IN THE SUPREME COURT OF FLORIDA

CASE NO: 81,004

W.R. GRACE & CO.-CONN., etc.,

Petitioner,

vs.

THOMAS WATERS and ELOISE AGNES WATERS, his wife,

Respondent.

FILED
SID J. WHITE
MAY 13 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

BRIEF OF RESPONDENTS WATERS

COLSON, HICKS, EIDSON, COLSON, & MATTHEWS
4700 S.E. Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2310
Telephone: (305) 372-2310

COOPER & WOLFE, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-1807

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INTRODUCTION

Plaintiffs/Appellees THOMAS and ELOISE WATERS will be referred to as they stand in this Court, as they stood in the trial court and by name. Defendant/Appellant W.R. GRACE & CO. will be referred to as it stands in this Court, as it stood in the trial court and as Grace.

"R" refers to the record on appeal; "T" refers to the trial transcript; "A" refers to the appendix filed with Petitioner's brief. Emphasis is supplied by counsel unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Grace seeks review of an opinion of the Third District Court of Appeal which reinstated the Waters' claim for punitive damages in a products liability action against Grace.

The evidence and the trial. Waters was a construction worker who did tile and marble work in a variety of commercial and residential settings. (T. 396). During the 1950s and 1960s, Waters was exposed to a fireproofing product manufactured by Grace which contained asbestos. Although Waters did not personally handle fireproofing material, the fireproofing was done in sufficiently close proximity to him to cause him to contract asbestosis.[1/] (T. 421, 423).

Before trial, Grace moved for partial summary judgment on the issue of punitive damages. It claimed, among other things, that an asbestos defendant which once had been subject to a punitive damage award could not be subjected to a second award. (R. 51-52). The trial court granted the motion. (R. 66). At trial, the jury found for the Waters on a theory of negligent failure to warn.

Experts at trial agreed that a worker does not have to handle asbestos products to get asbestosis. (T. 224, 885). Workers who are merely exposed to asbestos dust also run the risk of contracting the disease. If the worker can breathe in asbestos dust, he risks contracting asbestosis. (T. 200, 224, 885). Even family

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1/ Asbestosis occurs because asbestos fibers are breathed into the lungs. (T. 200).

members may develop asbestosis because they breathe in the asbestos dust which contaminates the worker's clothes. (T. 224)

The medical reason for this is very simple. Asbestos dust contains small fibers of asbestos. (T. 203). These fibers penetrate the lung tissue when inhaled and embed themselves in the lung wall, creating scars. The scarring prevents the easy exchange of oxygen and carbon dioxide. (T. 200-05). Eventually, the lung may become so scarred that the victim dies from lack of oxygen. (T. 200).

Asbestosis is not curable. (T. 205, 324). It gets progressively worse, regardless of whether exposure to asbestos stops. (T. 210). There is no surgical procedure or medication to remove asbestos once it becomes embedded in the lung tissue. (T. 205). Only the symptoms may be treated. Nevertheless, medical check-ups are necessary to track the progress of the disease.

Evidence of Grace's Knowledge. Although punitive damages was not an issue at trial in light of the partial summary judgment, Waters introduced considerable evidence to prove that Grace knew about the hazards of asbestos as far back as the 1930s. (T. 748-54). Bradley Dewey, president of Dewey Chemical Company and later a director of Grace, noted in a 1938 letter to an official of the Department of Labor and Industries that he believed asbestosis to be "a very serious and sometimes fatal disease [that] should not be belittled." (T. 747-48).

> I have been through plants and competitors [sic] where conditions were so bad that vision from one end of the shop to the other was actually impaired by asbestos dust in the

air.

(T. 747).

A 1956 report issued by the Montana State Board of Health on the conditions at a Grace-affiliated plant confirmed these suspicions:

> The asbestos dust in the dust in the air is of considerable toxicity . . . . [A]s [asbestos-related] fibrosis increases, reduction in lung area causes a serious decrease in lung capacity or difficulty in breathing.

(T. 748-749).

Despite these and other similar warnings, Grace continued to manufacture and market asbestos-containing fireproofing material well into the 1970s. An internal memorandum which detailed the long-range plans of Grace's Construction Products Division drafted in late 1969 indicates approval of asbestos-related products even though "[a]sbestos fiber is a health hazard during the application of Monokote." (T. 753). A later piece of internal correspondence written in 1972 states that "[f]ormulation MK-3 contains some asbestos and can be used in location[s] where asbestos is not banned." Id.[2/]

[2/] Waters also introduced evidence that Grace employees were suffering from asbestos-related illnesses as a result of their exposure to its products. A letter written by the general manager of Grace's Zonolite Division in December 1968 concerning the health of a Grace worker, notes:

> Anon [the employee] is suffering from asbestosis. I have no knowledge about [his] previous employment, but the 18 years he has been with us has given him ample opportunity for exposure to asbestos . . . . I'm afraid we still may be exposing our employees to an

(continued...)

Grace's "corporate intent" was summed up in a 1970 document: "Stay unscrupulous, unethical, mean and selling Monokote [the product to which Waters was exposed]." (T. 754).

The Appeal. Grace appealed the adverse final judgment. The Waters cross-appealed. They argued that the trial court erred in granting summary judgment on the issue of punitive damages. The Third District reversed the punitive damage summary judgment. It held that a punitive damage claim was not foreclosed merely because the defendant had been the subject of a punitive damage award in another case. It sua sponte certified the following question to this Court as one of great public importance:

> Whether Florida law permits the award of multiple punitive damages in products liability cases.

The Dr. Tate Issue. The Waters' first witness was Dr. Charles Tate, a physician who saw Mr. Waters in 1986 and diagnosed his asbestosis. (T. 430). After the trial court accepted Dr. Tate as an expert, he explained how lungs work. (T. 137-43, 144-54). Before he could testify to anything else, Dr. Tate fainted. (T. 155, 160-61). He was treated in the courtroom by paramedics and taken to Jackson Memorial Hospital. (T. 157-58).

After Dr. Tate's collapse, the trial court spoke with counsel about Grace's inability to cross-examine him.

> [T]here has been, to the best of my recollection, no issue has been brought up relative

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[2/](...continued)
unnecessary health hazard.

(T. 750).

> to the Plaintiff in this case yet. It's been generally background information as to the lung situation.
>
> So as I take it, the defendants aren't harmed from loss of a right to cross examine because all there has been is background.
>
> You're nodding.

(T. 155). Grace's attorney responded: "I don't feel a concern that way." (T. 155).

After telling the lawyers it would consider mistrial motions the next morning, the court spoke to the jury. (T. 157). It told the jury that Dr. Tate was taken to the hospital and court would recess until the next morning.

> Leave the case here. These things happen. This is not an unusual occurrence, but it is certainly not usual either.
>
> So I simply ask you to include the doctor in your prayers as you leave, also the parties.
>
> Have a nice evening, relax, and I'll see you tomorrow morning.
>
> Go out that way so you won't have to meet up with the medical people. He's got good blood pressure and good pulse rate. He thinks he just fainted, but rather than take a chance, okay. Good night.

(T. 157-58). No one objected to these comments.

The next morning, the trial court heard the motions for mistrial. Grace's codefendant, U.S. Mineral, argued that a mistrial should be granted based on jury sympathy. But it prefaced its argument by reiterating that "there has been no prejudice developed during the interrogation of Dr. Tate." (T. 160). Grace joined in U.S. Mineral's argument and moved for a mistrial based

solely on jury sympathy. (T. 162-64).

The trial court decided it would question the jury to make sure it remained impartial. If the court was satisfied, trial would proceed. If the jury gave any indication it could not be impartial to either side, that would be "another story." (T. 166).

