IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,626

TERRI LYNN CONLEY,

Petitioner,

v.

BOYLE DRUG COMPANY, etc., et al.,

Respondents.

ON CERTIFICATION FROM
THE DISTRICT COURT OF APPEAL
OF THE FOURTH DISTRICT OF FLORIDA

ANSWER BRIEF OF RESPONDENT ELI LILLY AND COMPANY

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INTRODUCTION

This answering brief is respectfully submitted by respondent Eli Lilly and Company ("Lilly"), one of the defendants in the trial court. It will refer to the parties as plaintiff and defendants, the defendants having prevailed in both courts below and the plaintiff being the petitioner in this Court. The record on appeal will be designated by the symbol "(R. ___)."

STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff appealed to the district court from the trial court order that dismissed her Second Amended Complaint on motions to dismiss by some defendants and on motions for judgment on the pleadings by the remaining defendants. (R. 657-58, **833.)** The district court affirmed the orders of the trial court, but certified to this Court the question of whether plaintiff should be allowed to proceed on a radical and unprecedented theory of liability that would modify or eliminate her burden of proving certain essential elements of her claim. The facts and procedural background of this case have been described at length in briefs submitted by other defendants and will be repeated here only to the extent that they are necessary for Lilly's arguments.

Plaintiff has alleged a variety of conditions, all of which are in fact benign, occur in the general population whether or not there has been drug exposure, have no deleterious effect, usually remit spontaneously at approximately age 25, and do not progress to any

more serious condition. A number of cases involving the same or similar conditions have been tried to a verdict, all of which have been by juries, and all of which have been for the defendant. Keil v. Eli Lilly & Co., Docket No. 570997 (E.D. Mich. 1981) (product literature adequate; no causation); Sardell v. Eli Lilly & Co., Index No. 18268/77 (N.Y. Sup. Ct. Kings County 1982) (same); Mink v. Univ. of Chicago and Eli Lilly & Co., No. 77 C 1432 (N.D. Ill. 1983) (same). No verdict has ever been rendered for a plaintiff in a case alleging conditions of this type.

In spite of the fact that the juries have consistently found against them, a few plaintiffs have continued to castigate the entire pharmaceutical industry and call for draconian changes in the law requiring that a tort plaintiff identify the person who allegedly injured her. Of the cases pending in Florida against manufacturers for conditions allegedly resulting from use of diethylstilbestrol during pregnancy, this is the only case in which the plaintiff claims that there is no evidence identifying the manufacturer. Suing to recover for conditions that occur in the population at large, plaintiff is asking the court to abandon long accepted principles of tort law and undertake a radical and unsound change in the tort law of Florida.

Although the Second Amended Complaint alleges that "there is clear and convincing evidence that Plaintiff's injury was caused by the DES made by one of the Defendants" (R. 376, 378), and that plaintiff "is substantially certain that one of the defendants . . . caused her injury" (R. 379), plaintiff has actually conceded that, after a year of

exhaustive discovery on this subject, she has no idea which company, defendant or not, manufactured any tablets used by her mother.

Relying solely on plaintiff's professed inability to identify, the trial court dismissed and granted judgment on the pleadings. None of the evidence submitted on the motions for summary judgment, which were supported by depositions, exhibits, affidavits, and other materials, therefore, was needed by the lower court; and any ruling on the several motions for summary judgment was deferred. (R. 657-58.) This material is, however, in the record on appeal. (See R. 138-139, 139A-139B, 407-410, 496-642 and 837-2254.)

In her appeal to the district court, plaintiff raised only one issue, the same issue that she presses in this Court: must she identify the specific manufacturer of the tablets taken by her mother when she was pregnant with plaintiff in 1955 and 1956. As the district court held, under the current law of Florida, she must. In the courts below, plaintiff suggested that a variety of legal theories, only one of which is an accepted part of the law of Florida, relieved her of the obligation to identify. Three of these theories, concert of action, alternative liability, and enterprise liability, have been declared viable tort theories by one court or another in different contexts, but each in its classic form has been rejected repeatedly by courts around the country which considered it on the facts in a lawsuit involving the use of diethylstilbestrol during pregnancy. The fourth theory, market share liability, was invented by the Supreme Court of California in a diethylstilbestrol case, but, with two exceptions, it has been rejected in

every other state in which it has been raised. 1/

Recognizing the very substantial problems she has with each of these theories, plaintiff asked the district court to create any new remedy that would relieve her of the obligation to identify. Although the district court agreed that under the settled law of Florida plaintiff's claims had been properly dismissed, that Court went on to propose a theory that would allow plaintiff to proceed against any single company that manufactured or marketed diethylstilbestrol in this State, for the full value of her claim, unless that company can prove that it did not supply the pills taken by plaintiff's mother. The district court admitted that in proposing this radical new theory it was "severely handicapped, dealing as we are with bare allegations of a complaint rather than facts fully developed at a trial." 477 So.2d at 607. This handicap will be the focus of Lilly's brief.

