erie guess," we submit, was simply wrong.

Similarly, in Erlich V. Abbott Laboratories, supra, a Pennsylvania trial court, although referring to it as alternative liability, seems to have accepted a market share theory, since the trial judge required the joinder only of "substantially all" the manufacturers of DES (measured by volume of DES production, rather than by number of manufacturers). In that case, the plaintiff was able to identify the form of DES involved (a small white pill) and where it had been purchased; the trial judge observed that 61 companies manufactured this form of DES, 44 of whom were not defendants, but stated that the remaining defendants[38] supplied more than 90% of that form of DES at the time and place of purchase. Although recognizing the possibility that liability might well be imposed on one or more defendants who had not in fact harmed the

[38]Plaintiff had originally sued 94 defendants; 71 were either not amenable to process or were able to prove that they did not market the form of DES involved or did not do so at the time and place where the DES in question was purchased.

plaintiff, the trial court nonetheless denied defense motions for summary judgment based on plaintiff's inability to identify the offending DES manufacturer.

Apart from the limited precedential value of a trial court decision,[39] the fundamental flaw in the courts' analysis in these cases, as in all market share cases, is that the theory improperly shifts the burden to defendant to prove that he did not harm plaintiff, making him "guilty until proven innocent," and results in liability on the part of a number of defendants who caused plaintiff no harm. Florida law, as discussed at length above, is exactly the contrary: a plaintiff must demonstrate that defendant harmed him before the defendant may be held liable for money damages.

In Ferrigno v. Eli Lilly and Co., supra, a New Jersey trial court, although stating (420 A.2d at 1315) that it need not consider the "market share" approach because it adopted alternative liability, nonetheless adopted market share percentages as a basis for contribution among joint tortfeasors. Whatever precedential value Ferrigno might have had is destroyed by New Jersey's subsequent rejection of the "market share" theory in Namm v. Charles E. Frosst and Co., Inc., supra.

In rejecting the "market share" theory, New Jersey is in accord with the vast majority of courts which have considered it.[40]

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[39] Interestingly, the only cases outside of California in which the "pure" market share theory was accepted involve trial court decisions in which this issue was not appealed.

[40] See, e.g., Tidler v. Eli Lilly and Co., supra (DES); Morton v. Abbott Laboratories, supra (DES); Starling v. Seaboard Coast Line R.R. Co., supra (asbestos); Thompson v. Johns-Manville Sales Corp.. (Footnote 40 continued on next page).

Indeed, the District Court in Mizell v. Eli Lilly & Co., 526 F.Supp. 589 (D.S.C. 1981) specifically rejected the Sindell "market share" theory even though California substantive law otherwise governed the rights of the parties. Noting that the law of the forum controls if the law of the place of wrong is contrary to the forum's public policy (526 F.Supp. at 596). the court held that application of the "market share" theory would violate South Carolina's public policy. The court pointed out (526 F.Supp. at 596):

> Market share liability represents a radical departure from the body of products liability law that has been developed in South Carolina. By removing the traditional requirement that the plaintiff identify the responsible manufacturer, the doctrine destroys the nexus between production of a defective item and the plaintiff's injury. As a result, liability is placed on defendants bearing no responsibility for the defective product. (footnote omitted).

For precisely the same reasons, the "market share" theory is contrary to well-settled principles of Florida jurisprudence, permitting

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(Footnote 40 continued from previous page).
supra (asbestos); Hannon v. Waterman S.S. Corp., 567 F.Supp. 90 (E.D. La. 1983, applying Louisiana law) (asbestos); Payton v. Abbott Labs. 386 Mass. 540, 437 N.E.2d 171 (1982) (DES); Zafft v. Eli Lilly & Co., supra (DES); Ryan v. Eli Lilly & Co., supra (DES); Martin v. Abbott Laboratories, supra (DES); Collins v. Eli Lilly Co., supra (DES). Even those courts which adopt one of the theories espoused by Plaintiff recognize that theirs is a minority view. See, for instance, Martin v. Abbott Laboratories, supra, at 375. Indeed, this Court has already noted that the majority of courts addressing the issue have rejected the market share theory, with its elimination of the traditional requirement of establishing causation, which this Court referred to as involving a "major policy change necessary to adopt the market share theory in Florida." Celotex Corp. v. Copeland, supra, at 538-539.

recovery from defendants who have not been a cause-in-fact of any injury to plaintiff, destroying the requirement that plaintiff show a relationship between the defendant and the product which caused the injury, and permitting speculation and conjecture as to the source of the product to substitute for proof.

As noted in Payton v. Abbott Labs, 437 N.E.2d at 188, the identification requirement serves two purposes: separating wrongdoers from innocent actors and ensuring that wrongdoers are held liable only for the harm that they have caused. In that court's words: "We believe that the plaintiffs' market share theory fails adequately to protect either of the interests served by the identification requirement." Id.