When the jury returned, the trial court spoke to it about the incident. It inquired about the effect of Dr. Tate's fainting on the jury's capacity to be fair and impartial to all the parties:

> I want to be satisfied by each of you that whatever occurred yesterday is not going to interfere with your ability to be fair in your listening to and judging this case.
>
> It is an unusual event that Doctor Tate fainted in the courtroom. It's not usual, but these things do happen with lawyers, judges, litigants. But the real test is whether or not those of us who have to sit in judgment are adversely affected by the event to the extent that they can no longer be fair and impartial. Any of you have any feeling that way or another?
>
> I do tell you Doctor Tate is alive and well. He's in Jackson and he's there for observation only. So we have kept track from that point of view and everything seems to be okay, but all the parties want to be satisfied that you can sit here and listen to this case and not allow what happened to Doctor Tate to interfere with your abilities to be fair and impartial.
>
> Is there any problem with any of you in that regard? Don't hesitate to say something because I don't want to spend days in a trial and have one of you worrying about this and then end up having to mistry it after three or four days. So if you have a problem with it, now is the time to tell me.
>
> Anybody? Okay. All right.

(T. 182-83). No one asked that the jurors be individually polled or that they give an oral response. See (T. 184-86). The trial court allowed the case to continue.

The Third District's Holding as to Dr. Tate. The Third District first held that Grace and U.S. Mineral failed to properly object:

> The judge specifically asked counsel if they felt prejudiced by not being able to cross-examine the witness. Attorneys for both USM and Grace agreed that no prejudice occurred since only background information had been elicited from the witness prior to his fainting. Because the attorneys failed to object to not being able to cross-examine the witness at trial, this argument was not properly preserved, and the defendants may not argue it on appeal.

(A. 4)(citations omitted). The court then held that, in any event, Grace was not prejudiced:

> Furthermore, whether a particular event requires a mistrial is a matter within the trial court's discretion. In the instant case, the trial court questioned the members of the jury to determine if they had been prejudiced, and then instructed them that the incident should not affect their consideration of the case. The trial court did not abuse its discretion in concluding that USM and Grace had suffered no prejudice, and, thereafter, denying their motions for mistrial.

(A. 4).

SUMMARY OF ARGUMENT

Florida law does not and should not limit the number of punitive damage awards that may be imposed in products liability cases to a single award. Neither the Florida legislature nor any of the courts of this state have given the slightest indication that they favor limiting punitive damage awards to the first plaintiffs. On the contrary, the courts that have ruled on the issue specifically have rejected Grace's position because it lacks a basis in law. The same is true of courts in other jurisdictions, which have refused either to limit punitive damage awards in mass tort actions to a single plaintiff or to abolish them altogether. Quite, simply, Grace has constructed its argument in reliance on the dissents in the cases which have rejected its position.

Allowing multiple punitive damage awards furthers the goal of punishing defendants who engage in malicious and socially harmful behavior. Currently, juries are free to distinguish between defendants who deserve to be repeatedly punished for their actions and those for whom a single punitive damage award is sufficient. Limiting punitive damages to a single plaintiff would eliminate this flexibility and allow manufacturers guilty of particularly egregious conduct to escape relatively unscathed.

The current system of awarding punitive damages also furthers the goals of punishment and deterrence. Under the present system, defendants are unable to predict with precision the number of punitive damage awards to which they may be subjected. This unpredictable feature of punitive damage awards functions as a

strong deterrent against anti-social behavior, both in terms of the particular defendant and other manufacturers of mass market products.

Grace's argument that it has been "adequately deterred" by the one punitive damage award to which it has been subjected and the compensatory damage awards for which it is responsible is unavailing and unpersuasive. Courts have uniformly held deterrence to be a general, rather than a specific, concept. The goal is to deter manufacturers in general, not just Grace, from the type of conduct involved in this case. Thus, whether Grace has stopped manufacturing the product that is the subject of this lawsuit has absolutely no bearing on whether multiple punitive damage awards are an effective deterrent against corporate misconduct in general.

Moreover, claims by Grace that multiple punitive damage awards will force it into bankruptcy are vague and overblown. There is nothing to substantiate Grace's position that the financial difficulties faced by asbestos manufacturers are the result of multiple punitive damage awards. Nor is there any evidence that Grace itself is suffering under the weight of such awards. For all the Court knows, Grace may actually be thriving despite the number of asbestos claims filed against it.

Finally, Grace is not without power to limit its punitive damage exposure. Should the issue of punitive damages ultimately go to trial, Grace has the option of presenting evidence to the jury of prior punitive damage awards. It also has the opportunity

to seek post-trial review of an award it deems excessive or imposed in violation of statute or common law limitations. Until a jury actually imposes a punitive damage award in this case, however, any analysis of the constitutionality of such an award would be premature.

This Court should not reach the issue concerning Dr. Tate because the Third District did not certify it. It does not conflict with any appellate decisions. The issue is a routine appellate matter.

In any event, this Court should affirm even if it reaches the issue concerning Dr. Tate. The trial court did not abuse its discretion in denying the mistrial motions. The trial court has discretion to decide whether an unexpected medical event involving a witness will preclude the jury from being impartial. Here, the court made that decision only after it instructed and questioned the jurors. Its determination that Grace was not prejudiced was not an abuse of discretion.

Moreover, Grace waived its claim of prejudice due to the inability to cross-examine Dr. Tate. Grace agreed that this inability did not prejudice them. Its attempt to circumvent this waiver by claiming it did not know it would be prejudiced until the medical experts mentioned Dr. Tate's diagnosis and the medical history he took should be rejected. Grace did not renew its motions on this ground. In any event, Dr. Tate's testimony was limited to explaining how lungs work. He said nothing about his diagnosis or Mr. Waters' medical history. Grace suffered no legal

prejudice from being unable to cross-examine Dr. Tate about matters not raised on direct examination.

Nor was Grace prejudiced by the court's innocent comment that the jurors should keep Dr. Tate and the parties in their prayers. Grace certainly never complained about this comment to the trial court. Its complaint now comes too late.

ARGUMENT

FLORIDA LAW DOES NOT AND SHOULD NOT LIMIT THE NUMBER OF PUNITIVE DAMAGE AWARDS IN PRODUCTS LIABILITY CASES TO A SINGLE AWARD.

A. There is no precedent in Florida or other jurisdictions for limiting punitive damage awards to a single plaintiff.

Conspicuously absent from Grace's brief are any cases which hold that multiple punitive damage awards should not be permitted in products liability cases and that only a single award should be allowed. Such an omission is not surprising, given the extent to which courts have opposed limiting punitive damages to a single plaintiff. It is, however, indicative of just how weak Grace's position is in this case.

Florida courts have repeatedly rejected broad-based attacks on multiple punitive damage awards in mass tort situations. In Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242 (Fla. 1st DCA 1984), the First District declined to carve out a "special exemption from punitive damages" for defendants in mass market tort cases. The court noted that defendants in such cases were not precluded from introducing evidence of prior punitive damage awards at trial, and that any attempt at imposing a limit on punitive damages would "not comport with the traditional functions of the court and jury." Id. at 253.[3/]

[3/] The court also rejected John-Manville's argument that it should not be subjected to punitive damages because it was no longer manufacturing any asbestos-containing products. "[P]unitive damages operate not only to punish the actual wrongdoer but, by way of example, to deter others from committing similar wrongs." Id. at 252.

Janssens was followed two months later by Celotex Corp. v. Pickett, 459 So. 2d 375 (Fla. 1st DCA 1984), aff'd, 490 So. 2d 35 (Fla. 1986), a case which involved another asbestos manufacturer. Celotex argued that exposure to multiple punitive damage suits would force the company into bankruptcy and prevent future plaintiffs from receiving compensation for their injuries. However, the court refused to accept the defendant's argument.

> We agree with this Court's recent opinion in Janssens . . . and decline to adopt a contrary view immunizing asbestos companies, and more particularly appellant, from punitive damage awards in mass tort litigation.

