IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,626

TERRI LYNN CONLEY,

Petitioner
Cross-Respondent,

vs.

BOYLE DRUG COMPANY, etc., et al.,

Respondents
Cross-Petitioners.

INITIAL BRIEF OF PETITIONER-CROSS-RESPONDENT, TERRI LYNN CONLEY, ON THE MERITS

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QUESTION PRESENTED

WHETHER FLORIDA SHOULD RECOGNIZE A CAUSE OF ACTION AGAINST A DEFENDANT FOR MARKETING DEFECTIVE DES WHEN THE PLAINTIFF ADMITTEDLY CANNOT ESTABLISH THAT A PARTICULAR DEFENDANT WAS RESPONSIBLE FOR THE INJURY.

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PREFACE

This brief is submitted on behalf of the Petitioner, TERRI LYNN JONLEY, from a decision of the District Court of Appeal, Fourth District, affirming dismissal of Petitioner's second amended complaint with prejudice as to certain Defendants[1] (R.657,705) and a judgment on the pleadings in favor of certain other Defendants[2] (R.833).

While affirming the orders below, the District Court of Appeal certified the following question to this Court:

> Does Florida recognize a cause of action against a Defendant for marketing defective DES when the Plaintiff admittedly cannot establish that a particular Defendant was responsible for the injury?

Conley v. Boyle Drug Company, 477 So.2d 600,607-608 (Fla. 4th DCA 1985).

In this brief, the parties will be referred to by name or as Plaintiff and Defendants. Reference to the Record on Appeal will be by R.1-836. Any emphasis appearing in this brief is that of the writer unless otherwise indicated.

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[1] BOYLE DRUG COMPANY (hereinafter BOYLE); MERCK SHARPE & DOHME ORTHOPEDIC CO., INC. (hereinafter MERCK); ORTHO PHARMACEUTICAL CORP. (hereinafter ORTHO); E. R. SQUIBB & SONS, INC. (hereinafter SQUIBB); SANDOZ, INC. (hereinafter SANDOZ); and MILES LABORATORY (hereinafter MILES).

[2] ABBOTT LABORATORIES (hereinafter ABBOTT); ELI LILLY AND COMPANY (hereinafter ELI LILLY); REXALL DRUG COMPANY (hereinafter REXALL); and UPJOHN COMPANY, INC. (hereinafter UPJOHN).

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STATEMENT OF THE CASE AND FACTS

In its opinion, the Fourth District Court of Appeal summarized the facts of the case as follows:

> The issue presented in this appeal is whether the appellant, Terry Lynn Conley, who was allegedly injured as a result of the ingestion by her mother of the drug diethylstilbestrol (DES), may state a cause of action against numerous DES manufacturers even though she is admittedly unable to identify the specific manufacturer of the drug her mother ingested.
>
> Ms. Conley filed an action against eleven defendants who manufactured the drug DES in 1955-56 and prior thereto. The action alleges that in 1955-56, before Ms. Conley was born and while she was still in the fetal stage, her mother was given DES. Ms. Conley alleges that her mother was administered the drug in Broward County, Florida. Years later Ms. Conley, who is also a Florida resident, was diagnosed as suffering from cervical adenosis and underwent surgery for the removal of most of her cervix as well as other precancerous and cancerous lesions and tumors. She alleged that her cancer is linked to the ingestion of the DES by her mother and that the drug was defective by reason of the cancer-causing agent it contained and the danger that agent presented to unborn children. She also alleged that she was unable to identify the manufacturer of the DES ingested by her mother. The trial court granted various motions to dismiss and motions for judgment on the pleadings because Ms. Conley was admittedly unable to identify the specific manufacturer of the drug her mother ingested. The only issue which Ms. Conley raises on appeal is whether she must allege the identity of the specific manufacturer of the drug in order to state a cause of action.

Conley v. Boyle Drug Co., Inc., 477 So.2d 600,601-602 (Fla. 4th DCA 1985). A more detailed account of the procedural and factual background follows.

The Plaintiff filed a complaint against eleven individual Defendants who manufactured the drug diethylstilbestrol[3] (hereinafter referred to as DES) during the period when Plaintiff was in utero,

[3] DES is a synthetic compound of the female hormone estrogen.

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claiming severe damages as a result of her mother's ingestion of the drug during her pregnancy (R.1-17). After various motions and other responsive pleadings were filed, the Plaintiff secured permission to nmend the complaint (R.51).

The first amended complaint (R.52-70) alleged inter alia that the Plaintiff's mother was administered the drug between June 1955 nnd March 27, 1956, while the Plaintiff was in the fetal stage and that the Plaintiff has been diagnosed as suffering from cervical adenosis and has been required to undergo surgery for the removal f most of her cervix as well as other precancerous and cancerous lesions and tumors.

The amended complaint further alleged that the various Defendants were being sued individually as the manufacturers of DES and as representatives of the class of drug manufacturers which have at any time between 1941 and the present manufactured, marketed, promoted or sold DES in the United States. It was alleged that the named Defendants were the manufacturers of a substantial share of the product sold for the purpose for which it was used, and that it aas the identical defective product that injured the Plaintiffs.

Plaintiffs further alleged in their complaint that well before DES was first marketed to the general public in 1941 and continuously throughout the period of such marketing to the present, Defendants knew or should have known that DES was carcinogenic; that the Defendants knew or should have known of a grave danger that DES ingested by a pregnant woman would or could be transmitted to an unborn child; and that the Defendants knew or should have known that

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.fter varying periods of latency, DES so transmitted would or could :ause precancerous or cancerous growths to attack the bodies of)ersons who had been exposed to the drug before birth.