Furthermore, the "market share" concept, as this Court recognized in Celotex Corp. v. Copeland, supra, at 538, creates problems in defining the relevant market and market shares of the defendants.[41] In addition to the jurisprudential and trial-

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[41]The concept of a "relevant market", which forms the basis for determining a particular defendant's market share, has been developed in federal antitrust law. Obviously, before a defendantls share of the market can be determined. the market must first be defined. At least three separate elements are involved. First, the relevant geographic market has to be determined (i.e., would liability be allocated along the basis of the defendant's share of the national market, the state market, or the market in the locality in which the DES was ingested?). Next, the product market would have to be determined (i.e., would similar generic drugs such as dienestrol, diethylstilbestrol dipropionate, stilbestrol and other synthetic estrogens be included, or, as indicated in Ferrigno (420 A.2d at 1316). should stilbestrol defendants be excluded in dienestrol cases?; would the product market be limited to the form and dosage of DES involved (i.e., small white pills of 10mg) where that much identification could be achieved, or would all forms and

(Footnote 41 continued on next page).

management problems create' in dea ing wit those terms, the courts would have to determine what percent of the market constitutes a "substantial share" which must be present before the court as defendants before a market share theory could be used.[42]

The resolution of these issues also introduces liability distortions into the theory. In addition to the obvious risk -- indeed, the certainty -- that defendants who caused plaintiff no harm will be held liable[43] and that the true tortfeasor will escape

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(Footnote 41 continued from previous page).
dosages be included in every case?; would the product market include all DES sold or would it be limited to DES sold for purposes of preventing mishaps of pregnancy?). Finally, the relevant temporal market would have to be determined (i.e., would the market be evaluated as of the period during which the plaintiff's mother was ingesting the drug, or would it include all DES sales since initial F.D.A. approval in 1941, or since approval of DES use for pregnancy-related problems in 19471). The answers to these questions are not clear. These problems of proper definition of the relevant market, with the concomitant trial-management problems and heavy expenditure of scarce judicial resoures, have themselves persuaded some courts to reject the market share theory. **See**, e.g., Zafft V. Eli Lilly & Co., supra; Collins V. Eli Lilly Co., supra.

[42]Five years after its decision in Sindell, the Supreme Court of California has still not resolved what constitues a "substantial share." Murphy V. E.R. Squibb & Sons, Inc., ____ Cal. ____, _____ P.2d ____, 14 Product Safety & Liability Rptr. 46 (Case No. L.A. 31970, Dec. 30, 1985) (holding a 10% market share not "substantial" for Sindell purposes, but declining to declare a specific market percentage which would be "substantial"). As noted in Tidler V. Eli Lilly and Co., supra, at 334: "Even if the companies which accounted for ninety (90) percent of the nation's DES production in a given year were joined as defendants, the myriad of variables and uncertainties introduced by the distribution process would render it, at least, equally likely that the DES sold at a particular pharmacy and ingested by a particular plaintiff's mother was manufactured by a non-defendant." (footnote omitted).

[43]If the true tortfeasor is not among the chosen defendants, **all** defendants would be held liable despite the fact that none of them harmed plaintiff; even if the guilty party were among the defendants, the other defendants are still held liable, though they did not injure the plaintiff. Thus, it is certainty that damages will be assessed against defendants who have done plaintiff no harm.

liability, the concept creates the danger of malapportionment[44] of liability among defendants in several ways. If defendants are jointly and severally liable, plaintiff can execute against a small market participant who may be unable to obtain service of process on other manufacturers and hence have to bear the burden alone.[45] Large market participants may escape liability because they cannot be brought into court (either because they are not amenable to service or because they no longer exist), forcing smaller participants to "pick up the tab" for them.[46] If defendants' market shares are proportionally increased to permit full recovery where some manufacturers were not (or could not be) joined as defendants, the chosen defendants will necessarily pay more than their "share" of the liability as measured by their own market position. Where the evidence to prove a defendant's market share no longer exists, any allocation of market share to it will not only be arbitrary, but will likely be either overinclusive or underinclusive; in either event, at least one defendant will have to

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[44]Since the fundamental precept of the market share theory is to apportion causation, and hence liability, by market position, factors leading to an allocation of liability not in strict accordance with true market percentages create a malapportionment of liability under this theory of recovery.

[45]Several courts have rejected the market share theory for this reason. See, e.g., Martin v. Abbott Laboratories, supra; Collins v. Eli Lilly Co., supra.

[46]Assume, for instance, that the DES was ingested in another state; only manufacturers who have requisite minimum contacts with Florida are amenable to service of process, leading to the distinct possibility that a number of potential defendants simply could not be brought into a Florida court. Still other potential defendants may no longer exist, further exacerbating the situation.

bear more than its true market share of the liability.[47] The selection of defendants will itself tend to distort liability by overincluding "target defendants" of high visibility and/or financial resources while underincluding small, defunct, and "low profile" defendants. Indeed, as noted in Martin V. Abbott Laboratories, supra, at 381, the very definition of what constitutes a "substantial market share" which must be joined as defendants, "directly affects the degree to which the defendant's liability is distorted." The widespread rejection of the market share theory itself results in distortions in states where it is accepted, since liability will fall unevenly on manufacturers, depending on which states they are amenable to suit in.