459 So. 2d at 377.

More recently, in Baione v. Owens-Illinois, Inc., 599 So. 2d 1377, 1378 (Fla. 2d DCA 1992), the Second District reinstated a claim for punitive damages which the trial court had stricken solely because punitive damages previously had been assessed against the defendant in other cases. Citing Janssens as precedent, the court proclaimed:

> We know of no authority which would support the striking of a claim for punitive damages, as a matter of law, for this sole-stated reason. To the contrary, punitive damages are appropriate in asbestos litigation . . . .

Id.

The situation is the same in every jurisdiction that has had the opportunity to address the issue. See Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991)(rejecting challenge by asbestos manufacturer to a Texas court's decision to subject it to

multiple punitive damage awards)[4]; Wammock v. Celotex Corp., 826 F.2d 990 (11th Cir. 1987)(same result under Georgia law); City of Greenville v. W.R. Grace & Co., 640 F.Supp 559, 566 (D.S.C. 1986), aff'd, 827 F.2d 975 (4th Cir. 1987)(punitive damages appropriate against manufacturer of asbestos products even though other similar claims pending against the defendant); Hanlon v. Johns-Manville Sales Corp., 599 F.Supp. 376, 380 (N.D. Iowa 1984)("This Court feels . . . that the defendants have provided no direct authority for the position that . . . punitive damages [in cases] involving multiple claimants in multiple jurisdictions should be limited:); Froud v. Celotex Corp., 437 N.E.2d 910 (Ill.Ct.App. 1982)(defendants should not be relieved of liability for punitive damages "merely because, through outrageous misconduct, they may have managed to seriously injure a large number of persons"); State ex rel. Young v. Crookham, 618 P.2d 1268 (Or. 1980)("like every other court that has considered it, we reject the one bite/first comer solution as an inappropriate remedy" to punitive damage awards where alternative means of mitigating the impact of such awards exist). As the Fifth Circuit succinctly summarized: "The simple fact of the matter is that no appellate court has accepted the defendants' theory in a reported decision." Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 405 (5th Cir. 1986).

Even the cases on which Grace itself relies to support a

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[4] Glasscock noted that the defendant's arguments had been rejected previously by that circuit and that there was "no principle in law limiting recovery of punitive damages to the first claimant." 946 F.2d at 1097.

change in the law based on its public policy arguments explicitly reject the idea of limiting punitive damage awards to first-time plaintiffs:

> We know of no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments . . . . [N]either does it seem fair or practicable to limit punitive recoveries to an indeterminate number of first comers.

Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967).

Grace cites a number of cases for the proposition that multiple punitive damage awards should be outlawed in Florida. However, its "authority" consists almost entirely of dissenting opinions, e.g., Celotex Corp. v. Pickett, 490 So. 2d at 39, Pacific Mutual Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991) and dicta, see, e.g., Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832 (2d Cir. 1967), Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985), aff'd, 781 F.2d 394 (5th Cir. 1986). The few cases Grace cites that actually address the issue of multiple punitive damage awards in asbestos cases favor allowing juries to impose such awards -- precisely the opposite of what Grace advocates in its brief. See Racich v. Celotex Corp., 887 F.2d 393, 397 (2d Cir. 1989); State ex rel. Young v. Crookham, 618 P.2d at 1268; Leonen v. Johns-Manville Corp., 717 F.Supp. 272 (D.N.J. 1989); Baione v. Owens-Illinois, Inc., 599 So. 2d 1377 (Fla. 2d DCA 1992).

The remaining cases Grace cites either have nothing at all to

do with punitive damages or are inapposite to the issue before the Court. See, e.g., Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517 (Fla. 3d DCA 1985)(damages for future risk of cancer not recoverable); In Re School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986)(advocating class action certification in mass tort litigation); Mercury Motors Exp., Inc. v. Smith, 393 So. 2d 545 (Fla. 1981)(employer not vicariously liable for punitive damages where misconduct was solely attributable to acts of employee); Lohr v. Byrd, 522 So. 2d 845 (Fla. 1988)(punitive damages cannot be imposed on innocent heirs or creditors of a decedent's estate); In re: "Agent Orange" Product Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983), aff'd, 818 F.2d 145 (2d Cir. 1987)(discussing punitive damage awards in non-asbestos context); In re: N. Dist. of California "Dalkon Shield" IUD Products Liab. Litig., 526 F.Supp. 887 (N.D.Cal. 1981), rev'd on other grounds, 693 F.2d 847 (9th Cir. 1982)(same).

This is not to say that courts are unaware of, or insensitive to, the problems posed by mass tort litigation. See, e.g., Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 406 (5th Cir. 1986)(noting that relief sought by asbestos manufacturer against multiple punitive damage awards was more properly granted by state or federal legislature). However, courts have uniformly declined to interfere in what they rightfully perceive as a matter properly left to Congress or state lawmakers. See Racich v. Celotex Corp., 887 F.2d at 399 ("[W]e are here asked to hold, in effect, that the common-law standards applied by the courts of New York for imposi-

tion of punitive damages are unconstitutional, and that our own cases applying that law were in error. This would be a far-reaching holding indeed, particularly in the context of mass tort litigation that suggests the need for a uniform, national rule on the issue. Under all the circumstances, we believe that such a step, if it is to be taken . . . is best left for Congress or for higher judicial authority").

Indeed, the Florida legislature's silence during the last decade on what is clearly a matter of public policy suggests that the legislature does not deem such a limitation on punitive damages appropriate. The legislature has not been afraid to legislate concerning of punitive damages. See Fla.Stat. § 768.73(1)(a) (presumptively limiting the size of punitive damage awards to three times the amount of compensatory damages); Fla.Stat. § 768.72 (requiring evidentiary basis before punitive damages can be pled); Fla.Stat. § 768.73(2)(allocating a portion of every punitive damage award to state).

If the legislature truly believed the punitive damage situation was as severe as Grace has portrayed it, it certainly could have moved to either limit punitive damage awards to a single plaintiff or to abolish them from mass tort litigation altogether. That the legislature has seen fit to do neither while simultaneously imposing these other statutory restrictions on punitive damage awards can only mean that it considers the current laws governing punitive damage awards adequate and the public policy be-

hind those laws appropriate.[5/]

This Court noted in Carter v. City of Stuart, 468 So. 2d 955, 957 (Fla. 1985):

> Deciding which laws are proper and should be enacted is a legislative function. How and in what manner those laws are enforced is, in most instances, a judgmental decision of the executive branch. The judicial branch should not trespass into the decisional process of either.

See also Orr v. Trask, 464 So. 2d 131, 135 (Fla. 1985)("Just as we would object to the intrusion of the executive or legislative branches into this Court's authority to promulgate rules of court procedures or to discipline parties before the courts as in contempt proceedings, we must be equally careful to respect the constitutional authority of the other branches"); Barnes v. B.K. Credit Serv., Inc., 461 So. 2d 217, 219 (Fla. 1st DCA 1984) ("Courts are never permitted to strike down an act of the Legislature because it fails to square with their individual social or economic theories or what they deem to be sound public policy") (emphasis added).

Moreover, limiting punitive damages to a single plaintiff would undermine the intent of § 768.73, which states that punitive awards in excess of three times the compensatory award are pre-

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[5/] Grace maintains that the legislature's hands are tied by "parochial concerns." Brief of Grace at 31 (citing Dunn v. Hovic, No. 91-3838, 1992 WL 228875 (3d Cir. Sept. 18, 1992), vacated and reh'g en banc granted, (3d Cir. Oct. 8, 1992)(Weis, J., dissenting)). Were this the case, however, the legislature never would have acted to limit punitive damage awards at all. Obviously, the legislature's activity in this area proves that it is not afraid to act when it deems such action appropriate.

sumptively excessive. Section 768.73 reflects the legislature's belief that defendants ought to be punished in proportion to the amount and degree of harm they cause. The greater the injury, the more the defendant ought to be punished. The defendant's rule, however, would effectively emasculate that policy, since total punitive damage liability would be limited to three times the compensatory damages sustained by the first plaintiff to sue.[6/] The end result is that companies that commit heinous acts over a prolonged period of time would be rewarded for their misconduct -- a result the legislature clearly did not intend when it adopted § 768.73.