If this Court decides that the law of Florida will continue to require identification and that no other theory eliminating the identification requirement should be created, the certified question should be answered in the negative; and nothing more needs to be said.

1/ In Celotex Corp. v. Copeland, 471 So.2d 533 (Fla. 1985), an asbestos case, this Court, while recognizing "the clearly established majority view" opposing the adoption of the market-share theory, found it unnecessary to accept or reject the theory, noting that the case "neither required nor justified the major policy change necessary to adopt the market share theory in Florida."

But if this Court believes that some radical new theory relieving plaintiff of the duty to identify should be considered, that complex task should not be undertaken solely on the pleadings before the Court or even on the papers submitted on the motions for summary judgment because, although this individual case will soon pass from the courts, any principle of law will remain for a long time. Instead, this Court should remand the case for a trial, thus permitting both sides to create a full record for review and consideration of this extremely delicate and far-reaching issue of tort law. Other courts have wisely taken this approach.

STATEMENT OF THE ISSUE

DID THE TRIAL COURT ERR IN DISMISSING PLAINTIFF'S COMPLAINT WHEN SHE COULD NOT IDENTIFY THE MANUFACTURER OF THE TABLETS ALLEGEDLY TAKEN BY HER MOTHER?

ARGUMENT

PLAINTIFF MUST PROVE WHICH DEFENDANT MANUFACTURED THE TABLETS ALLEGEDLY TAKEN BY HER MOTHER, BUT IF A NONIDENTIFICATION THEORY IS ADOPTED, IT SHOULD ONLY BE DONE ON A FULL TRIAL RECORD.

Florida law requires a plaintiff in a personal injury action to identify the party whose conduct caused her injury. University Community Hospital v. Martin, 328 So.2d 858 (Fla. 2d DCA 1976); Washewich v. Le Fave, 248 So.2d 670 (Fla. 4th DCA 1971).

This is true in negligence. 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); Fellows v. Citizens Federal Savings and Loan Assoc., 383 So.2d 1140 (Fla. 4th DCA 1980); Matthews v. GSP Corp., 368 So.2d 391 (Fla. 1st DCA 1979).

It is true in warranty. Sansing v. Firestone Tire & Rubber Co., 354 So.2d 895 (Fla. 4th DCA), cert. denied, 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. 1974).

And it is also true in strict liability. Clark v. Boeing Co., 395 So.2d 1226 (Fla. 3d DCA 1981); Sansing v. Firestone Tire & Rubber Co., supra; West v. Caterpillar Tractor Co., Inc., 336 So.2d 80, 87 (Fla. 1976).

This is the prevailing law of most other jurisdictions. Negligence: Thompson-Hayward Chemical Co. v. Childress, 277 Ala. 285, 169 So.2d 305 (1964); Inouye v. Black, 238 Cal. App. 2d 31, 47 Cal. Rptr. 313 (1965); Douglas v. Smith, 578 F.2d 1169 (5th Cir. 1978) (applying Georgia law); Neubauer v. Coca-Cola Bottling Co. of Chicago, 96 Ill. App. 2d 18, 238 N.E.2d 437 (1968); Montgomery v. Johnson Motor Lines, Inc., 205 So.2d 218 (La. App. 1967); Aymond v. Texaco, Inc., 554 F.2d 206 (5th Cir.), reh. denied, 559 F.2d 29 (1977) (applying Louisiana law); Undeck v. Consumer's Discount Supermarket, Inc., 29 Md. App. 444, 349 A.2d 635 (1975); Coca-Cola Bottling Co., Inc. v. Everett, 234 Miss. 882, 108 So.2d 545 (1959); Miller v. Steinfeld, 160 N.Y.S. 800 (1916); Wetzel v. Eaton Corp., 62 F.R.D. 22