It was further alleged that prior to the Federal Food and Drug \dministration's action in **1971** ordering the Defendants to cease \arketing and promoting DES as a miscarriage preventative, the)efendants acting individually and in concert promoted, approved, \uthorized, acquiesced and reaped profits from sales of the drug for \se by pregnant women for that purpose.

The complaint further alleged that the Defendants knew or should \ave known throughout that period that DES was neither effective nor)afe when used to prevent miscarriages; that the Defendants never :ested DES for its efficacy as a preventative of miscarriages or for .ts safety in terms of carcinogenic effects on pregnant women and on :hildren they would bear; and that although the Federal Food and Drug \dministration only authorized production of DES for use by pregnant vomen on an experimental basis, the Defendants nonetheless marketed)ES for such purposes without any warnings as to the experimental \ature of the drug as a miscarriage preventative and to the potential :arcinogenic effects on the unborn children.

The complaint further alleged that the Federal Food and Drug \dministration expressly warned physicians and the general public in **L971** that DES should not be used by pregnant women due to the :arcinogenic danger to their unborn children, based on hospital reports confirming that DES was the cause or strongly indicative :ause of cancer and other precancerous vaginal and cervical growths

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.n daughters exposed to DES before birth. The complaint further)ointed out that the condition suffered by the Plaintiff and others .s believed to strike after a minimum latency period of ten to :welve years, and that the precancerous lesions and tumors of the :ype suffered by Plaintiff are believed to be precursors or 'enerators of vaginal or cervical cancer which is potentially fatal.

Plaintiff alleged that despite the Defendants' knowledge or 'eason to know of the carcinogenic dangers, the Defendants continued .o market DES for use by pregnant women to avoid miscarriages without 'arning of its potential carcinogenic effects and without proper .esting; that the Defendants continued to market DES without notice hat it was only conditionally and experimentally approved, or that t had no proven efficacy or safety as a miscarriage preventive; 'ithout monitoring the carcinogenic side effects or such use; and 'ithout reporting those side effects to the Federal Food and Drug .dministration and the public.

The first amended complaint sought recovery from the Defendants ased upon their negligence in failing to conduct adequate tests, ssue warnings, monitor the medical history of persons exposed to ES before birth, and failing to record or report facts indicating hat DES is a carcinogenic threat to unborn children as they mature. he complaint further sought recovery based upon strict liability, lleging that DES was an unreasonably dangerous and harmful drug hen used for its advertised and intended purpose and that the regnant women and their attending physicians would and could not etect the harmful nature of DES unless clear warnings were expressly

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.ssued. The complaint further alleged that the Defendants failed to)btain the consent of the Plaintiff's mother or other pregnant women :o the experimental use of DES and that the Defendants breached :xpress and implied warranties that the drug was fit and safe for ts intended purpose.

It was also alleged that the Defendants were guilty of fraud in 'epresenting to pregnant women and their physicians by means of iterature enclosed in the container that DES was safe and suitable or the purpose intended, and that Defendants had violated provisions)f the Food and Drug Act regarding the manufacture, marketing and .ale of misbranded drugs. Finally, the Defendants were alleged to .ave engaged in a joint and concerted enterprise and an express or mplied agreement exploiting and adopting each others' testing, .arketing methods, promotional campaigns, lack of warning and other ortious failures to test and report. The first amended complaint emanded compensatory and punitive damages against each Defendant.

All of the various Defendants responded to the first amended omplaint by either a motion to dismiss or an answer and affirmative efenses. Defendant BOYLE filed a motion to dismiss/quash/strike R.359-363), alleging that service had not been properly perfected, hat there was a lack of personal jurisdiction since it did not lo business or otherwise have minimum contacts in Florida, and :inally that the complaint failed to state a cause of action because it failed to allege that BOYLE manufactured the DES in question.

Defendant ORTHO PHARMACEUTICAL also filed a motion to lismiss/quash/strike on essentially the same grounds (R.140-145).

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)efendant SQUIBB moved to strike certain portions of the complaint tnd also moved to dismiss the first amended complaint (R.71-73) for failure to state a cause of action on the grounds that the first tmended complaint failed to allege that SQUIBB produced the drug :ngested by the Plaintiff's mother. Defendants UPJOHN (R.92-93) and SANDOZ (R.89-91) filed similar motions. Defendant PARKE DAVIS also noved to dismiss the first amended complaint on the basis that it :ailed to allege that said Defendant manufactured or distributed the drug in question (R.164-166).

The following Defendants answered the first amended complaint and moved for summary judgment: ABBOTT (R.94-99,161); ELI LILLY (R.107-117,138-139); and REXALL (R.74,223). Defendant MERCK moved to dismiss for lack of jurisdiction as well as moving for summary judgment (R.196).

Hearing was held upon the various motions to dismiss and motions for summary judgment on September 7, 1982 (transcript appearing in :he Record at R.232-275). As a result of that hearing, the court leferred the motions for summary judgment and granted the motions to dismiss on the basis that the first amended complaint did not state a cause of action. The Plaintiff was given ninety days within which to amend (R.212). By separate order, the court also granted MERCK'S motion to dismiss for lack of personal jurisdiction (R.211).

The Plaintiff ultimately filed a second amended complaint in which she specifically alleged that due to no fault of her own, she was unable to identify the specific manufacturer of the DES ingested by her mother, but that she was informed and believed that the drug

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as produced from an identical formula utilized by all the Defendant rug companies (R.370).