The injustices and liability distortions of a market share theory become even more palpable when the potential of a punitive

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[47]Nor do these examples exhaust the possibilities. Consider, for instance, the case where the true manufacturer is identified. Is plaintiff limited, as this Court indicated in Celotex Corp. V. Copeland, supra, to recovery against only that party? If so, should not that manufacturer's market share be adjusted downward in future cases? But how can that be done without knowing what percent of DES will eventually cause injury? How can the reduction be applied in cases which have already been concluded? It cannot! Thus, an "identified" manufacturer has this particular DES counted against him on multiple occasions -- once when a plaintiff identifies his product and again (and again) in every suit where plaintiff cannot identify the true tortfeasor.

Also, what of the plaintiff whose mother used two brands of DES, but can only identify one? Is the entire liability to be imposed on the identified manufacturer, or is it to be allocated, with the unidentified manufacturer's portion sub-allocated among all defendants? In either event, the result will not end up reflecting the various manufacturers' market shares, which is the goal this theory strives to reach. Distortion is inevitable.

damage award[48] is considered. If punitive damages are awardable in such cases,[49] numerous manufacturers whose actions have never harmed the plaintiff in any way will not only be unjustly required to pay compensatory damages, but will be further required to pay additional amounts still less related to any injury they may have caused.[50]

Even leaving aside problems of properly defining the appropriate market, liability distortion, and availability of punitive damages, the fundamental basis of "market share" liability is contrary to the settled jurisprudence of this State. Totally absent from the "market share" theory is any requirement of proof

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[48]Plaintiff in the instant case, although seeking punitive damages in other counts, has not yet sought punitive damages in conjunction with the counts before this Court.

[49]Those courts recognizing the theories advanced by Plaintiff disagree as to whether punitive damages are recoverable. Morris v. Parke, Davis & Co., 573 F.Supp. 1324 (C.D. Cal. 1983). would permit recovery of punitive damages on an appropriate showing of egregious conduct. Collins v. Eli Lilly Co., supra, flatly refused to permit the possibility of punitive damages. If punitive damages were permissible in such cases, further questions would arise as to whether they would be imposed on an individual basis (which would seem contrary to the basic premise of these theories) or on an allocated collective basis (which would further distort liability and could lead to bankruptcy-producing judgments as to some defendants).

[50]Under current Florida law, no particular relationship is required between the amount of compensatory damages and the amount of punitive damages. Arab Termite and Pest Control of Florida, Inc. v. Jenkins, 409 So.2d 1039 (Fla. 1982); Wackenhut Corp. v. Canty, 359 So.2d 430 (Fla. 1978); Lassiter v. International Union of Operating Engineers, 349 So.2d 622 (Fla. 1977). As shown above, a compensatory damage award in a "market share" case is essentially unrelated to whether defendant in fact harmed plaintiff, since proof of causation-in-fact is not required; the amount of compensatory liability is measured by the defendant's share of the relevant market. Since no relationship between compensatory and punitive damage awards is required, any award of punitive damages will bear even less relationship to whether a selected defendant in fact harmed the plaintiff in any way.

that defend nts, or any of them, were a cause-in-fact of plaintiff's injury (i.e., responsible for the **DES** her mother ingested). Those few courts which have accepted the "market share" theory have done so based on the assumption that it is somehow easier for defendants to prove that they did not manufacture the doses of DES in question, than it is for plaintiff to prove that any of them **did,**[51] and hence that the burden of proof should be shifted. Although the courts accepting "market share" have stated that a defendant can escape liability by proving that his product could not have been the one which harmed **plaintiff,**[52] it has also been held that a DES manufacturer cannot exonerate itself by proving that it never marketed, or received F.D.A. approval to market, **DES** for pregnancy-related problems.[53]

Fundamentally, however, the "market share" theory must be rejected because of its basic conflict with firmly-rooted principles

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[51]This assumption runs directly counter to usual notions as to the difficulty of proving a negative. Furthermore, as shown by the cases cited in note 17, supra, a great number of DES plaintiffs have been able to identify the manufacturer in question, even after alleging they would be unable to do so. It has been held in at least one case that the evidence is in fact more accessible to plaintiff than to defendant. McCreery V. Eli Lilly and Co., 87 Cal.App.3d 77, 150 Cal.Rptr. 730, 734 (1978).

[52]Sindell V. Abbott Laboratories, supra; Weinberg V. Johns-Manville Products Corp., 67 A.D.2d 640, 412 N.Y.S.2d 370 (1979) (an asbestos case in which one defendant demonstrated that it did not begin manufacturing, distributing, or selling insulation products containing asbestos until after plaintiff's last exposure); Martin V. Abbott Laboratories, supra.

[53]Miles Laboratories, Inc. V. Superior Court of Orange County, 133 Cal. App. 3d 587, 184 Cal. Rptr. 98 (1982). The court held that defendant could be found liable if it were shown that the defendant knew that pharmacists were substituting its **DES** (which was only

(Footnote 53 continued on next page).

of our jurisprudence.[54] Plaintiff argues that this Court should free her of having to prove the identity of the entity which caused her injury, and let her recover against a group of Defendants, one of which might have caused the injury (and the rest of whom clearly did not), because she is unable to identify the true tortfeasor. The courts of this state have consistently refused to permit recovery where plaintiff was unable to prove the identity of the injury-causing entity. Vecta Contract, Inc. V. Lynch, supra (inability to identify manufacturer of chair); Matthews V. GSP Corp., supra (inability to identify manuacturer of cable); Vance V. Miller, supra (inability to identify hit-and-run driver). If Plaintiff's rationale were accepted, those cases were all wrongly decided.