In sum, the legislature has stated its position on the issue of multiple punitive damages. There is simply no justification for this Court to interfere with the public policy decisions inherent in that position.

B. Even if there were precedent for lim-

[6/] Grace's proposed rule limiting punitive damages to the first plaintiff, combined with the legislature's "three times compensatory" restriction in § 768.73, renders the award of punitive damages a game of chance, bereft of any logic. Suppose two personal injury claims arise from use of the same product. Claim A is worth $1,000,000 in compensatory damages; claim B is worth $100 in compensatory damages. Claim B is tried first. Pursuant to Fla.Stat. § 768.73, a punitive award for claim B is limited to $300 (assuming no clear and convincing evidence sufficient to exceed the § 768.73 limit). Grace's argument, if adopted, would bar punitives when Claim A is tried thereafter. Thus, total punitives would be limited to $300.

Suppose, however, that Claim A is tried first. Pursuant to § 768.73, a punitive award for claim A is limited to $3,000,000. When Claim B is tried thereafter, punitives for that claim would be barred. Thus, total punitives would be limited to $3,000,000. These arbitrary results, determined solely by which claim is tried first, make no sense at all.

iting punitive damage awards to a single plaintiff, this Court should nevertheless decline to adopt such a rule because it would undermine the goals of punishment and deterrence.

This Court has long held that punitive damages are an effective means of punishing a defendant whose conduct is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others. Winn & Lovett Grocery Co. v. Archer, 171 So. 214 (1936).[7/] Punitive damages play a vital role in deterring anti-social behavior. See Johns-Manville Sales Corp. v. Janssens, 463 So. 2d at 247 (quoting St. Regis Paper Co. v. Watson, 409 So. 2d 75 (Fla. 1st DCA 1982), rev'd on other grounds, St. Regis Paper Co. v. Watson, 428 So. 2d 243 (Fla. 1983)). They also encourage companies to take affirmative steps to promote product safety. See Wammock v. Celotex Corp, 826 F.2d at 990. That these goals are more than mere abstractions is demonstrated by the repeated emphasis courts place on them when upholding punitive damage awards. See, e.g., American Cyanamid Co. v. Roy, 466 So. 2d 1079, 1082 (Fla. 4th DCA 1984), modified, 498 So. 2d 859 (Fla. 1987)("the object of punitive damages is to punish the

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7/ Carraway v. Revell, 116 So. 2d 16, 20 (Fla. 1959) held that punitive damages are appropriate if the defendant's negligence is "of a gross and flagrant character, evincing reckless disregard of human life or of the safety of persons exposed to its dangerous effects, or there is that entire want of care which would raise the presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or that reckless indifference to the rights of others which is equivalent to an intentional violation of them." See also White Constr. Co. v. DuPont, 455 So. 2d 1026 (Fla. 1984).

defendant and by his example deter him and others from similar future conduct"); Dorsey v. Honda Motor Co. Ltd., 655 F.2d 650, 658 (5th Cir. Unit B 1981)(punishment and deterrence appropriate basis for awarding punitive damages in Florida).

In the area of products liability, punitive damages function as a particularly effective deterrent against anti-social behavior precisely because they are so difficult to predict. This is true, regardless of whether the product is still being manufactured at the time the award is issued.[8/] State ex rel. Young, 618 P.2d at 1272. Because a jury has the option of deciding whether to award punitive damages in each case, a defendant in a mass market tort action never knows to what extent, and how frequently, he can expect to be punished.[9/] This uncertainty functions as a strong deterrent against anti-social conduct in the mass market context, since product manufacturers are forced to consider the possibility of being punished not merely once, but repeatedly, for their behavior.[10/]

A rule which limits punitive damage awards to first time plaintiffs, however, would destroy much of that uncertainty -- as

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[8/] Florida recognized the propriety of punitive damages in products liability cases in 1981. See Dorsey v. Honda Motor Co., Ltd., 655 F.2d 650 (5th Cir. Unit B 1981).

[9/] Fla.Stat. § 768.73 (1992) does impose some limitations on the amount of punitive damages a jury may award. However, a defendant's total punitive damage liability is difficult to prospectively ascertain because those limitations create only a rebuttable presumption that a verdict is excessive.

[10/] Punitive damages also function as an effective deterrent because it is difficult to insure against them. Fischer v. Johns-Manville Corp., 512 A.2d 466, 477 (N.J. 1986).

well as a good deal of the deterrence that goes with it. If manufacturers were able to forecast the amount of punitive damages for which they might be liable, they are likely to end up factoring that figure into the price of the product, destroying much of the incentive for removing dangerous products from the market. Leonen v. Johns-Manville, 717 F.Supp. 272, 284 (D.N.J. 1989); Martin v. Johns-Manville Corp., 469 A.2d 655, 663 (Pa.Super.Ct. 1983)(threat of multiple punitive damage awards forces a prudent manufacturer intent on maximizing profits to hesitate before marketing a known defective . . . or an untested product). On the other hand, if manufacturers were forced to risk being subjected to multiple punitive damage awards, as is presently the case, they would be less likely to engage in conduct which they know poses a serious threat to human life.[11/]

Limiting punitive damage awards to first time plaintiffs would also undermine the punitive aspect of such an award. Under the present system, a jury may consider, but is not required to take into account, evidence of prior punitive damage awards. See, e.g., Rinaldi v. Aaron, 314 So. 2d 762 (Fla. 1975). Such discretion enables the jury to mete out punishment, within statutory limits. See Fla.Stat. § 768.73. Thus, a jury under the

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11/ Multiple punitive damages are especially important in Florida because of the statutory prescriptions on the size of punitive damage awards. See n.5, supra. If defendants were limited to one punitive damage award, it would be fairly simple for them, using the 3:1 ratio prescribed by § 768.73, to determine their punitive damage liability in advance. This amount could in turn be factored into the cost of manufacturing the dangerous product, effectively insulating the defendant from financial harm.

present system could subject a defendant who commits a particularly egregious act to multiple punitive damage awards, while declining to award punitive damages in cases where it feels the defendant has been adequately punished. Id.

The system proposed by the defendant, however, would eliminate crucial distinctions between defendants and turn punishment into a creature of chance. Instead of basing the total amount of punitive damages on the nature of the defendant's conduct, punitive damages would turn on the extent of the injury of the first person who happened to sue. If that person were severely injured, a company could be hit with a significant punitive damage award. However, if the person were only modestly injured, that same company could escape from punitive damage liability relatively unscathed -- even if successive plaintiffs suffered much more serious injuries. See State ex rel. Young v. Crookham, 618 P.2d at 1272. The end result is that even if a jury felt a defendant deserved to be repeatedly punished because of the nature of its conduct, it would be effectively prevented by law from imposing such a penalty.[12/]

[12/] Amicus Product Liability Advisory Counsel, Inc. proposes a complicated series of presumptions which would preclude a second punitive damage award if the first punitive damage award punished a defendant, not just for the injury to the first plaintiff, but also "for harm caused to other individuals by the product line." However, the simple fact is that in Florida, § 768.73 precludes a jury from awarding punitive damages based on the compensatory damages incurred by such other individuals. If a plaintiff suffers $1,000 in damages and shows a jury that 100 other people suffered $1,000 of damages each, for a total of $100,000, Fla.Stat. § 768.73 limits a Florida award of punitive damages to $3,000, i.e., three times the plaintiff's own compensatory award (unless evidence of wrongdoing "clear and convincing").