The second amended complaint also contained an additional count or enterprise and/or industry-wide liability (R.376-377), in which he Plaintiff alleged that at the time of the manufacturing, arketing and selling of DES, there was an insufficient industry-wide tandard of safety and that each of the Defendants adhered to that tandard; that each of the named Defendants manufactured DES; that laintiff's injury was caused by that defective drug; and that the amed Defendants accounted for a high percentage of the DES on the arket at the time the Plaintiff's motion ingested it. Plaintiff urther alleged that all named Defendants jointly controlled the risk f harm to Plaintiff in that they adhered to an industry-wide tandard with regard to the safety features of DES, they had elegated some functions of safety investigation and labeling to thers, they had sold DES to each other to market under their own ames, and there was industry-wide cooperation in the manufacture of ES.

The second amended complaint further added a count for concerted ction (R.377-378) in which it was alleged that the Defendants' acts ad the effect of substantially encouraging or assisting the rongful conduct of the others, which in this case was the failure o adequately test and warn; that each Defendant knew the other efendants' conduct was tortious toward the Plaintiff, yet they ssisted and encouraged one another to inadequately test DES and to rovide inadequate warnings; that the Defendants' actions

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consciously paralleled each other in failing to fully test and warn of the dangers of DES; and that the Defendants' wrongful action in concert with the other drug manufacturers in testing and marketing DES was a direct and proximate cause of the Plaintiff's injury.

Plaintiff further added a count for market share liability (R.378-379) which essentially repeated the allegations of the count on enterprise and/or industry-wide liability, and further alleged that the Defendants were the manufacturers of a substantial share of the DES which the Plaintiff's mother might have ingested, and that each of the Defendants should be liable for the proportion of the injury sustained by the Plaintiff as represented by its share of the market.

Finally, the second amended complaint contained a count for alternative liability (R.379-380) which alleged that each of the Defendants' actions, although independent, was tortious, and that injury was caused to the Plaintiff by one of them; that the Plaintiff was unable to prove which Defendant caused her injury, but was substantially certain that one of the Defendants named herein caused her injury; and that the Plaintiff was entitled to a judgment based upon alternative liability.

The Defendants again challenged the second amended complaint on various grounds. Defendants BOYLE (R.420-4241, MERCK (R.411-4121, ORTHO (R.489-4981, SQUIBB (R.415-419) and SANDOZ (R.425-429) filed motions to dismiss. The motions of BOYLE, SQUIBB and SANDOZ were essentially predicated on the argument that the Plaintiff cannot identify the manufacturer of the specific brand of DES which she

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took; that the legal theories advanced by Plaintiff are not cognizable in Florid ; and that the Plaintiff was not a person at the time of the alleged wrongs and thus was without standing to assert her causes of action for express and implied warranty, fraud and conspiracy. In addition, the motions of those Defendants sought to strike the punitive damage claim and various specific paragraphs of the complaint (R.415-429). Defendant ORTHO'S motion to dismiss was based on similar grounds (R.489-498).

In addition, both Defendant ORTHO and BOYLE sought to quash service of process upon them and alleged lack of jurisdiction over their persons (R.420-424;489-498). Defendant MERCK moved to dismiss the second amended complaint with prejudice solely on the ground that there was no personal jurisdiction (R.411-412). Defendant PARKE DAVIS, as well as UPJOHN (R.455-460), also moved to dismiss the second amended complaint (R.482-483) on the basis that there was nothing new in the second amended complaint.

The remaining Defendants, ABBOTT (R.461), ELI LILLY (R.440), MILES (R.434), REXALL (R.396) and UPJOHN (R.455) answered the second amended complaint. Most of these same Defendants also moved for summary judgment (BOYLE at R.484; ABBOTT at R.468; ELI LILLY at R.407; REXALL at R.393; SQUIBB at R.477; UPJOHN at R.473; and SANDOZ at R.430). The motions for summary judgment were, again, essentially predicated on the argument that the Plaintiff could not identify the source of the DES which her mother ingested, and that none of the joint or collective liability theories was applicable. In addition, the defense of statute of limitation was raised.

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Upon hearing (transcript appearing at R.725-795), the court entered its order dated June 24, 1983 (R.657-658) in which it granted with prejudice the various motions to dismiss by Defendants SQUIBB, BOYLE, SANDOZ, MERCK and ORTHO, based on the Plaintiff's allegation that she could not identify the specific manufacturer of the DES alleged to have been ingested. The trial court further found that the allegations of the second amended complaint asserting a right to recovery under the concert of action, market share and enterprise theories could not legally suffice for allegations of legal causation.

In the June 24 order, the trial court also denied the motion to quash filed by Defendant BOYLE, and deferred ruling on all motions for summary judgment (R.658). Shortly thereafter, Defendant MILES moved for an order of dismissal (R.701) which the trial court also granted (R.705).

Thereafter, the remaining Defendants not encompassed within the June 24 order moved for clarification and modification (R.703,706,709,717). Additionally, those remaining Defendants filed notions for judgment on the pleadings (ELI LILLY at 797; REXALL at B00; UPJOHN at 804; ABBOTT at 831). Upon hearing (transcript in the Record at R.809-829), the trial court denied ORTHO'S motion for clarification (R.830), but entered judgment on the pleadings in favor of those remaining Defendants[4] (ABBOTT, ELI LILLY, REXALL and UPJOHN) (R.833).

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[4] Defendant PARKE DAVIS had previously been dismissed by stipulation (R.803).