Indeed, Plaintiff's approach would appear to be equally applicable to any and every situation in which a plaintiff could not identify the entity which in fact caused the injury. A plaintiff who suffered food poisoning from a "generic" can of peas[55] could sue all

(Footnote 53 continued from previous page).
approved and marketed for prostate problems) for that of other manufacturers who marketed DES for pregnancy-related problems, and did nothing to try to prevent pharmacists from doing so. Apparently, assuming that a defendant could not meet the almost-insuperable burden of proving a negative (that its DES was not used by plaintiff's mother), a defendant could escape liability on this basis only if it could show that it never marketed DES prior to plaintiff's birth or (perhaps) that it never marketed DES in the geographical area in question.

[54]The "statistical" basis on which the "market share" theory is grounded not only is contrary to fundamental principles of individual responsibility, but also embraces precisely the "likelihood of causation" approach to liability which this Court rejected in Gooding V. University Hospital Building, Inc., supra.

[55]i.e., a can of peas sold without any brand name, usually at a lower price. Generic foodstuffs are distinguishable by a label which identifies only the basic product involved; i.e., "laundry soap," "peas," "motor oil," etc.

suppliers of bulk peas to that supermarket chain. A plaintiff who suffered the same ailment as a result of tainted hot dogs could sue all the store's hot dog suppliers if he could not recall what brand he bought. Not only would this be true of products from cornflakes to motor oil,[56] but the same rationale would seem applicable outside the products liability field. If a plaintiff injured by an unidentifiable manufacturer can recover against a selection of manufacturers of the offending product, would not a plaintiff injured by an unidentifiable motorist be equally entitled to recover against a selection of motorists driving the offending type of vehicle? Under Plaintiff's theory, the answer must be "yes." Under Florida law, the answer is "no." Vance V. Miller, supra.

Nor can Plaintiff's theory properly be restricted, as Plaintiff argues, to generic products which are "universally defective"[57] -- such a restriction would exclude DES itself from

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[56] It would be difficult, if not impossible, to confine the theories Plaintiff espouses to a limited field. Although most cases discussing these theories deal with DES or asbestos, they have also been asserted in cases involving, among other things, blasting caps (Hall V. E.I. Du Pont De Nemours & Co., Inc., 345 F.Supp. 353 (E.D. N.Y. 1972)), optical lenses (Greene V. Union Optical Center, Inc., supra), antipolio vaccine (Sheffield V. Eli Lilly and Co., 144 Cal. App. 3d 583, 192 Cal.Rptr. 870 (1983)), sabres (Garcia V. Joseph Vince Co., 84 Cal.App.3d 868, 148 Cal.Rptr. 843 (1978)). corticosteroids (Aarnes V. Merck & Co., supra), jail equipment and furnishings (Davis V. Yearwood, 612 S.W.2d 917 (Tenn. App. 1980)). and DPT vaccine (Morris V. Parke, Davis & Co., supra). It has been suggested that the market share theory could apply to cigarettes, food additives, generic drugs, asbestos, pesticides, aluminum wire. industrial waste and pollution-causing products. Sheffield V. Eli Lilly and Co., supra, at 880, n.11. The Academy's statement (Brief at 6) that the cases "appear to be limited at this point to three types of products; [sic] the DES cases, asbestos cases and blasting cap cases" is clearly inaccurate.

[57] i.e., products which are identical, and all of which are defective in a strict tort liability sense.

application of the rule, since DES is still approved for use in connection with certain conditions not related to pregnancy, and is the major ingredient in the "morning after" contraceptive pill.[58] Thus, DES is not, as Plaintiff claims, inherently and universally defective. To say the least, it would be pointless for the Court to accept the "major policy change necessary to adopt the market share theory in Florida"[59] and at the same time restrict the theory so as to exclude the very case which caused the Court to consider those changes in the first place.

Clearly, adoption of the "market share" liability theory "represents a radical departure from the traditional concepts of product liability law."[60] This Court has recognized that fact in Celotex Corp. v. Copeland, supra. It was for precisely this reason that the court in Mizell v. Eli Lilly & Co., supra, expressly refused to apply California substantive law (and specifically the "market share" theory), even though California substantive law would otherwise have been applicable in that case. "Market share" liability represents a radical and unjustified departure from the settled law of Florida, and must be rejected.

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[58] Payton v. Abbott Labs, 512 F.Supp. 1031, 1034 (D. Mass. 1981); Zafft v. Eli Lilly & Co., supra; Ferrigno v. Eli Lilly and Co., supra, 420 A.2d at 1312.

[59] Celotex Corp. v. Copeland, supra, at 539.

[60] Tidler v. Eli Lilly and Co., supra, at 334; Thompson v. Johns-Manville Sales Corp., supra, at 583. This Court has already recognized that adoption of a market share theory requires a major policy change. Celotex Corp. v. Copeland. supra, at 539.

D. Market-Share Alternate Liability

Dissatisfied with the liability distortions and other problems of the market share theory, three courts have recently created yet another theory to aid the plaintiff who is unable to identify the entity which injured him. Martin v. Abbott Laboratories, supra; Collins v. Eli Lilly Co., supra; McCormack v. Abbott Laboratories, 617 F.Supp. 1521 (D.Mass. 1985).[61] It is this theory -- with still further modifications -- that the District Court urges this Court to adopt.