Moreover, limiting punitive damages to a single plaintiff is unnecessary because juries already have the power to impose such limits if they deem them appropriate. Although punitive damage awards are an option, they are by no means mandatory. Indeed, a jury presented with sufficient evidence that a company has been adequately punished might well be inclined not to award additional punitive damages against it.[13/]

Finally, limiting punitive damages to first-time plaintiffs is simply unfair. There is no reason why an individual who suffers injury as a result of using a harmful or defective product should be entitled to recover punitive damages from a defendant simply because he is accidentally the first one to receive a jury verdict. See State ex rel. Young v. Crookham, 618 P.2d at 1272 (Ore. 1980)("This court cannot endorse a system of awarding punitive damages which threatens to reduce civil justice to a race to the courthouse steps"). This is particularly true in the context

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13/ Amicus Product Liability Advisory Council, Inc. suggests in its brief at 27 that allowing a jury to consider prior punitive damages award, the approach taken by the Restatement (Second) of Torts § 908 comment e, does not work because a jury would improperly consider such prior awards on the issue of liability. However, courts and juries often face evidence which is admissible on one issue and inadmissible on another. Net worth evidence is admissible on the issue of punitive damages, but inadmissible and potentially prejudicial on the issue of liability and damages. Rinaldi v. Aaron, 314 So. 2d at 763. Evidence of prior punitive damage awards simply presents the same problem. If an appropriate cautionary instruction is insufficient to cure any prejudice, bifurcation might be appropriate -- if the jury determines liability, it could then receive additional punitive damage evidence (i.e., net worth evidence and evidence of prior punitive damage awards) and then decide the issue of punitive damages. See Jackson v. Johns-Manville Sales Corp., 781 F.2d at 407 n.16; Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir. 1990).

of asbestos cases, where plaintiffs often do not discover their injuries until years after they have occurred.[14/]

Multiple punitive damage awards keep companies on their toes. They also reduce the likelihood that companies will write off the public's injury as a cost of doing business. Allowing jurors to retain discretion over punitive damage awards is essential if the concepts of punishment and deterrence are to have any meaning whatsoever.

C. The jury should determine whether multiple punitive damages are appropriate in this case.

Grace argues that multiple punitive damages are inappropriate in this case because it cannot be deterred from manufacturing a product it no longer produces and because multiple punitive damages will wreak financial havoc on it and other asbestos manufacturers. Brief of Grace at 23. Alternatively, Grace argues that imposing multiple punitive damage awards on it would be unconstitutional because multiple punitive damage awards violate the due process clause of the United States Constitution and the notion of "fundamental fairness." Brief of Grace at 30.

Both these arguments have been repeatedly considered and rejected by courts in this state and other jurisdictions. Further, this Court should reject Grace's arguments because they are inconsistent with the goals of punitive damages and make for unsound public policy.

[14/] It is irrelevant that 35% of the total award for punitive damages goes to the state, see Fla.Stat. § 768.73, since the plaintiff would still receive 65% of whatever sum he was awarded.

1. Deterrence applies to other manufacturers as well as to Grace.

Whether out of ignorance or a desire to avoid liability, Grace demonstrates a fundamental lack of understanding of the concept of deterrence. In arguing that it has been sufficiently deterred by the imposition of a single prior punitive damage award, Grace ignores the essential nature of deterrence in the context of products liability cases. The overwhelming majority of states, including Florida, view deterrence in general, rather than specific, terms. As Wammock v. Celotex Corp., 826 F.2d 990, 993 (11th Cir. 1987)(applying Georgia law) stated:

> Since National Gypsum no longer produces products containing asbestos, National Gypsum contends that punitive damages as a specific deterrent are no longer necessary. National Gypsum is incorrectly narrowing the deterrent impact of punitive damages. . . . Punitive damages act as a specific deterrent in both specific and general ways. . . . Punitive damages serve to deter manufacturers from accepting the risks of paying compensatory damages rather than changing the business practice which would result in extra cost.

See also Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 403 (5th Cir. 1986)(punitive damages serve as a mechanism "so that others may be deterred from the commission of similar offenses"); Campbell v. A.C. and S., Inc., 704 F.Supp 1020, 1023 (D.Mont. 1989)("the deterrent effect sought to be accomplished goes beyond the simple attempt of deterring these particular defendants from repeating the same tortious conduct . . . to the public in general); Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 816 (6th Cir. 1982)("whether a defendant's particular course of conduct has

ceased is irrelevant to the accomplishment of [the] broader purpose" of deterring others from similar conduct); City of Richmond, Va. v. Madison Management Group, 918 F.2d 438, 456 (4th Cir. 1990)(purpose of Virginia punitive damage award is not simply to deter the wrongdoer from future wrongdoing, but "to display to others an example of the consequences they may expect if they engage in similar conduct"); Johns-Manville Sales Corp. v. Janssens, 463 So. 2d at 252 ("punitive damages operate not only to punish the actual wrongdoer but, by way of example, to deter others from committing similar wrongs").

Thus, even if Grace were correct in its claim that it had been sufficiently deterred from manufacturing dangerous products -- which it is not -- multiple punitive damages would still be appropriate because they would serve as an effective deterrent against misconduct by other manufacturers.[15/]

Moreover, Grace has offered no evidence whatever to demonstrate that the moral and business standards in operation back when it was manufacturing fireproofing material were any different than they are today, or that the conduct in question would have been considered any less odious by a jury at that time. Fischer

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15/ Multiple punitive damage awards are also an effective means of deterring Grace from acting in a similarly irresponsible manner with respect to other products it currently manufactures or intends to manufacture in the future. Martin v. Johns-Manville Corp., 469 A.2d 655 (Pa.Super.Ct. 1983). By its own admission, Grace remains a financially solvent company. Brief of Grace at 22. Although the record does not reveal what products the company currently manufactures, it is likely, given the company's size and resources, that it is still engaged in the manufacture of mass market products.

v. Johns-Manville Corp., 512 A.2d 466, 475 (N.J. 1986). Had Grace lacked knowledge of the hazards of asbestos before this suit was filed, it conceivably might have been able to justify exposing the plaintiff and other users of its product to asbestos. However, there is no way that it could justify deliberately concealing knowledge of a known hazard over a period of years.[16/]

2. Grace's fears of mass insolvency are unsubstantiated.

Grace's arguments concerning its fears of future insolvency are equally unavailing. Grace offers no evidence whatever that it is currently suffering financial hardship as a result of prior punitive damage awards. Grace points to two prior punitive damage awards in its brief as evidence that it is being destroyed by punitive damages. Brief of Grace at 2. But one of those awards was reversed on appeal. See Mercer Univ. v. Nat'l Gypsum Co., 877 F.2d 35 (11th Cir. 1989). The record does not show whether the other one has been paid. Indeed, Grace appears to be weathering the punitive damage "onslaught" rather well.[17/]

16/ Although the issue of punitive damages was never tried because the trial court entered summary judgment, the record is nevertheless replete with evidence that Grace officials knew of the dangers of asbestosis as early as 1938. See generally (T. 746-54). See also Statement of Facts, supra at 2-4.