(D. Minn. 1973) (applying North Dakota law); Thomas v. St. Joseph Hospital, 618 S.W.2d 791 (Tex. App. 1981); Coca-Cola Bottling Co. of Lubbock v. Fillmore, 453 S.W.2d 239 (Tex. App. 1970). Implied warranty: Undeck v. Consumer's Discount Supermarket, Inc., supra; Coca-Cola Bottling Co., Inc. v. Everett, supra; Williams v. Coca-Cola Bottling Co., 285 S.W.2d 53 (Mo. App. 1955); Bilk v. Abbotts Dairies, Inc., 147 Pa. Super. 39, 23 A.2d 342 (1941); Hahn v. Atlantic Richfield Co., 625 F.2d 1095 (3d Cir. 1980), cert. denied, 450 U.S. 981 (1981) (applying Pennsylvania law); Thomas v. St. Joseph Hospital, supra. Strict tort liability: Paul v. Hardware Mutual Insurance Co., 254 So.2d 690 (La. App. 1971); Wetzel v. Eaton Corp., supra; Thomas v. St. Joseph Hospital, supra.

It has also been the decision of the overwhelming majority of courts in diethylstilbestrol cases in which the plaintiff cannot identify. Morton v. Abbott Laboratories, 538 F. Supp. 593 (M.D. Fla. 1982); Pipon v. Burroughs-Wellcome Company, 532 F. Supp. 637 (D.N.J.), aff'd without opinion, 696 F.2d 984 (3rd Cir. 1982); Gullotta v. Eli Lilly and Company, et al., Civil No. H-82-400 (D. Conn., May 9, 1985); [2/] Mizell v. Eli Lilly & Co., 526 F. Supp. 589 (D.S.C. 1981); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981); Gray v. United States, 445 F. Supp. 337 (S.D. Tex. 1978); Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981); Lyons v. Premo Pharmaceutical Labs, Inc., 170 N.J. Super. 183, 406

2/ A copy of the Gullotta opinion appears in the Appendix to Lilly's brief as Exhibit 2.

A.2d 185 (App. Div.), certif. denied, 82 N.J. 267, 412 A.2d 774 (1979); Lebak v. Eli Lilly & Co., Docket No. L-13753-73 (Super. Ct. Law Div., N.J., filed Dec. 14, 1976), appeal dismissed, Docket No. A-1333376 (App. Div., June 1, 1977); Gruseth v. Eli Lilly and Company, Civ. 77-4051 (D.S.D., Aug. 13, 1982); Watson v. Eli Lilly and Company, Civ. Action No. 82-951 (D.D.C. Dec. 20, 1982); Zafft v. Eli Lilly and Company, 676 S.W.2d 241 (Mo. 1984).

Plaintiff suggests that three tort theories (concert of action, alternative liability, and enterprise liability) relieve her of the obligation to identify in this case. These theories would not apply to the present case even if they were part of the existing law of Florida.

Concert of Action. This theory has been widely recognized in cases not involving diethylstilbestrol use as a method of extending liability from the person who actually inflicted the injury to those who acted with and assisted him. The party who inflicted the injury has always been specifically identified in these cases. See, e.g., Symmes v. Prairie Pebble Phosphate Co., 63 So. 1 (Fla. 1913); Standard Phosphate Co. v. Lunn, 63 So. 429 (Fla. 1913); Skroh v. Newby, 237 So.2d 548 (Fla. 1st DCA 1970) (drag race); Jacobs v. State, 184 So.2d 711 (Fla. 1st DCA 1966) (same). Every court to consider this theory in its traditional form on the facts of a diethylstilbestrol case has found it inapplicable for a wide variety of reasons. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, 932, cert. denied, 449 U.S. 912 (1980); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 598-99 (1984); Burnside v. Abbott Laboratories, et al.,

Docket Nos. 589-594, slip op. at 21-28 (Pa. Super. Ct., Dec. 20, 1985); [3/] Gullotta v. Eli Lilly and Company, et al., supra, slip op. at 21-23; Payton v. Abbott Labs, 512 F. Supp. 1031, 1037-38 (D. Mass. 1981); Morton v. Abbott Laboratories, 538 F. Supp. at 596-98; Ryan v. Eli Lilly & Co., 514 F. Supp. at 1004; Lyons v. Premo Pharmaceutical Labs, Inc., 406 A.2d at 190-91; Watson v. Eli Lilly and Company, supra; Mizell v. Eli Lilly & Co., Civ. A. Nos. 80-1091-1, 80-1092-1 (D.S.C., Bench Order of June 22, 1982). [4/]

The related doctrine of conspiracy has also been a widely accepted theory for extending liability from the party who actually inflicted the injury to others who agreed to participate in his conduct. Here, too, the party who inflicted the injury must be identified. Prosser, The Law of Torts § 46 (4th ed. (1971). And again for many reasons, every court to consider conspiracy in a diethylstilbestrol case has refused to apply it for legal or factual reasons. Ryan v. Eli Lilly & Co., 514 F. Supp. at 1012-14; Burnside v. Abbott Laboratories, et

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[3/] A copy of the Pennsylvania Superior Court's opinion in Burnside appears in the Appendix to Lilly's Brief as Exhibit 1.