Under this theory as set forth in Collins, plaintiff may sue a single defendant, and must show only that plaintiff's mother took DES, that DES caused plaintiff's injuries, that the chosen defendant marketed the type of DES taken by plaintiff's mother, and that defendant's conduct in marketing DES constituted a breach of a legally recognized duty to plaintiff. If plaintiff cannot prove what type (i.e., color, shape, size, etc.) DES is involved, it is sufficient under this theory to prove that the chosen defendant marketed DES for use in preventing miscarriages. Defendant may implead other DES manufacturers. Damages are apportioned by the jury among those defendants unable to prove that they did not produce the DES ingested by plaintiff's mother. In apportioning damages, the jury is permitted to

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[61] McCormack's precedential value is extremely questionable. It is a federal district court decision purporting to apply Massachusetts law, but flies directly in the face of the decision of the Supreme Judicial Court of Massachusetts in Payton v. Abbott Laboratories, 386 Mass. 540, 437 N.E.2d 171 (1982), rejecting the market share theory. Indeed, the same federal district court, acting through a different judge, had already rejected "concert of action" and "alternative liability" theories in another DES case. Payton v. Abbott Labs, 512 F.Supp. 1031 (D.Mass. 1981). Interestingly, McCormack was originally consolidated with Payton, 617 F.Supp. at 1523.

consider the market share of each defendant, the extent to which it conducted safety and efficacy tests on DES, the extent of its activity in obtaining FDA approval for use of DES in connection with pregnancies, whether it issued warnings about the use of DES, and several other factors.[62] Collins v. Eli Lilly Co., supra, at 50-54.

The other courts accepting the "market-share alternate liability" theory differ from Collins in their allocation of liability among defendants unable to exonerate themselves. Martin v. Abbott Laboratories, supra, at 382-383; McCormack v. Abbott Laboratories, supra, at 1527. Rather than the wide-ranging jury discretion approach used by Collins, the Martin formulation allocates liability solely on a percentage-of-market basis, initially presuming that all defendants have equal market shares, subject to contrary proof; if defendants collectively prove that they have less than 100% of the relevant market, plaintiff recovers only the percentage of her damages equal to the defendants' collective market share.

The District Court endorsed the Martin modification of the "market-share alternate liability" theory, but with still further changes. The District Court would define the relevant market as the entire state of Florida, from 1941[63] to 1956; it is unclear whether

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[62]This nearly-unreviewable jury discretion distorts liability to the extent that it allocates damages on grounds unrelated to the statistical chance (measured by market position) that a given defendant's product was in fact the cause of plaintiff's injury.

[63]The District Court appears to suggest (slip opinion at 13) that the temporal market would commence with the earliest time DES was marketed in Florida. As the District Court observed, the FDA approved DES in 1941, but it was not until 1947 that it was approved for pregnancy-related problems. (Slip opinion at 13, n.7).

the District Court would include all forms of DES, or would restrict the market to the form ingested by the plaintiff's mother where that could be ascertained. Unlike Martin, the District Court would hold all defendants jointly and severally liable[64] if they could not exonerate themselves.[65] Contribution among remaining defendants would be based solely upon proportionate market shares.

The "market-share alternate liability" theory shares all the flaws of the "market share theory," permitting recovery against defendants who have caused plaintiff no harm while risking the escape from liability of the true tortfeasor,[66] and requiring the wholesale abandonment of fundamental principles of causal connection between the defendant and the plaintiff's injury, in favor of a new collective-guilt-through-association approach. Indeed, by permitting suit to be brought against a single defendant, and "permitting" defendant to implead other parties, this theory exacerbates the risk that liability will be improperly allocated and

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[64] It is unclear whether the District Court would hold the Defendants liable for Plaintiff's entire damages (slip opinion at 13) or would follow Martin in limiting recovery to the Defendants' collective market share.

[65] Thus, except in the extremely rare case where there was only one defendant, and that defendant was, fortuitously, the true cause-in-fact of plaintiff's injuries, joint and several liability would be imposed on a number of defendants who had done plaintiff no harm; at best, the true tortfeasor would happen to be among the defendants. Quite likely, the true tortfeasor would often not be among the defendants, resulting in joint and several liability resting on a number of defendants none of whom in fact ever caused any harm to plaintiff.