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The Plaintiff appealed the orders and judgments below, and Defendants ORTHO and BOYLE filed a notice of cross-appeal directed to the June 24 order (R.723-724). The District Court of Appeal, Fourth District, issued a lengthy opinion[5] in which it expressed its concern that traditional theories of tort law were inadequate to redress the Plaintiff's injuries and certified to this Court the question of whether Florida should recognize a cause of action against a Defendant for marketing defective DES when the Plaintiff cannot identify the manufacturer of the particular dosage ingested.

In its opinion, the Fourth District discussed the various theories of liability advanced by the Plaintiff in support of her position and, after concluding that only the Supreme Court had the authority to adopt one or more of the theories advanced, recommended that a modified market share theory be adopted by this Court.

Plaintiff has invoked this Court's jurisdiction to review the decision of the Fourth District Court of Appeal. Defendants ORTHO and BOYLE have filed a cross-notice to invoke this Court's jurisdiction with respect to its cross-appeal, which was not addressed in the opinion of the Fourth District.

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[5] Reported at 477 So.2d 600.

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IMMARY OF GUMENT

TERRI LYNN CONLEY has sued a number of manufacturers of the drug DES, alleging that the drug was defective and dangerous when administered to a pregnant woman, and further alleging that she suffers from cancerous and pre-cancerous conditions as a result of her mother's ingestion of that drug while TERRI was in utero. She has admitted that she cannot identify which of the Defendants manufactured the particular pills her mother took, but further alleged that the DES was produced from an identical formula utilized by all the Defendant drug companies, and thus each of the Defendants was guilty of marketing a defective, unsafe drug which caused her injury.

The trial court held as a matter of law that Plaintiff's inability to identify the manufacturer of the particular dosages taken by her mother was fatal to her claim. The court dismissed the action with prejudice as to certain Defendants and entered judgment on the pleadings for those Defendants who had answered the complaint.

On appeal, the Fourth District affirmed based upon its conclusion that it did not have the authority to depart from established case law requiring identification of the manufacturer in a products liability case. However, that court made it clear that were it free to do so, it would relax the identification requirement in cases of this type, since the grievous wrong committed upon innocent victims of DES required that a remedy be afforded. Accordingly, the court discussed at length the theories which have

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been developed for that purpose in other jurisdictions, and recommended that this Court adopt a market share alternate liability theory in Florida. In essence, this theory presumes that each Defendant had an equal share of the Florida market, and unless they can prove that it did not manufacture DES at that time and place, such Defendants will be held jointly and severally liable for the Plaintiff's damages, but would be entitled to contribution from other manufacturers who shared in the relevant market. The Plaintiff would still be required to prove the inherent dangerousness and defectiveness of DES, regardless of which manufacturer produced it, and that DES ultimately caused the Plaintiff's injuries.

Plaintiff joins in that recommendation and respectfully urges this Court to hold that she need not identify the particular manufacturer, so long as she alleges and proves that (1) her mother took DES; (2) DES caused her injuries; (3) each of the Defendants produced the type of DES taken by her mother; and (4) that the conduct of the Defendants in producing the drug constituted a breach of a legally recognized duty to the Plaintiff. Each of those elements has been alleged in the complaint, and Plaintiff should not be shut out of court at this stage of the proceedings simply because of her inability to identify the manufacturer of the specific dosage involved.

The liability theory recommended by the Fourth District is a synthesis of several doctrines based on the Restatement (Second) of Torts §433B(3) and established in other jurisdictions, which have

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also recognized the injustice of imposing the almost always insurmountable burden of identification upon an innocent plaintiff who was still unborn at the time the drug was administered. Each of the theories discussed in this brief share that common concern. However, the market share alternate liability theory as refined by the court below seems best suited to Florida's developing products liability law, and Plaintiff urges its adoption by this Court.

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ARGUMENT

FLORIDA SHOULD RECOGNIZE A CAUSE OF ACTION AGAINST A DEFENDANT FOR MARKETING DEFECTIVE DES WHEN THE PLAINTIFF ADMITTEDLY CANNOT ESTABLISH THAT A PARTICULAR DEFENDANT WAS RESPONSIBLE FOR THE INJURY.

The question certified by the District Court of Appeal should be nswered in the affirmative. As the Fourth District pointed out in .tsopinion, Florida's constitution mandates in Article 1, Section :1 that for every wrong there must be a remedy. The Court went on :o state:

> This constitutional "guarantee" of a remedy is particularly compelling when the magnitude of the harm is great and the claimant is innocent of any conduct contributing to the injury. Here the consequences of the alleged drug defect are particularly devastating because the resulting cancer is life-threatening and the victim is not the direct consumer of the drug, but rather the consumer's off-spring. The circumstances are also unique in that the ill effects of the drug did not manifest themselves for years, thereby compounding the problem of identification of the particular manufacturer. Thus, in our view, if appellant's allegations are accepted as true, it is clear that traditional theories of tort law are inadequate to redress the appellant's injuries, primarily because of the requirement of identifying the specific wrongdoer. Someone has to pay. Is it to be the admittedly blameless child whose similarly innocent mother ingested the allegedly defective drug? Surely it is more appropriate that the producers of the drug, those who derive profit from its distributtion bear and share the risk of injury from its defects.

:onley v. Boyle, 477 So.2d at 602. Like the Fourth District, 'laintiff shares a concern for the "apparent lack of a remedy for a rievous wrong", Id. at 602, and believes that the requirement for dentifying the wrongdoer should be relaxed in situations such as hat presented in this case.