[4/] Bichler v. Eli Lilly & Co., 79 A.D.2d 317, 436 N.Y.S.2d 625 (1st Dep't 1981), cited by plaintiff, is not to the contrary. There, an intermediate appellate court affirmed a verdict based on what it admitted was a "modified version" of concert of action, 436 N.Y.S.2d at 630-31. Although New York's highest court affirmed the result, it did so on purely technical grounds, holding that the defendant had failed to preserve its arguments by proper objection to the jury charge. Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 583-84, 436 N.E.2d 182, 450 N.Y.S.2d 776, 781-82 (1982). As a result, the court neither addressed the merits of the theory nor adopted it as the law of New York. Id. Similarly, in Abel v. Eli Lilly and Company, 418 Mich. 311, 343 N.W.2d 164 (1984), the court permitted a concert claim to stand, but expressly confined its decision to the pleadings.

al., slip op at 16-21; Watson v. Eli Lilly and Company, supra, at 2; Mizell v. Eli Lilly & Co., Bench Order, supra; Collins v. Eli Lilly Company, 116 Wis. 2d 166, 342 N.W.2d 37, 47-48, cert. denied, 105 S. Ct. 107 (1984). See generally Payton v. Abbott Labs, 512 F. Supp. at 1037-38; Sindell v. Abbott Laboratories, 607 P.2d at 932-33; Lyons v. Premo Pharmaceutical Labs, Inc., 406 A.2d at 190-91.

Alternative Liability. Originally created by the courts of California in Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948), and later incorporated in the Restatement of Torts § 433B(3), the theory of alternative liability has been widely but not universally accepted by the common law jurisdictions of the United States. It requires that the defendants be few in number, that all of them have acted negligently toward the plaintiff, that all negligent actors be before the court, and that the defendants be responsible for the lack of identification evidence or in a better position to supply it. None of these requirements are met here. Nor has the theory been accepted by the courts of Florida. But even if it had been, the vast majority of courts which have been asked to apply this theory to the facts of a diethylstilbestrol case have rejected it. E.g., Sindell v. Abbott Laboratories, 26 Cal. **3d** 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980); Collins v. Eli Lilly Company, 342 N.W.2d at 37, cert. denied, 105 S. Ct. 107 (1984); Gullotta v. Eli Lilly and Company, et al., supra, slip op. at 12-14; Morton v. Abbott Laboratories, 538 F. Supp. at 598-99; Martin v. Abbott Laboratories, 102 Wash. 2d at 595; Ryan v. Eli Lilly & Co., 512 F. Supp. at 1016-17; Watson v. Eli Lilly and

Company, supra at 2; Namm v. Charles E. Frosst & Co., supra. Cf. Abel v. Eli Lilly and Company (discussed infra at pp. 15-16).

Enterprise Liability. The most recent of the "traditional" theories, this approach was outlined but never applied by a federal court theorizing on a non-existent form of universal tort law in Hall v. E. I. Du Pont de Nemours & Co., Inc. and Chance v. E. I. Du Pont de Nemours Co., Inc., 345 F. Supp. 353 (E.D.N.Y. 1972), the "blasting caps" cases. It requires that virtually all of the companies whose products could have caused the injury be defendants in the action; that the group from which the defendants are drawn be small, rather than fragmented and numerous; that the companies have assumed joint control of the risk; that they have delegated the joint control to some individual or organization; and that causation be undisputed. None of these requirements are met here. In a later opinion the federal district judge who created this theory recognized that it was not the law of any jurisdiction. Chance v. E. I. Du Pont de Nemours & Co., 371 F. Supp. 439 (E.D.N.Y. 1974). This theory has not been adopted by the courts of Florida, and every court to consider it in a diethylstilbestrol case has found it inappropriate. See Morton v. Abbott Laboratories 538 F. Supp. at 593; Gullotta v Eli Lilly and Company, et al., supra, slip op. at 19-21; Ryan v. Eli Lilly & Co., 512 F. Supp. at 1017-18; Sindell v. Abbott Laboratories 607 P.2d at 933-35; Burnside v. Abbott Laboratories, et al, supra, slip op. at 28-32; Watson v. Eli Lilly and Company, supra; Collins v. Eli Lilly Company, 342 N.W.2d at 47; Gruseth v. Eli Lilly and Company, supra; Namm v. Charles E. Frosst & Co., 427 A.2d at 1121; Martin v. Abbott Laboratories, 102 Wash. 2d at 600.