[66] Indeed, McCormack expressly admits that this theory will result in some defendants being held liable to plaintiffs they did not actually injure. 617 F.Supp. at 1527.

improperly shifts still another burden to defendant, that of locating and joining other potential defendants.[67]

Neither Collins, McCormack, nor Martin attempted, as did the District Court, to address the inherent problems in defining the relevant market (discussed at p. 27-28, supra) by rigidly defining the relevant geographic and temporal markets for all future cases. But, in attempting to avoid the problems involved, the District Court's suggested theory creates even further distortions of liability. By fixing the time period as **1941-1956,** the District Court has over-looked the effect of companies moving into and out of the market during this period, and companies' market shares increasing or decreasing over time. **A** company which had a **40%** market share when Plaintiff was in utero might have had a 1% share over the entire period, and another company with a **40%** market share over the entire period might, through the vagaries of the market and the timing of its sales efforts, have had only a 1% share while Plaintiff was in utero. Using a pre-set temporal market distorts liability-allocation efforts in both instances by further weakening the already-tenuous link between the extent of a defendant's liability exposure and the statistical chance that the defendant was in fact the manufacturer of the DES plaintiff's mother took. Similarly, the use of a state-wide market distorts liability where manufacturers have differing market shares in different locations around the state. In short, the District Court's suggestion

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[67]This theory thus shifts from plaintiff to defendant the dangers of other manufacturers -- including the true tortfeasor -- being defunct or not amenable to service of process.

sacrifices what little "accuracy" a market share theory provides in favor of expediency of proof of the relevant market.

Despite the fact that this theory is based on a "contribution to the risk" concept, the District Court would apparently reject Martin's limitation of recovery to the percentage of the market (and hence of the risk) represented by defendants unable to exonerate themselves, thus still further distorting liability. Defendants are thus held liable in amounts far exceeding the extent to which they "contributed to the risk" and far in excess of any statistical chance that their product, rather than someone else's, in fact harmed plaintiff.

In short, the "market-share alternate liability" theory not only continues the fundamental flaws of the Sindell theory, but adds additional problems. The "modifications" suggested by the District Court create still further distortions. Like the other theories advanced by Plaintiff, the numerous and fatal flaws in this theory require its rejection.

E. Concert of Action

The requirements of the "concert of action" theory, as set forth in Sindell V. Abbott Laboratories, supra, are that: (1) the defendant commits a tortious act in concert with another or pursuant to a common design with the other; or (2) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself; or (3) gives substantial assistance to the other in accomplishing a

tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person. (607 P.2d at 932). The allegations in the instant case attempt[68] to assert a claim under the second alternative: giving substantial assistance or encouragement in inadequately testing and warning.

Plaintiff asserts that Florida has accepted the "concert of action" theory, citing Skroh V. Newby, 237 So.2d 548 (Fla. 1st DCA 1970). In Skroh, a drag racing case, the court held that both drivers participating in the race were proximate causes of the accident, even though only one of them actually struck plaintiff's decedent. Skroh V. Newby is entirely explainable in terms of concurrent negligence, not on a "concert of action" theory. The only other two Florida cases involving a claim of concert of action refused to apply that theory to multiple parties polluting the same

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[68]The allegations do not properly allege concerted action, since they speak in terms of consciously parallel action (R-377, ¶46), or of independent action (R-377, 1143). The concept of concerted action has been developed in federal antitrust law (see, for instance, Interstate Circuit, Inc. V. United States, 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610, 620 (1939)). and those cases have held that consciously parallel business behavior is not sufficient in itself to support a finding of concerted action. E.g., Theatre Enterprises, Inc. V. Paramount Film Distr. Corp., 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954): Kreager V. General Electric Co., 497 F.2d 468 (2d Cir. 1974). The concert of action theory adopts the antitrust standard of conscious parallelism. See, e.g., Morton V. Abbott Laboratories, supra, at 597, n.7: Payton V. Abbott Labs, 512 F.Supp. 1031, 1037, n.6. A finding that defendant acted independently precludes a finding of concerted action. Theatre Enterprises, Inc. V. Paramount Film Distr. Corp., supra: Delaware Valley Marine Supply Co. V. American Tobacco Co., 297 F.2d 199 (3d Cir. 1961), cert. den., 369 U.S. 839, 82 S.Ct. 867, 7 L.Ed.2d 843 (1962).

stream. Standard Phosphate Co. v. Lunn, 66 Fla. 220, 63 So. 429 (1913); Symmes v. Prairie Pebble Phosphate Co., 66 Fla. 27, 63 So. 1 (1913). Thus, it seems unlikely that Florida has accepted the "concert of action" theory as a basis for recovery. For purposes of argument, however, we will assume that Florida would accept that theory.

Other DES cases in which the "concert of action" theory was advanced have almost unanimously rejected it because the particular allegations did not state a cause of action under the theory.[69] Sindell v. Abbott Laboratories, supra; McCreery v. Eli Lilly and Co., supra; Zafft v. Eli Lilly & Co., supra; Martin v. Abbott Laboratories, supra; Collins v. Eli Lilly Co., supra; Payton v.

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[69] Although we recognize that this case must be decided on the sufficiency of the pleadings. it is interesting to note that, in those cases in which factual development of this theory has occurred, the courts have almost unanimously held that no concert of action had been shown. Morton v. Abbott Laboratories, supra; Payton v. Abbott Labs, 512 F.Supp. 1031 (D. Mass. 1981); Lyons v. Premo Pharmaceutical Labs, Inc.. supra; Ferrigno v. Eli Lilly and Co., supra; Ryan v. Eli Lilly & Co., supra. The only reported DES case in which liability on a concert of action theory was upheld is Bichler v. Eli Lilly & Co., supra, in which the court itself noted that the case had not been tried under the "classic version of concerted action, but rather a modified version of that concept, expanded to adapt to the exigencies of trying a case in the rapidly developing area of the law of strict products liability." 436 N.Y.S.2d at 630-631. In Bichler, the court found a concert of action on the basis of the very same facts which the other courts had unanimously rejected as sufficient to support a concert of action. It should also be noted that, although the Appellate Division's decision in Bichler was affirmed (Bichler v. Eli Lilly and Co., 55 N.Y.2d 571, 450 N.Y.S.2d 776, 436 N.E.2d 182 (1982)). the Court of Appeals specifically noted that the defendant had failed to preserve this issue for appeal. A comparison of Bichler to the cases previously cited reveals that Bichler was not decided based on additional facts found in discovery, but rather on a minority view as to whether the same facts were sufficient to constitute a concert of action. Subsequent decisions have criticized Bichler and found that Ryan and Payton present a sounder analysis. See, e.g., Tidler v. Eli Lilly and Co., supra.