The issue raised in the present case represents a problem which as appeared with increasing frequency in cases around the country.

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Where, as here, a plaintiff suffers adverse long term effects from the use of a defective product which do not surface until many years after exposure to that product, and where the nature of the product renders identification of the source thereof practically impossible, the static application of traditional tort theories has in many cases precluded an innocent plaintiff from any recovery. This problem has most frequently arisen in cases involving exposure to asbestos and in prenatal exposure to drugs such as DES and Bendectin.

One of the initial problems confronting such plaintiffs who did not discover an injury until perhaps a generation after exposure to the defective drug, was the potential bar of a statute of repose. In Florida at least, that initial bar has been removed by this Court's holding that in such DES cases application of a statute of repose would be a denial of access to the courts. Pullum v. Cincinnati, Inc., 476 So.2d 657,659 (Fla. 1985); Diamond v. E. R. Squibb & Sons, Inc., 397 So.2d 671 (Fla. 1981). Still remaining, however, and crucial here, is the problem caused both by the passage of time and by the particular nature of the product involved, namely the impossibility of determining which of the DES manufacturers was responsible for producing the particular dosage involved in each individual case.

As the Plaintiff has alleged in her complaint, and as has been widely recognized in the cases on the subject,[6] DES was distributed

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6 Ferrigno v. Eli Lilly and Company, 75 N.J. Super. 551, 420 A.2d 1305 (1980); Sindell v. Abbott Laboratories, infra; Bichler v. Eli Lilly & Co., infra.

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widely throughout the United States in generic form. Because of the way prescription drugs are marketed in this country, neither the patient nor the physician is aware of the identity of the manufacturer, and indeed even the pharmacist frequently does not know who actually manufactured the drug when, as is often the case (and alleged here) the manufacturer sells its excess drugs to a redistributor or repackager. Federal law only requires that the name of the packager be placed on the container when shipped to the pharmacist. 21 U.S.C. §352(b); "Products Liability For Prescription Drugs", 23 Syracuse L.Rev. 887 (1972). Furthermore, even if the identity of the manufacturer were originally known, records generally no longer exist a generation later when the adverse effects of the drug begin to appear.

It is our contention that where, as here, the identity of the manufacturer of these drugs was unknown and irrelevant to the patient because of the way in which the defendants marketed the drugs, the resulting uncertainty as to identity of manufacturers should be borne by the defendants as a matter of law, rather than operating to wholly defeat innocent plaintiffs' rights to redress. Numerous courts have recognized and agreed with this position, although adopting different theories in the process, depending upon the facts of the individual case. We believe that ample precedent exists for this Court to take a similar course.

While four different labels have emerged for such theories (alternative liability, concert of action, enterprise liability and market share liability), and the complaint has separately alleged each

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of those theories, the rationale thereof is largely interlocking and interwoven.

Alternative Liability

The theory often referred to as "alternative liability" has long had acceptance in the law and is codified in Section 433B(3) of the Restatement (2d) of Torts, which provides:

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.

This represents a codification of the celebrated case of Summers v. Tice, 33 Cal.2d 80, 199 P.2d 1 (1948) in which the plaintiff was injured when two hunters negligently shot in his direction. While it could not be determined which of the hunters had fired the shot which injured the plaintiff, both defendants were held jointly and severally liable on the rationale that both were wrongdoers and both were negligent toward the plaintiff. The court held that it would be unfair to deprive the plaintiff of any remedy by requiring him to isolate the defendant responsible. The court shifted the burden of proof to the defendants, "each to absolve himself if he can." Id. at 4.

The Summers court in turn relied upon Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687 (1944), the equally well known case of a patient who awoke from surgery to find that he had suffered injury while unconscious, and sued the various doctors and nurses who attended him. The court held that he would not be required to identify the particular defendant and that under the doctrine of res

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ipsa loquitur, an inference of negligence arose that defendants were required to meet by explaining their conduct.

This type of approach has also been approved in Florida. In Holman v. Ford Motor Company, 239 So.2d 40 (Fla. 1st DCA 1970), the plaintiff's brakes failed and it was alleged that the fault lay with either the manufacturer or installer of a brake component. The doctrine of res ipsa loquitur was held to be applicable even though there were two possible defendants whose negligence could have caused the injury. The court cited with approval the case of Dement v. Olin-Mathieson Chemical Corporation, 282 F.2d 76 (5th Cir. 1960), wherein that court approved the use of a similar theory even where the source of the defective product was not identified. The Dement court held that the premature explosion of a dynamite charge was sufficient evidence of negligence on the part of either the maker of the dynamite or of the blasting cap to create joint liability on both manufacturers even though the specific negligent tortfeasor could not be shown.

Similarly, in Troupe v. Evans, 366 So.2d 139 (Fla. 1st DCA 1979), the plaintiff's spinal disc was allegedly ruptured while she was in the operating room. The court held that if the plaintiff could prove that her injuries did occur in the operating room, then someone in the operating room was negligent and it was a jury question as to which of the defendants would be responsible. The court cited to Davis v. Sobik's Sandwich Shops, Inc., 351 So.2d 17 (Fla. 1977), wherein the Supreme Court found that where at least one of the three defendants sued by the plaintiff must have been liable,

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the trial court properly directed a verdict on the issue of liability sgainst all defendants and properly instructed the jury to determine which defendant or defendants were negligent.