Four courts have attempted to create theories of liability which would in one manner or another relieve the plaintiff in a diethylstilbestrol case of the obligation to identify the manufacturer whose product was used by her mother. Sindell v. Abbott Laboratories, supra; Collins v. Eli Lilly Company, supra; Abel v. Eli Lilly and Company, supra; Martin v. Abbott Laboratories, supra. None of these decisions were rendered on a full trial record. Two were decided on the pleadings alone -- pleadings which, as in the present case, strayed far from the actual facts. Without the benefit of adversary presentation and without a record adequate for such a course, the court in each case attempted to invent a means for relieving the plaintiff of the obligation to identify. The lack of a complete record and the absence of adversary treatment unfortunately led these courts to create far more problems than they solved and to deal unfairly with the defendants.

In Sindell, the California Supreme Court required the plaintiffs to sue defendants representing "a substantial share" of the "market." 607 P.2d at 937. Assuming that plaintiff had satisfied that requirement and could prove that the defendants were negligent, each defendant was then liable for the portion of the judgment representing its "share of the market." Any defendant that could prove that the plaintiff's mother could not have used its product was permitted to "exculpate" itself; but the burden of proof on this issue was on the defendant. Id.

The market share theory relies on a number of assumptions which are simply not accurate. First, no static, definable and provable product market existed. Second, two companies have become "targets"

and have been stuck with virtually the entire burden of these claims rather than paying their "proportionate share." Third, the defendants are not "better able to bear the cost of injury" by insuring for risks of loss and passing the cost on to the public "as a cost of doing business," Sindell, 607 P.2d at 941, because no company can obtain insurance to cover liability for the actions of other manufacturers.

Although Sindell was decided six years ago, the most basic questions remain unanswered. What is a "substantial share" of the market? Indeed, what is the "market"? Is it the pharmacy the mother might have used to fill the prescription? The city in which the prescription was filled? The state in which the mother resided? A national market? Nor has the soundness of exculpation been considered. If all diethylstilbestrol is, as plaintiff alleges, capable of causing injury to the female offspring and if, as plaintiff argues, the mother's use of one manufacturer's product rather than another's is completely fortuitous, should any company participating in the market be entitled to exculpation?

In Collins, the Supreme Court of Wisconsin allowed the plaintiff to sue a single manufacturer without regard for the identity of the manufacturer whose product was actually used by her mother. Its justification for this was the right of the single defendant to assert third-party claims against other manufacturers for contribution.

Although superficially fair, this approach requires the single defendant to abandon any chance of winning its case on the scientific and medical issues by filling a stand of bleachers with a mass of third-party defendant manufacturers. Whether the defendant chooses to use

third-party practice or await the outcome and sue for contribution if it loses, it must prove the plaintiff's case against the other companies.

This might expose it to collateral estoppel in every other case against it because, having carried the burden of proof on the liability issues, it would necessarily have abandoned most of the arguments against collateral estoppel. Hence, the major justification offered by the court for allowing the plaintiff to sue a single manufacturer is a meaningless right. A single company could be exposed to untransferable and unsharable liability for an entire industry.

In Abel, the Supreme Court of Michigan conceded that it was "actually fashioning and approving a new DES-unique version of alternative liability." 343 N.W.2d at 173. The plaintiffs in that case alleged that they had joined as defendants all known manufacturers of DES-type drugs in Michigan. The Court held that those plaintiffs who were unable to identify the specific manufacturer could proceed against all of them, provided they had used due diligence in attempting to identify the actual manufacturer and could prove, among other things, that each had been negligent. This decision, like Sindell, was rendered on the pleadings.

In Martin v. Abbott Laboratories, the Supreme Court of Washington fashioned a "market-share alternate liability" theory. The plaintiff could sue one defendant that supplied DES of the "type" her mother took and then had to prove the ordinary elements of a tort case. 102 Wis. 2d at 604. She was allowed to recover all of her damages from the sole defendant unless the defendant could exculpate itself or prove its "share of DES in the plaintiff's particular geographic

market." If the defendant was able to establish its share, then plaintiff's recovery was limited to the percentage of her damages corresponding to the defendant's percentage of the market.