Abbott Labs, 512 F.Supp. 1031, 1037 (D. Mass. 1981); Tidler v. Eli Lilly and Co., supra.

Furthermore, the complaint itself reveals that the facts of this case are wholly inconsistent with the theoretical underpinnings of the concert of action theory. Plaintiff claims to have been injured by the acts of a single DES manufacturer, and to be unable to identify which manufacturer was the offending party. As discussed in Collins v. Eli Lilly Co., supra, at 46-47, the concerted action theory applies where a particular defendant has been identified as causing plaintiff's injury, and plaintiff desires to expand liability to those acting in league with that defendant.[70] Here, by contrast, the identity of the entity which caused Plaintiff's injury is unknown -- that entity may not be, indeed probably is not, a Defendant in this case. In those cases where it applies, the concert of action theory is used to expand liability to those acting in concert with an identified tortfeasor, not to relieve plaintiff of the necessity of identifying who caused the harm in the first place. Thus, the concert of action theory simply has no bearing here.

F. Industry-wide Liability

The final theory espoused by Plaintiff is that of "enterprise"[71] or "industry-wide" liability. The latter term more accurately describes the theory, and will be used here.

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[70]The Florida cases discussed at p. 41-42, supra, in connection with this theory all involve identified tortfeasors and an effort to expand liability to other parties.

[71]The suggestion in the Academy's Brief (p.13) that this Court accepted enterprise liability in West v. Caterpillar Tractor Co., supra, is specious. As discussed at page 4, supra, West specifically requires that plaintiff establish the defendant's relationship to the product in issue.

The "industry-wide liability" theory was discussed in Sindell v. Abbott Laboratories, supra, the court noting (607 P.2d at 935, n.24) that the suggested requirements for application of the theory are: (1) there existed an insufficient, industry-wide standard of safety; (2) the absence of evidence identifying the causative agent is due to defendants' conduct; (3) a generically similar defective product was manufactured by all defendants; (4) plaintiff's injury was caused by this defect; (5) defendants owed a duty to the class of which plaintiff was a member; (6) there is clear and convincing evidence that plaintiff's injury was caused by a product made by one of the defendants brought before the court; and (7) all defendants were tortfeasors.[72]

The industry-wide liability theory was first suggested by a student law review note[73] which, in turn, was based in large part on Hall v. E. I. Du Pont De Nemours & Co., Inc., supra. Hall involved a number of consolidated cases in which children had been injured by blasting caps; damage actions had been brought against all of the American manufacturers of blasting caps and their trade association. It was alleged that the long-term practice of the entire industry was not to place any warning on individual blasting caps, and that the defendants had jointly controlled the risk and had delegated at

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[72]Although the Sindell formulation does not expressly require that the identity of the manufacturer of the product which caused plaintiff's injury be unknown, that requirement is implicit in the second element; furthermore, the only court to address the issue determined that, since the manufacturer of the particular DES ingested by the plaintiff's mother had been identified, the industry-wide liability theory was inapplicable. Lyons v. Premo Pharmaceutical Labs, Inc., supra.

[73]"DES and a Proposed Theory of Enterprise Liability," 46 Fordham L.Rev. 963 (1978).

least some functions of safety investigation and design to the trade association. Recognizing that the cases arose from a number of jurisdictions, the District Court "assumed the existence of a national body of state tort law" (345 F.Supp. at 360) for purposes of its tentative decision, while directing the parties to supply briefs as to the law applicable to different aspects of the case (345 F.Supp. at 381). Given these facts, and the further fact that all American manufacturers of blasting caps and the industry association were before it, the court held that the burden of proving causation-in-fact could, under the circumstances, be shifted to the defendants. In doing so, the court stated (345 F.Supp. at 378):

> To establish that the explosives industry should be held jointly liable on enterprise liability grounds, plaintiffs, pursuant to their pleading, will have to demonstrate defendants' joint awareness of the risks at issue in this case and their joint capacity to reduce or affect those risks. By noting these requirements we wish to emphasize their special applicability to industries composed of a small number of units. What would be fair and feasible with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of thousands of small producers.