Various courts have applied this alternative liability theory as embodied in Restatement 433B(3) to the DES situation. In McElhaney v. Eli Lilly and Company, 564 F.Supp. 265 (D.S.D. 1983), the court held that South Dakota, which (like Florida) had adopted strict liability under Restatement 402A, would likely adopt 433B(3) as its burden of proof rule in such cases. The McElhaney court held that while the Section 433B burden of proof rule may not produce perfect results in all cases,

> It represents a reasonable application of the rationale which supports strict liability, given the unusual nature of the facts and circumstances presented here.

Id. at 271. The court made particular note of Comment (h) to Section 433B which acknowledged the need for modification of the rule to some extent

> because of complications arising from the fact that one of the actors involved is not or cannot be joined as a defendant, or because of the effect of lapse of time, ...The rule stated in subsection (3) is not intended to preclude possible modifications if such situations call for it.

The court approved the similar approach taken in the often cited case of Sindell v. Abbott Laboratories, 26 Cal.3d 588, 163 Cal.Rptr. 132, 607 P.2d 924 (1980), cert. den'd. E. R. Squibb & Sons, Inc. v. Sindell, 101 S.Ct. 285 (1980).[7] The McElhaney court quoted the following from Sindell to explain why Section 433B(3) should apply even though all possible tortfeasors had not been joined in the case:

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[7] The Sindell approach is generally described as the "market share liability" theory, to be discussed further, infra.

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> In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. Just as Justice Traynor in his landmark concurring opinion in Escola v. Coca Cola Bottling Company, ...recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances. The Restatement comments that modification of the Summers rule may be necessary in a situation like that before us.... [A] modification of the rule in Summers is warranted.

Sindell, supra, 607 P.2d at 936 [citation omitted].

An important distinction drawn in McElhaney was that between the question of causation and the question of identity of product source. The McElhaney court pointed out that the issue here is not really one of causation, upon which plaintiff traditionally bears the burden of proof, but rather identification of product source. There, as here, it was alleged that the injury was caused by DES, and that is an issue which Plaintiff will of course have to prove at trial. The question before that court and presently before this Court is thus not the question of what instrumentality caused the injury, but rather the identity of the source of that instrumentality.

Enterprise Liability

Section 433B(3) of the Restatement has also been employed as the basis for a somewhat different theory of liability referred to as the enterprise or industry-wide liability theory, exemplified in the case of Hall v. E. I. DuPont deNemours and Company, Inc., 345 F.Supp. 353 (E.D.N.Y. 1972). In Hall, the plaintiffs were thirteen children who

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were injured by the explosion of blasting caps in twelve separate incidents. The defendants were six blasting cap manufacturers who comprised nearly the entire blasting cap industry in the United States. In addition, there were a number of Canadian manufacturers who were not joined in the action. As here, the plaintiffs were unable to identify the particular manufacturer of the cap which caused injury. The Hall court found that liability on the part of all defendants could be predicated on several bases even though the particular manufacturer could not be isolated. First, the court noted that plaintiffs could (as they did in Hall) demonstrate an explicit agreement or joint action among the defendants with regard to lack of warnings, etc. (labeled a "concert of action" theory). Furthermore, the court held that if the plaintiff could show a tacit agreement by proof of defendants' parallel behavior, or their adherence to industry-wide standards which showed a joint control of the risk involved, the burden should properly shift to the defendants to disprove their liability. The Hall court, once again, relied upon Restatement 433B, and held that the plaintiff need only show a causal connection between the group-created risk and the injury caused by at least one member of the group. In other words, the plaintiff was required to show that the products were manufactured by the defendants and that each was negligent in so doing, but that the plaintiff need not identify which of the defendants manufactured the particular blasting cap which injured the plaintiff.

Concert of Action

An additional theory which would support liability in the present case is labeled the "concert of action" theory. Once again,

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:his is a traditional tort theory which has been adopted in Florida, although obviously upon different facts. In Skroh v. Newby, 237 So.2d 548 (Fla. 1st DCA 1970), plaintiff's decedent was killed when struck from behind when an automobile whose driver was allegedly racing with another vehicle. The court held that the second driver, even though he did not actually strike the deceased, could be held equally liable to him because of the joint activity of the two lefendants in causing the accident. The so-called concert of action :heory is further embodied in Restatement (2d) of Torts Section 876, which provides that a person may be held liable for the acts of mother if he

* * * *

> (b) 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
>
> (c) 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.

lean Prosser, in discussing this doctrine, wrote:

> All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. Express agreement is not necessary, and all that is required is that there be a tacit understanding....

Prosser, Law of Torts, Section 46 (4th Ed. 1971).

The facts of the DES cases require a certain modification of the standard concert of action rule. In Bichler v. Eli Lilly and Company, 436 N.Y.S.2d 625 (App. Div. 1981), the court recognized the special circumstances facing the majority of prospective plaintiffs

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allegedly harmed by DES and concluded that it did not strain the court's "sense of fairness" to allow a limited expansion of the doctrine of concerted action to cover this type of case "where the traditional evidentiary requirements of tort law may be insurmountable." Bichler, supra at 632. The court further noted:

> The specific problems presented by the widespread use of generic drugs, which render identification almost impossible to the user, let alone the ultimately harmed person, plus the absence of any uniform requirement for pharmacies to keep and maintain records over extended periods, cannot be permitted to prevent valid recoveries nor to allow some manufacturers to escape their liability altogether by means of this shroud of anonymity. We of this court, too, adhere to the view of Dean Pound that '[t]he Law must be stable but must not stand still.'

Id. at 632.