The analysis becomes more complex if plaintiff sues more than one defendant or if third-party defendants are impleaded: all non-exculpated defendants are initially presumed to have equal shares of the market, a presumption that each can rebut only by sustaining its burden of proving its actual market share. The defendants that succeed in doing so may then limit their liability to their percentage share, but any defendant that fails to carry that burden must pay the entire balance of the plaintiff's damages.

In one stroke, the Washington court managed to concentrate the inequities and impracticalities of Sindell, Abel and Collins in a single theory because it relied entirely on third-party practice and market-share allocation to redress the unfairness imposed on the target defendant.

As the courts in Sindell, Collins, Abel, and Martin recognized, their theories represent drastic departures from pre-existing tort law. In each instance, their attempts to deal with the identification requirement in diethylstilbestrol cases have placed the defendants in a position which cannot be justified on any assessment of fairness and, in at least two cases, have given the plaintiffs a remedy with no practical use in the courtroom.

The vast majority of courts that have been asked in diethylstilbestrol cases to effect such radical changes in their tort law have for sound reaons refused to do so. Yet even courts that have

expressed a willingness to modify the identification requirement have recognized that no theory can be fully considered based solely on the allegations of a complaint. Some have refused to decide the issue without a full trial record.[5/] This approach allows both sides to submit the evidence they deem important on the issue and adds the benefit of adversary treatment of a specific substantive theory. One court, at the same time that it created a remedy, admitted uncertainty and expressly reserved the right to reconsider the fairness of the result after the issues had been tried. Others have left the trial courts to grapple with the problems and inequities created.

In Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171 (1982), pending in the United States District Court for the District of Massachusetts, the federal district judge certified four questions to the Supreme Judicial Court of Massachusetts, but he refused to include any record and was unwilling to await the outcome of a trial. After holding that Massachusetts had no form of non-identification liability, Massachusetts' highest court refused to consider the creation of a theory without an adequate record:

5/ Some courts have attempted to bridge the factual gaps by relying on "factual" recitations in law review articles. See, e.g., Bichler v. Eli Lilly & Co., 450 N.Y.S.2d at 778, 436 N.Y.S.2d at 628-30; Sindell v. Abbott Laboratories, 607 P.2d at 927, 937 n.28; cf. Collins v. Eli Lilly Company, 342 N.W.2d at 47. Wholly apart from the propriety of this as a matter of law, the articles on diethylstilbestrol contain a number of glaring and important factual errors. The article that has attracted the most attention unfortunately has the most errors. Comment, DES and a Proposed Theory of Enterprise Liability, 46 Fordham L. Rev. 963 (1978). Without a full trial record taken in an adversary context, no court can have the accurate factual underpinnings necessary for the fair resolution of a complex question.

> In both their reply brief and in oral argument, the plaintiffs suggest that if particular aspects of their market share theory [which was rejected] create difficulties, we should excise, reformulate, and rewrite to create a theory under which they could recover without meeting the identification requirement. The posture of the case and consequent state of the record, the magnitude of the ramifications of our decision with respect to this certified question, and our view of the judicial process combine to convince us that such a course of action is imprudent at this time.
>
> That is not to say that on an adequate record this court would not recognize some relaxation of the traditional identification requirement in appropriate circumstances so as to allow recovery against a negligent defendant of that portion of a plaintiff's damages which is represented by that defendant's contribution of DES to the market in the relevant period of time." [437 N.E.2d at 190.1

In Abel, the Michigan Supreme Court, having confined its consideration to the pleadings, was sufficiently unsure of the theory it had fashioned to make an express reservation of its right to reconsider its position when it had the benefit of a full trial record:

> The number and posture of the parties and the novelty and complexity of the issues incidental to the theory of recovery we approve today suggest a major challenge to the trial management skills of the trial judge and the advocacy skills of trial counsel, In addition, unanticipated jurisprudential procedural and substantive issues will inevitably arise. We do not presume the prescience to anticipate all of them at this remove, let alone address and resolve them. We are deciding the issues before us today in a virtual factual vacuum. The fairness of the application at trial of the theory of a lternative liability remains to be seen. A factual record may reveal a number of unanticipated inequities affecting any of the parties in trying to a verdict the new cause of action we approve today. . . .
>
> Thus, we explicitly reserve judgment concerning the validity of *any* verdict that may result from a trial of the cause of action we have approved. [343 N.W.2d at **177.1**