Noting the Hall court's comment as to the importance of the number of members in the industry involved, the court in Sindell v. Abbott Laboratories, supra,[74] specifically declined to apply the industry-

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[74]As Sindell noted (607 P.2d at 934, n.22), whatever precedential value Hall may have (in view of its assumption of a national body of state tort law principles) is even further weakened by the subsequent disposition of the consolidated cases before the court in Hall. So far as we can determine, three of the eighteen accidents before the court in Hall resulted in reported decisions. In Ball v. E. I. Du Pont De Nemours and Co., 519 F.2d 715 (6th Cir. 1975). the court

(Footnote 74 continued on next page).

wide liability theory, observing that at least two hundred manufacturers produced DES, as contrasted to the six blasting cap manufacturers before the court in Hall. 607 P.2d at 935. Additionally. the Sindell court noted, the drug industry is closely regulated by the Food and Drug Administration, which actively controls the testing and manufacture of drugs and the method by which they are marketed, including the contents of warning labels, thereby making the standards to be followed by drug manufacturers often those suggested or compelled by the government. 607 P.2d at 935.

No jurisdiction has ever accepted the industry-wide liability theory in a DES case. To the contrary, that theory has repeatedly been rejected by every court that has considered it in the instant context.[75] Although the rejection of the industry-wide liability theory in Morton, supra, was based on factual findings that there was no industry-wide delegation of safety functions to a drug manufacturers' trade association, and that if any body was responsible for safety in the industry it was the Food and Drug Administration, the other decisions rejecting the industry-wide

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(Footnote 74 continued from previous page).
affirmed a directed verdict for defendant on the strict liability claim following a defense jury verdict on the negligence question. The other two reported decisions both resulted in summary judgments on the basis of statute of limitations issues. Lehtonen v. E.I. Du Pont De Nemours & Co., Inc., 389 F.Supp. 633 (D. Mont. 1975); Davis v. E. I. Du Pont De Nemours & Co., Inc., 400 F.Supp. 1347 (W.D. N.C. 1974).

[75] Morton v. Abbott Laboratories, supra; Thompson v. Johns-Manville Sales Corp., supra; Zafft v. Eli Lilly & Co., supra; Namm v. Charles E. Frosst and Co., Inc., supra; Aarnes v. Merck and Co., supra; Ryan v. Eli Lilly & Co., supra; Davis v. Yearwood, supra; Martin v. Abbott Laboratories, supra; Collins v. Eli Lilly Co., supra.

liability theory have pierced to the heart of the matter: the radical departure from settled principles of law embodied in that theory. Thus, for instance, the court in Ryan, supra, observed (514 F.Supp. at 1017):

> The expansive notion of vicarious liability represented by the enterprise concept -- which would render every manufacturer an insurer not only of the safety of its own products, but of all generically similar products made by others -- is repugnant to the most basic tenets of tort law.

To like effect, see Namm v. Charles E. Frosst and Co., Inc., supra, 427 A.2d at 1129; Davis v. Yearwood, supra, at 920.

Acceptance of the industry-wide liability theory would be a flagrant departure from basic precepts of Florida tort law,[76] and would constitute an abandonment of the fundamental principle that a manufacturer is responsible for injury caused by his own products, but not by those of others.[77] It would be an abandonment of the

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[76] Additionally, in the context of the DES cases, adoption of an industry-wide liability theory would be contrary to the public policies of the generic drug statutes, permitting a pharmacist to substitute a generically equivalent drug unless the physician has specifically indicated that a brand-name drug is medically necessary. 5465.025, Fla. Stat. In the context of the DES cases (or similar drug-related cases which should arise in the future), a manufacturer would have no way of controlling its exposure. Even if it had obtained approval for use of its drug limited to a specified purpose, a pharmacist could substitute it for a generic equivalent approved for a different purpose, and the manufacturer would be powerless to prevent it. See, in this regard, Miles Laboratories, Inc. v. Superior Court of Orange County, supra n.53, holding a DES manufacturer liable in precisely that situation.

[77] The Academy appears to recognize this effect of the theory it advances, suggesting (Brief at 11, 16) that manufacturers would be encouraged to "concern themselves" with each other's production and engage in "mutual cooperation." Such a course of action brings to mind still another antitrust concept -- conspiracy liability under 15 U.S.C. §§1, 2.

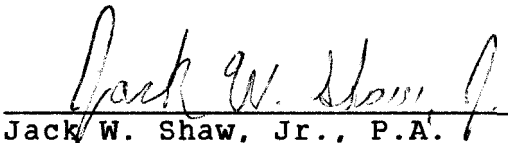
standard of causation-in-fact, and would permit jury verdicts to be based on speculation and conjecture as to whom the manufacturer was in any given case. That departure is not justified, and the industry-wide liability theory must be rejected.

CONCLUSION

For the reasons cited above, all of the theories espoused by Plaintiff must be rejected. The court should reiterate the fundamental principle of Florida tort law that no defendant may be required to pay damages to a plaintiff unless it is shown that the defendant was in fact responsible for the plaintiff's injuries. The certified question must be answered in the negative.

Respectfully submitted,

MATHEWS, OSBORNE, McNATT, GOBELMAN & COBB



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to: Diane H. Tutt, Attorney, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131; David J. Kadyk, Esquire, P. O. Box 1531, Tampa, Florida 33601; Hugh J. Turner, Esquire, and James L. Armstrong, Esquire, 1301 Alfred I. duPont Building, Miami, Florida 33131; Lamar D. Oxford, Esquire, P. O. Box 2928, Orlando, Florida 32802; Robert

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