The court noted that modification of the concert of action doctrine was not without precedent, citing Hall v. E. I. DuPont, supra. The court further found that there was evidence in abundance of "conscious parallel activity" by the drug companies in seeking FDA approval of the DES for use in treating risks of pregnancy, "evidence from which may be inferred a tacit understanding." Bichler, supra at 633.

In the present case, the second amended complaint alleged that the various Defendants acted independently in committing the same wrongful acts of failing to test the product or to warn of its use; that those acts had the effect of substantially encouraging or assisting wrongful conduct of the others; that the action of the Defendants in failing to test and warn consciously paralleled each other; and that the Defendants' wrongful acts in concert with the

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other Defendants were the proximate cause of the Plaintiff's injury. These facts must be taken as true,[8] and if it be proven at trial that all Defendants were jointly negligent in failing to adequately test the DES before placing it on the market, or to properly warn physicians of the carcinogenic effects thereof when they should have learned of same, joint liability upon all DES manufacturers would be entirely appropriate under the above rationale.

Market Share Liability

The Sindell[9] case is credited with creating the "market share liability" theory. In reality, this appears to be a synthesis of the alternative liability and enterprise liability theories to a certain extent, although Sindell purported to reject the "enterprise" theory per se. The Sindell court was concerned that application of "an undiluted Summers rationale" would result in a possibility that none of the five defendants in that case produced the offending substance, and that the responsible manufacturer might escape liability. The court therefore held that it would be reasonable to measure the likelihood that any of the defendants supplied the product by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all for that purpose. The court therefore concluded that if the plaintiff joined the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to the defendants to demonstrate that they could not

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8 Venditti-Siravo, Inc. v. City of Hollywood, 418 So.2d 1251 (Fla. 4th DCA 1982).

9 Sindell v. Abbott Laboratories, supra.

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have made the substance would be significantly diminished. The court concluded that each defendant would be held liable for the proportion of the judgment represented by its share of the market unless it demonstrated that it could not have made the product which caused the plaintiff's injuries. This method would lessen the likelihood that the offending producer would escape liability, but yet would permit the innocent plaintiff to recover. The court reasoned that as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury. Sindell, supra at 936.

The question of whether the market share theory should be adopted in Florida was addressed by this Court in Celotex Zorporation v. Copeland, 471 So.2d 533 (Fla. 1985). In that case, this Court declined to apply the theory, based on its conclusion that the plaintiff had identified several of the named defendants as having manufactured the products that caused his injury. This Court specifically stated that it did not find it necessary to accept or reject the market theory approach under those circumstances. Celotex, supra at 539. In addition, the Court questioned the appropriateness of such a theory to asbestos cases, noting that there are inherent differences between asbestos products and the drug DES, for which the market share theory was developed. Id. at 537. The door was left open for consideration of that theory in a proper case, which we submit is the case at bar.

Market Share Alternate Liability

The market share liability theory was adopted by the Washington Supreme Court in a modified form, in Martin v. Abbott Laboratories,

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102 Wash.2d 581, 689 P.2d 368 (1984). In a hybrid which it called "market share alternate liability", the Martin court merged the two theories of liability, finding support for modification of the traditional alternate liability theory in Comment h, Restatement(2nd) of Torts Section 433B(3), at 446 (1964):

> The cases thus far decided in which the rule stated in Subsection (3) has been applied all have been cases in which all of the actors involved have been joined as defendants. All of these cases have involved conduct simultaneous in time, or substantially so, and all of them have involved conduct of substantially the same character, creating substantially the same risk of harm, on the part of each actor. It is possible that cases may arise in which some modification of the rule stated may be necessary because of complications arising from the fact that one of the actors involved is not or cannot be joined as a defendant, or because of the effect of lapse of time, or because of substantial differences in the character of the conduct of the actors or the risks which they have created. Since such cases have not arisen, and the situations which might arise are difficult to forecast, no attempt is made to deal with such problems in this Section. The rule stated in Subsection (3) is not intended to preclude possible modification if such situations call for it.

The Martin court concluded that the plaintiff need commence suit against only one defendant and allege that her mother took DES; that DES caused her injuries; that the defendant produced or marketed the type of DES taken by her mother; and that the defendant's conduct in producing or marketing the drug constituted a breach of a legally recognized duty to the plaintiff. The court held that the defendants would initially be presumed to have equal shares of the market, and would be entitled to rebut that presumption by establishing that their respective market share in the particular geographic market was some lesser figure. Under the Martin theory, each particular defendant is only liable for its share of the market

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as it relates to the total judgment; to the extent that other defendants fail to establish their actual market share, their presumed market share is adjusted so that 100 percent of the market is accounted for.

Even more recently, a Federal District Court in Massachusetts has adopted the Martin "market share alternate liability" theory, in McCormack v. Abbott Laboratories, 617 F.Supp. 1521 (D.C. Mass. 1985).

In reaching its decision, the McCormack court noted that lack of identification evidence in DES cases is rarely attributable to any fault on the part of the plaintiff, but results from the fact that DES was produced in a generic form, and that pharmacies and drug companies have not kept adequate records. The court further noted that "...one of the functions of the identification requirement -- separating wrongdoers from innocent actors -- is of minor importance in the situation before this court." McCormack, supra at 1525. The court went on to explain:

> By producing and marketing an allegedly defective drug, all the defendants contributed to the risk of injury to the public and consequently, the risk of injury to individual plaintiffs. Under the market share theory, a plaintiff must still prove that the defendants were negligent before the Court may proceed to apportion damages on the basis of market share. Thus, none of the defendants can be considered truly innocent actors.