17/ Grace also fails to address the issue of how courts would determine what constitutes a "prior award of punitive damages." For example, Grace's motion for summary judgment was granted because of the punitive damage award in Mercer Univ. That award was reversed on appeal while this case was pending on appeal. See Mercer Univ. v. Nat'l Gypsum Co., 877 F.2d 35 (11th Cir. 1989). If there had been no other intervening punitive award, then Grace's "one punitive award rule" would mandate reversal of the summary judgment here. In other words, this appeal would be de-

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If Grace's financial health is truly as precarious as it suggests in its brief, it has the option of presenting evidence to the jury of prior punitive damage awards, as well as its net worth, at the time the trial on punitive damages takes place. See Jackson v. Johns-Manville Sales Corp., 781 F.2d at 407. That Grace stridently opposes this means of mitigating its punitive damage liability suggests what courts have recognized all along: that threats of insolvency in products liability actions are "greatly exaggerated."[18/] Brotherton v. Celotex Corp., 493 A.2d 1337, 1344 (N.J.Super.Ct. 1985); State ex rel. Young, 618 P.2d at 1271; Martin v Johns-Manville, 469 A.2d 655, 666 (Pa.Super.Ct. 1983); Wall v. Owens-Corning Fiberglass Corp., 602 F.Supp 252 (N.D.Tex. 1985)(uncertainties of calculating optimal level of deterrence and obstacles to all potential plaintiffs seeking relief make Roginsky over-deterrence prediction empirically unsound).[19/]

[17/](...continued)
pendent on an appeal in another case in another state. But what if this appeal ended before the other appeal reversed the punitive award? It is simply unworkable to have the outcome of one case in one state dependent on the outcome of another case in another state over which the courts of this state have no control.

[18/] Mark Twain, Cable from London to the Associated Press (1897)("The reports of my death are greatly exaggerated").

[19/] Recent studies conducted by legal scholars and organizations confirm this conclusion. The Institute of Civil Justice at the Rand Corporation, which is funded primarily by business and insurance interests, analyzed some 17,000 civil jury trials. It found that "[p]unitive damages were rarely awarded in personal injury cases and there is little evidence that frequency has increased significantly." An American Bar Association study of the Rand data concluded that "contrary to the common perception, puni-
(continued...)

Nor is there any evidence that the insolvency of the companies Grace cites in its brief resulted from multiple punitive damage awards. Grace's financial woes, as well as those of the other bankrupt companies, could just as easily have resulted from the number of compensatory damage awards it has been forced to pay, or from other causes unrelated to litigation. See Jackson v. Johns-Manville Sales Corp., 781 F.2d at 403 nn.10, 11; Fischer v. Johns-Manville Corp., 512 A.2d 466, 477 (N.J. 1986).[20/]

Moreover, even if Grace currently faces serious financial disruption or insolvency, it is not at all clear that either of those conditions is inappropriate or undesirable, given Grace's wanton disregard for human life. Courts have consistently upheld sizeable punitive damage awards in products liability cases where a manufacturer demonstrated a deliberate preference for profit over public health and safety. See, e.g., Burke v. Deere & Co., 780 F.Supp 1225 (S.D.Iowa 1991)(letting stand $28 million of $50 million punitive damage award where manufacturer knew machinery

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[19/](...continued)
tive damages awards are neither routine nor routinely large, especially in personal injury cases including product liability and malpractice litigation." (emphasis added). See also Stephen Daniels and Joanne Martin, Myth and Reality in Punitive Damages, 75 Minn.L.Rev. 1, 28 (1990)("one should view with skepticism the claims that juries routinely awarded punitive damages in large amounts, and that these developments were nationwide in scope").

[20/] Punitive damage awards account for a relatively minor percentage of the overall amounts manufacturers have been forced to pay. See Fischer v. Johns-Manville Corp, 512 A.2d at 466 (noting that overwhelming majority of asbestos cases settle without trial). Research reveals that a "typical ratio for a punitive damages award to a defendant's net worth may be around one percent." Cash v. Beltmann North Am. Co., 900 F.2d 109, 111 n.3 (7th Cir. 1990).

was dangerous but, due to economic motivation, continued to manufacture defective machinery); Teutan v. A.H. Robins Co., 738 P.2d 1210 (Kan. 1987)(affirming $7.5 million punitive damage award where manufacturer placed defective intrauterine device on market and then fraudulently concealed defects for years). As the court noted in Martin v. Johns-Manville Corp., 469 A.2d at 665: "If the defendant's conduct was so reckless, and injured so many people, that the effect of the damages awarded against it is bankruptcy, we are hard pressed to understand why that defendant should not be required to live with the consequences of its actions." See also Puppe v. A.C. and S., Inc., 733 F.Supp. 1355, 1363 (N.N.D. 1990)("Rational people could determine that it is worthwhile to punish those whose conduct is objectionable in order to get them to cease their activities even if such a policy bankrupts the tortfeasor before all of the injured can recover"); State ex rel. Young, 618 P.2d at 1271 ("financial interests of the malicious and wanton wrongdoer must be considered in the context of societal concern for the injured and the future protection of society").

Contrary to Grace's suggestion, a defendant in this state is not without means to limit his exposure to multiple punitive damage awards. Indeed, defendants in Florida have a number of tools at their disposal to keep multiple punitive damage awards in check. These include requests for class action certification, see Fischer v. Johns-Manville Corp, 512 A.2d at 479, remittitur of excessive verdicts, Hockensmith v. Waxler, 524 So. 2d 714

(Fla. 1st DCA 1988); Arab Termite and Pest Control v. Jenkins, 409 So. 2d 1039, 1043 (Fla. 1982), motions for a new trial, Rety v. Green, 546 So. 2d 410, 420 (Fla. 3d DCA 1989) and evidence of prior punitive damage awards and the effect such awards have had on their long-term solvency, Rinaldi v. Aaron, 314 So. 2d at 763.[21/] Grace's claim that it is powerless to defend itself in this instance is a bit like Donald Trump complaining about attracting too much media attention. Such complaints should fall on deaf ears because the party's own conduct created the problem.

3. Grace's claim that multiple punitive damage awards violate due process is unfounded and premature.

In addition to its policy arguments, Grace contends that multiple punitive damage awards violate its due process rights. This argument, which merges claims of substantive and procedural due process, boils down to the belief that "Grace has been punished enough." Brief of Grace at 23. Like Grace's other arguments, this one also fails to withstand scrutiny.

Courts have consistently rejected claims by defendants that exposure to multiple punitive damage claims violate due process. Johnson v. Celotex Corp., 899 F.2d 1281 (2d Cir. 1990); In Re Air Crash Disaster at Sioux City, Iowa, 734 F.Supp 1425, 1427 (N.D. Ill. 1990)(exposure to multiple punitive damage claims does not violate due process); Puppe v. A.C. and S., Inc., 733 F.Supp at 1361 (multiple punitive damage awards not an undue burden on de-

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[21/] Punitive damages are also subject to reversal if they exceed a substantial percentage of the defendant's net worth. Pier 66 Co. v. Poulos, 542 So. 2d 377, 381 (Fla. 4th DCA 1989).

fendant accused of continued misconduct under procedural or substantive due process analysis if a jury finds such conduct occurred). Cf. Pacific Mut. Life Ins. Co. v. Haslip, 111 S.Ct. 1032 (1991)(punitive damage award 200 times compensatory damage award does not violate due process).

Although the United States Supreme Court recently held that punitive damage awards are subject to some degree of due process analysis, it specifically declined to draw a "mathematical bright line" between constitutionally acceptable and unacceptable awards. Pacific Mut. Life Ins. Co. v. Haslip, 111 S.Ct. at 1032. The court noted only that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." Id. at 1043 (emphasis added).

Despite Haslip's refusal to establish specific due process parameters -- and despite the fact that Haslip upheld the award of punitive damages -- Grace asserts that all "multiple punitive damage awards violate the concept of 'fundamental fairness.'" Brief of Grace at 30. Such an extraordinary reading of Haslip is contrary to common sense, as well as the language of the opinion itself.