Perhaps the best statement of the need for a full trial record (and of the market share theory's unworkability) is the oral ruling of the California trial judge who recently presided for weeks over a trial limited to the market share issue, the first conducted under Sindell:

> This Sindell decision was written without one minute's evidence in the courtroom. Again, we must view Sindell from that standpoint, as I'll indicate here in a few moments.
>
> There are a lot of things that they've said in the case that I think are about half right, because they haven't got any evidence to go on. And that's the way a pleading case is, and that's what Sindell is, and that's why we find so little guidance in Sindell.
>
> * * *
>
> The harsh and blunt fact that the evidence has shown is that that information and data [for reconstructing the market and apportioning shares] is just not available. If there is anything that this case has shown, it is that there are -- with few exceptions, and very few manufacturers, no one [has] been able to prove or can ever prove -- because we are talking about historical information now. . . .
>
> * * *
>
> So when the Supreme Court, as I say, without having any evidence says that you can determine what the numerator is as to a particular manufacturer, it's just, just not there. That data doesn't exist.
>
> * * *
>
> And if there is anything that we have learned in the four weeks that we have been here together, it is that nobody knows what that gross sales was in 1948, or '47, or any other year.
>
> * * *
>
> My point is that when the Supreme Court makes such a statement as that, it bears no relation to [the] reality of what the evidence has shown. And

> if we look at the footnote on 61, as one of the counsel pointed out, when Sindell was up before the Supreme Court the defendants assert[ed] that there are no figures available to determine market share, that DES was provided for a number of uses other than to prevent miscarriage, and it would be difficult to ascertain what proportion of the drug was used as a miscarriage preventative and that the establishment of a time frame and area for market share would pose problems.
>
> Man, that is the understatement of the year. But there the defendants said it in Sindell in 1980; and it's the same problem that you and I face here today, and the evidence has borne out . . .

Stapp v. Abbott Laboratories, No. C 344 407, trial transcript at pp. 3758-3763 (Cal. Super. Ct., Los Angeles County, October 11, 1985).

In the present case, the district court admitted that it was "severely handicapped" because it was relying on "the bare allegations of a complaint." Slip op. at 12. The district court nonetheless proposed a theory. That theory would permit the plaintiff to sue a single defendant but would make liability joint and several, thus imposing full recovery on a target defendant despite the near certainty that it was not the actual supplier.

Saddling one of many companies with total liability does not allow for cost spreading and does not allocate costs fairly between consumer and supplier. In reality, it punishes a manufacturer simply because it marketed a "generic" drug, [6/] even though the marketing of

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6/ The fact that a drug is sold under its "generic" -- or chemical -- name does not mean that it is sold anonymously. Whether a drug is marketed under a trade name or under a descriptive name designated by the FDA, under federal law, as plaintiff concedes (Br., at page 18), the labelling of the drug must bear the name and place of business of the manufacturer, packer, or distributor and of the active ingredient.

generic drugs is specifically encouraged by federal and state laws and regulations. See, e.g., § 465.025, Fla. Stat.

If liability is joint and several and plaintiff succeeds on the substantive issues, those few manufacturers who happen to be sued will each be forced to pay damages well in excess of their proportionate responsibility under any theory although plaintiff probably was not exposed to its product. See, e.g., Fischer, Products Liability - An Analysis of Market Share Liability, 34 Vand. L. Rev. 1623, 1635-1642 (1981); Note, California Expands Tort Liability Under the Novel "Market Share" Theory: Sindell v. Abbott Laboratories, 8 Pepperdine L. Rev. 1101, 1032 (1981); Note, Market Share Liability - The California Roulette of Causation Eliminating the Identification Requirement, 11 Seton Hall L. Rev. 610, 623-624 (1980). Unless liability is several, plaintiff has no incentive to identify the actual supplier or to join a sufficient number of defendants to encompass the actual supplier; on the contrary, her incentive is to target a single defendant.

If the Court decides that some theory should be adopted relieving the plaintiff of the obligation to identify a specific wrongdoer, the nature of the case will be dramatically changed. It will no longer be a classic tort lawsuit against an alleged wrongdoer for his conduct. It will become a lawsuit against a product. The evidence at a trial would be directed at the product; and if the plaintiff prevailed, the defendant companies would be assessed damages, not because they had directly injured the plaintiff, but only because they supplied the product to the general public.