McCormack, supra at 1525.

In the present case, which was decided after Martin but prior to McCormack, the Fourth District expressed its approval of the market share alternate liability theory adopted in Martin, and urged its serious consideration, with some alterations, by this Court. Recognizing that one of the major problems with the market share

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theory is the definition of the relevant market, the Fourth District suggested that the market be defined as the entire state of Florida.[10] Thus, any manufacturer that produced or marketed the drug in Florida would be held responsible "because it contributed to the risk of injury by making the pool of defective drugs available, even though it may not have caused the actual injury of a given plaintiff." Id. at 607. Any manufacturer would still be able to exonerate itself under traditional theories, if it could establish that it did not manufacture the actual drug ingested.

The Fourth District departed from the Martin case, however, to the extent of suggesting that manufacturers that are proven to be responsible for some percentage of the Florida market should be held jointly and severally liable to the plaintiff for all of her damages, rather than just a share thereof. The court noted that a manufacturer would still be entitled to contribution from other manufacturers. Such contribution would be based on the proportionate share of the Florida market which each manufacturer enjoyed from the earliest time DES was marketed in the area until the latest date of ingestion.

As was pointed out by both the Fourth District and the McCormack court, among others, some form of remedy is clearly necessary, and as between the injured plaintiff and the possibly responsible drug company, the latter is in a better position to absorb the cost of the injury. McCormack, supra at 1526; Conley, supra at 602. As the McCormack court noted, "The magnitude of the physical and

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[10] If the drug were ingested in another state, that state would be the relevant market area. Conley, supra at 607, note 6.

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psychological injuries which are at issue in DES cases counsels toward permitting a remedy under some form of a market share theory of liability." McCormack, supra at 1526. Plaintiff respectfully urges that this Court answer the certified question in the affirmative, and adopt as the law of Florida the market share alternate liability theory as it has evolved from Sindell, through Martin and McCormack, and as further refined and modified by the Fourth District Court of Appeal in the decision below in this very case.

"A Rose by Any Other Name"[11]

The courts have discussed many theories of relief under a variety of labels. Although the Plaintiff is urging this Court to adopt the theory approved by the Fourth District, the foremost concern is to have an available remedy regardless of its label.

The Supreme Court of Wisconsin, in Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis. 1984), was presented with a situation factually similar to ours. The court considered every theory presented in the case at bar and found each unsatisfactory for one reason or another. However, the court recognized the importance or necessity of affording a remedy to the plaintiff.

The Wisconsin court interpreted its constitution as providing that "when an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts...can fashion an adequate remedy." Id. at 45. The court reasoned that "[I]nherent

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11 "What's in a name?
That which we call a Rose
By any other name would smell as sweet."
Shakespeare, Romeo and Juliet Act 11, Scene 11, line 43.

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in the common law is a dynamic principle which allows it to grow and to tailor itself to meet the changing needs within the doctrine of stare decisis, which...did not forever prevent the courts from... applying principles of common law to new situations as the need arose," Id. Thereupon the court proceeded to fashion a remedy for one DES plaintiff employing aspects of comparative negligence and the various theories of liability notwithstanding the fact that the plaintiff could not identify the manufacturer of the DES that caused her injuries. Id. at 45.

This Court has repeatedly made it clear that in Florida, like Wisconsin, the common law can and will be changed when changed conditions and circumstances establish that it is unjust or has become bad public policy. For example, this Court did not hesitate to recede from its earlier contributory negligence rule once it became apparent that comparative negligence provided a more equitable system of determining liability, Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). Similarly, the Court abolished the no-contribution among joint tortfeasors rule in Lincenberg v. Issen, 318 So.2d 386 (Fla. 1975). This Court has also made it clear that the judiciary need not await action by the Legislature to modernize Florida law. Insurance Company of North America v. Pasakarnis, 451 So.2d 447 (Fla. 1984); Gates v. Foley, 247 So.2d 40 (Fla. 1971).

We urge this Court to recognize, as did the Fourth District, that traditional theories of tort law are inadequate to redress the injuries of a DES plaintiff, and to afford TERRI LYNN CONLEY an opportunity for relief regardless of its label. Under our

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;onstitution, every legal wrong warrants a remedy and every wrongly .njured plaintiff deserves a day in court. Article 1, Section 21, Florida Constitution. Given a choice between permitting guilty lefendants to be immune from liability at the expense of an injured)laintiff, and permitting the plaintiff to be made whole at the risk)f possibly misallocating liability percentages in some cases, we ire confident that this Court will choose the latter course. We ırge this Court to adopt the theory of liability suggested by the)istrict Court, and to hold that the Plaintiff should not have bee ;hut out of court simply because she does not know which brand of)ES her mother took.

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CONCLUSION

For the reasons set forth above, Plaintiff urges this Court to quash the decision of the Fourth District Court of Appeal affirming dismissal of her action, and to answer in the affirmative the question certified by that Court.

Respectfully submitted,

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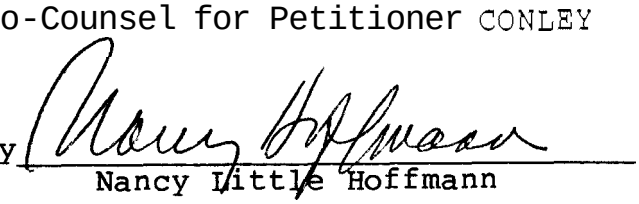
By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing and attached were served by mail this 13th day of January, 1986, upon those attorneys named on the attached Service List.

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