Central to the Haslip analysis was a discussion of the procedures Alabama used to guide the jury in arriving at a fair award. The Court considered the jury instructions especially important because awards which are the product of unlimited jury discretion "may invite extreme results that jar one's constitu-

tional sensibilities." Id. at 1043. See also Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S.Ct. 2909 (1989)("[w]ithout statutory (or at least common law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating decision")(Brennan, J., concurring).[22/]

In Grace's case, however, such an analysis is impossible to conduct because the claim for punitive damages has not yet been tried to a jury. Grace may still request any instructions it deems appropriate to guide the jury in its assessment of punitive damages. Moreover, there is no way to predict whether a jury would award punitive damages in this case, nor is it possible to determine whether an award of punitive damages is "grossly out of proportion to the severity of the offense" without actually seeing the size of the award. Pacific Mut. Life Ins. Co. v. Haslip, 111 S.Ct. at 1045. Grace's due process claim, if any, must await the conclusion of the punitive damage trial against it.[23/]

22/ The court also examined the availability of post trial procedures and of appellate review to scrutinize punitive damage awards in determining whether due process was satisfied. Id. at 1044-45.

23/ In addition to Grace's due process argument, Amici Curiae assert that multiple punitive damage awards violate the defendant's Eighth Amendment right to be free from excessive fines and his Fifth Amendment right against double jeopardy. These issues were not raised by the parties on appeal, and therefore should not be decided by the Court. See Higbee v. Housing Auth. of Jacksonville, 143 Fla. 771, 197 So. 479, 485 (1940); Acton v. Ft. Lauderdale Hosp., 418 So. 2d 1099 (Fla. 1st DCA 1982), aff'd on other grounds, 440 So. 2d 1282 (Fla. 1983); Keating v. State, 157 So. 2d
(continued...)

Even if punitive damages had been awarded in this case, sufficient procedural safeguards exist to pass constitutional muster. Juries in this state are not without guidance in their efforts to award punitive damages. An award of punitive damages must be supported by the evidence. Johns-Manville Sales Corp. v. Janssens, 463 So. 2d at 248. It also must satisfy stringent statutory requirements, which limit the amount of punitive damages to three times the amount of compensatory damages, unless the evidence is clear and convincing. Moreover, contrary to Grace's assertion, punitive damage awards are subject to review by the trial court, the appellate courts and this Court if they are excessive or violate statutory or common law. See generally Pier 66 Co. v. Poulos, 542 So. 2d at 381; Arab Termite and Pest Control, 409 So. 2d at 1043; Fla.Stat. § 768.73 (trial court required to review punitive damage awards in excess of three times the amount of compensatory damages).

By focusing on its own financial condition and the severity of the punishment, Grace clouds the real issue in this case -- its own misconduct. Grace's refusal to alert the public to the dangers of working with and around its asbestos products was conscious and deliberate. It ignored warnings of both health officials and its own management for over 30 years, solely to maxi-

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[23/](...continued)
567 (Fla. 1st DCA 1963). In any event, no authority supports those conclusions. See United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989)(rejecting double jeopardy argument); King v. Armstrong World Indus., Inc., 906 F.2d 1022 (5th Cir. 1990)(rejecting Eighth Amendment argument).

mize its profits. Grace's conduct was nothing short of reprehensible. It must now live with the consequences of its actions. This Court should not impose a rule of law which automatically takes the issue of punitive damages from the jury because some other jury in some other case has also assessed punitive damages.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING GRACE'S MOTION FOR MISTRIAL AFTER DR. TATE FAINTED.

Dr. Tate fainted shortly after he took the witness stand. Grace asserts that this entitled it to a mistrial. Neither the record nor the law supports this contention. The trial court instructed the jury not to allow the incident to influence its consideration of the case. It inquired at length as to whether the jury could still be fair and impartial. Trial continued only after the trial court was convinced that it could. That determination was not an abuse of discretion. Very simply, Grace can point to no prejudice it suffered as a result of this unfortunate event.

Whether a particular event requires a mistrial is within the trial court's discretion. Compania Dominicana de Aviacion v. Knapp, 251 So. 2d 18, 21 (Fla. 3d DCA 1971). Here the court exercised its discretion. It instructed and questioned the jury. It decided a mistrial was unnecessary. That decision is supported by the record and an abundance of case law.

Numerous courts have considered whether an unexpected medical event at trial involving a party, witness or attorney man-

dates a mistrial. They reject the conclusion that a party is entitled as a matter of right to a mistrial because of the possibility the event might engage the jury's sympathy. They hold that the trial court does not abuse its discretion in denying mistrials because of such unusual medical happenings. Significantly, Grace has not cited a single contrary case.

In Henderson v. Twin Falls County, 80 P.2d 801 (Idaho 1938), the plaintiff's treating physician testified. The court recessed for the day after his direct examination was completed. The doctor died that night. The trial court denied the defendant's motion for mistrial. It struck the doctor's direct testimony. The appellate court held that the trial court did not abuse its discretion in deciding that this alleviated any prejudice.

In Vandenberg v. Langan, 192 Neb. 779, 224 N.W.2d 366 (1974), one of the plaintiff's attorneys became ill. He was removed from the courtroom by stretcher and taken to the hospital by ambulance. The defendant moved for a mistrial on the grounds that "the incident could only have prejudicial effect on the jury so far as the defendants were concerned, in that it would aggravate the sympathy, passion, and prejudice of the jury." 224 N.W.2d at 371. The appellate court found "no validity" to this argument.

In Gregory v. Perry, 136 A. 354 (Me. 1927), the plaintiff's husband had a cerebral hemorrhage in the jury's presence. The defendant moved for a mistrial because "the husband's illness occurring in the presence of the jury . . . may have unduly en-

listed the sympathy of the jury." 136 A. at 354. The Supreme Court of Maine affirmed denial of that motion. Id.

> The ordering of a mistrial in such a case was discretionary with the presiding justice. No abuse of discretion is shown. He was present, and could better judge whether the incident would be likely to adversely affect the defendant than this court from the printed page or a description by counsel in argument.

In Commonwealth v. Harris, 522 A.2d 184 (Pa.Comm.Ct. 1987), the plaintiff had a seizure during the defendant's closing argument. The trial court denied defendant's motion for mistrial after it polled the jury and decided the jurors could still be impartial. The appellate court rejected the argument that the plaintiff's seizure was so prejudicial as to require a mistrial. It affirmed the denial of the motion as within the trial court's discretion. See also Maidman v. Stagg, 441 N.Y.S.2d 711 (App.Div. 1981)(affirming denial of defendant's motion for mistrial made after plaintiff died during trial where trial court polled jurors and determined defendant not prejudiced); Simpson v. Am. Oil Co., 14 S.E.2d 638 (N.C. 1941)(affirming denial of defendant's motion for mistrial on grounds of jury sympathy after plaintiff collapsed while testifying).

In Sanguinett v. May Dep't Stores, Inc., 65 S.W.2d 162 (Mo.Ct.App. 1933), the plaintiff testified and began to stagger when she returned to her seat. Her son helped her from the room. Trial adjourned to allow her doctor, the next witness, to treat her. The trial court denied the defendant's motion for mistrial. The appellate court found no abuse of discretion.

> [T]he trial judge was a witness to all that transpired in the courtroom in the presence of the jury. He had before him the jurors, the witnesses, and the lawyers. He not only could and did see all that occurred, but he was in a peculiarly advantageous position to understand and appreciate whether or not such occurrences had any prejudicial effect upon the jury. He ruled at the time of the incident and afterwards on defendants' motion for a new trial, that nothing had occurred which would justify him in holding that defendants' rights had been prejudiced. . . . [A]n appellate court will defer in a large measure to the judgment of the trial judge in determining whether or not an occurrence during a trial prejudiced the minds of the jurors to such an extent as to prevent a fair trial.