This policy determination would have to be founded on the fact that the DES products supplied by all of the companies in the market were chemically identical (they were), produced the same therapeutic effects in the human (they did), and had the same biological action (they did). Assuming for the sake of argument that plaintiff's conditions were caused by the drug, she would have suffered these conditions no matter whose product she used; and the use of any specific supplier's product was total happenstance. Hence, as much of the industry as possible should bear any loss in order to distribute it fairly.

With these basic concepts in mind, we do not undertake to suggest a fully refined theory for a case in which the plaintiff cannot identify the manufacturer. However, if the Court feels compelled to adopt a non-identification theory of liability, we strongly urge the Court to include the following elements in any theory that relieves the plaintiff of the identification requirement:

> (a) Plaintiff must prove by a fair preponderance of the evidence that she promptly and diligently attempted to identify the specific supplier of the tablets used by her mother and that she failed.

Plaintiff will have the earliest opportunity to obtain and preserve basic identification evidence. Because of the way a prescription drug is marketed and dispensed, all of the evidence identifying the supplier will be within her knowledge and control; none of it will be within the knowledge or control of a defendant. The burden of preserving this evidence should not be placed on the defendants, and the risk of loss for failure to preserve it after the claim is known should rest on the plaintiff.

(b) Most of the suppliers subject to the jurisdiction of the Florida courts must be named by the plaintiff as defendants in the lawsuit.

This is a reasonable burden to impose on a plaintiff in exchange for relieving her of the important obligation to identify the wrongdoer. This requirement would spread the cost of liability over those in the market. Any other course would give the plaintiff the arbitrary power to target a particular company for reasons unrelated to the merits of the case (deep pocket, insurance coverage, recent publicized problems in other areas, etc.). For obvious trial considerations, a single defendant should not be shackled with the obligation to make third-party claims against other suppliers.

(c) Plaintiff must prove the substantive elements of a tort liability claim against each defendant.

(d) The defendant's liability should be several.

When the suit is for all practical purposes against the product and the individual defendant is liable only by virtue of the fact that he made the product, he should not be exposed to liability for more than his share.

(e) Liability should be apportioned according to some basis adopted by the Court, as, for example, national market share.

If the Court decides to apportion liability on the basis of market share rather than some more traditional basis, the national market will again give the most fair distribution of liability among the suppliers of the product. Any more local market will only be a return to a modified identification requirement and will not spread the risk fairly.

(f) An individual defendant's percentage of damages should not exceed the actual percentage of liability fixed by the jury.

If the plaintiff omitted a particular company for any reason but passed the threshold requirement of suing "most" of them, the plaintiff should bear the risk of loss for not suing that company. For example, if the jury determined that four defendants were each liable for 10 percent of the damages, each should then be responsible for no more than 10 percent of the damages awarded by the jury, rather than 25 percent. This should also be true when the plaintiff settles with a manufacturer on a nominal basis later.

(g) No supplier should be permitted to exculpate himself merely by proving that the plaintiff's mother could not have used his product.

If the suit is against the product, the use of any individual company's product is happenstance and any company's product could have caused the injury, exculpation defeats the goal of spreading the loss over the largest group that might have caused the injury. Exculpation would merely re-incorporate a part of the identification requirement in a case which had theoretically abandoned identification as a part of the plaintiff's case.

These elements, either alone or taken together, strike a balance between the plaintiff and the defendants when the plaintiff has been relieved of the obligation to identify a specific wrongdoer and the defendants face the risk of liability for injuries caused by someone else's product.

Plainly, they provide no more than the barest outline of a theory. As the faltering attempts in other jurisdictions teach, many

other factors must be evaluated and accounted for before a workable theory can be considered, much less applied. But unless they are, and in concrete -- not abstract or hypothetical -- terms, no meaningful theory can be proposed.

CONCLUSION

Lilly strongly believes that a tort plaintiff in a diethylstilbestrol case should be required to identify the manufacturer of the tablets used by her mother. Lilly also believes that the universal rejection in diethylstilbestrol cases of concert of action, conspiracy, alternative liability, and enterprise liability is correct and that no other novel theories of non-identification liability can be fairly invented on these facts. The question certified by the district court should be answered in the negative.

If this Court decides it is willing to consider some drastic change from the standard law requiring identification, the case should be remanded to the trial court for the taking of evidence from the parties as at trial. The issues are extraordinarily complex with widely varying factors to be taken into account and widely varying conduct among the defendants. The Court should not be willing to undertake a

radical departure in tort law without the benefit of a full trial record and an adversary presentation on a particular theory.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent Eli Lilly and Company was served by mail this 27th day of February, 1986, upon those attorneys named in the attached Service List.

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