65 S.W.2d at 164. See also District of Columbia v. Chessin, 61 F.2d 523 (D.C. Cir. 1932)(trial court properly denied defendant's motion for mistrial although plaintiff collapsed at trial and was given aid by her physician/witness).[24/]

As these cases demonstrate, the collapse of a party, still less a party's witness, does not mandate a new trial. Whether a mistrial is required is within the trial court's discretion. That discretion is not abused when the trial court finds the jury is able to return a fair and impartial verdict despite the unexpected medical event. An abuse of discretion is even less likely to

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[24/] The potential prejudice to the defendant was much stronger in Chessin than it was here, yet the court stated:

> While doubtless it is true that the event as it happened favorably influenced the faith of the jury in the truthfulness of plaintiff's story of her condition, in the absence of anything showing bad faith we think the court below was correct in proceeding with the trial.

61 F.2d at 527.

exist when the trial court gives a cautionary instruction and then inquires of the jurors about their continued impartiality.

Florida law is consistent with these principles. Whether the actions of a party or witness in front of the jury require a mistrial is discretionary with the trial court. It is the trial judge's prerogative to decide "whether the conduct of a person in the presence of the jury is such as to preclude impartial consideration of the cause and so vitiate the trial." Morin v. Halpern, 139 So. 2d 495, 499 (Fla. 2d DCA 1962).[25/]

Here the trial court exercised its discretion. It observed the incident and its effect on the jury. It instructed the jury that the incident should not affect its consideration of the case and inquired whether any of the jurors would have "any problem" being fair and impartial. Only when none of the jurors indicated they would be adversely affected did trial continue. The trial

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[25/] Thus, when a plaintiff cries on the witness stand, a mistrial is not required despite the potential sympathy factor. It is for the trial court to decide whether that conduct is so prejudicial that a mistrial is needed. Wirt v. Fraser, 158 Fla. 777, 30 So. 2d 174 (1947). See also Messner v. State, 330 So. 2d 137 (Fla. 1976) (defendant not prejudiced when closing argument disrupted by victim's mother who was overcome with emotion and had to be taken from courtroom); Chaney v. State, 267 So. 2d 65 (Fla. 1965)(affirming denial of mistrial despite outbursts by hysterical prosecutrix that she could not look at rape defendant again and by her aunt who approached defense counsel and criticized him for defending defendant); Bertone v. State, 224 So. 2d 400 (Fla. 3d DCA 1969)(no abuse of discretion in denying mistrial because of prosecutrix' emotional outbursts).

Grace cites Pier 66 Co. v. Poulos, 542 So. 2d 377 (Fla. 4th DCA 1989), which involved excessive and disrupting emotionalism by the plaintiff which was supported, encouraged and capitalized on by her counsel and not successfully controlled by the trial court. The conduct at issue there is both quantitatively and qualitatively different from Dr. Tate's unexpected faint.

court did not abuse its discretion in concluding that Grace suffered no prejudice and in denying its mistrial motion.

Grace suggests it was prejudiced because it could not cross-examine Dr. Tate -- a contention it specifically repudiated in the trial court. Both Grace and its codefendant, U.S. Mineral, told the trial court they were not prejudiced by an inability to cross-examine him. After Dr. Tate's collapse, the trial court noted:

> the defendants aren't harmed from loss of a right to cross examine because all there has been is background.

Grace's counsel immediately responded: "I don't feel a concern that way." (T. 155). See also (T. 155-56)(U.S. Mineral gave same response).

Nor did Grace articulate such a concern when the motions for mistrial were argued the next day. It did not say it had reconsidered its position. Rather, Grace joined U.S. Mineral's motion which reiterated there was no cross-examination prejudice. The only argument was jury sympathy. Thus, Grace waived this argument. Its agreement with the court that it was not prejudiced by the inability to cross-examine Dr. Tate precludes its argument here. See State ex rel. Pettengill v. Copelan, 466 So. 2d 1133 (Fla. 1st DCA 1985)(assertion of error on appeal precluded where parties expressly acceded to court's unaccompanied inspection of premises); Diaz v. Rodriguez, 384 So. 2d 906 (Fla. 3d DCA 1980) (acquiescence in court's preliminary ruling by withdrawing witness from stand precluded raising matter on appeal).

Grace claims it did not know it would be prejudiced until the

medical experts mentioned Dr. Tate's diagnosis and the medical history Mr. Waters gave him.[26/] But at no time during trial did Grace renew its motion for mistrial on that ground. It never argued that its inability to cross-examine Dr. Tate impacted on the testimony of the Waters' other medical witnesses.

This Court has made it clear that review of a defendants' right to a mistrial is restricted to the specific grounds raised below. Ferguson v. State, 417 So. 2d 639, 641 (Fla. 1982). Grace's failure to raise below the specific grounds of prejudice it raises here is fatal to its argument on appeal.[27/]

In any event, Grace is incorrect on the merits. Its inability to cross-examine Dr. Tate on his asbestosis diagnosis and Mr. Waters' history did not prejudice it. Dr. Tate never testified on direct examination about those matters. A party is not entitled to cross-examine a witness on a subject wholly unrelated to topics raised on direct. Fla.Stat. § 90.612. Grace suffered no legal prejudice because it could not cross-examine Dr. Tate on

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[26/] Neither Grace nor U.S. Mineral objected to references by the Waters' experts to Dr. Tate's diagnosis or history. Instead, Defendants extensively cross-examined them about those matters. And those experts said they reached their asbestos diagnosis independently of Dr. Tate. (T. 253, 345).

[27/] According to Grace, the jurors' silence in response to the trial court's questioning should not have been given dispositive weight by the trial court. However, Grace did not express this belief at the time. It never suggested that the jury's silence was an insufficient response. It did not ask the judge to poll the jurors for an oral response. Whether the jurors could articulate how they were affected is irrelevant. They were not asked to articulate how they were affected. They were only asked if they were affected to the extent they could not be fair and impartial. Grace had a duty to speak up so that further inquiry could be made if it felt the jury's silence was equivocal.

matters he did not testify about on direct. And it agreed it was not prejudiced by being unable to cross-examine Dr. Tate on the subject about which he did testify. The conclusion is inescapable: Grace was not prejudiced at all.

Grace also argues prejudicial error in the court's unobjectionable and unobjected-to comment to the jurors when court recessed the first day, that they should keep Dr. Tate in their prayers.[28/] To prevail, Grace must show that the comment was "inherently or under the circumstances of the case clearly of a nature prejudicial to [its] rights" and produced a prejudicial effect. Penn. Threshermen & Farmers' Mut. Casualty Ins. Co. v. Koltunovsky, 184 So. 2d 450, 452 (Fla. 3d DCA 1966)(citing Crews v. Warren, 157 So. 2d 553 (Fla. 1st DCA 1963)). Grace must show more than an adverse jury verdict. The comment must give rise to:

> a compelling inference that had it not occurred the jury would have returned a verdict more favorable to the aggrieved party.

Id.

Grace has not made this showing. The statement was an inno-

28/ As noted, the comment was not objected to so the argument has been waived. Little v. Bankers Nat'l Life Ins. Co., 369 So. 2d 637 (Fla. 3d DCA 1979); Mack v. State, 270 So. 2d 382 (Fla. 3d DCA 1972); Worthington v. State, 183 So. 2d 728 (Fla. 3d DCA 1966). Nor is this waiver changed by Grace's suggestion that it is unclear whether its attorney heard the comment since the judge spoke to the jury from the jury room door. There is no indication the comment was not made within hearing of counsel. Certainly the court reporter was present since the comment is in the record. Grace knew the judge was going to speak to the jury. It was not prevented from listening. That Grace may not have listened is irrelevant. It had an obligation to do so and to object to anything it believed prejudicial. Its failure to object waives the argument here.

cent suggestion that the jurors keep Dr. Tate and the parties in their prayers. It did not comment on the merits of any parties' case, it did not suggest a resolution of the case, it did not suggest the court's views on the credibility or weight to be given any evidence or witness. It simply does not "produce a compelling inference that had it not occurred the jury would have returned a verdict more favorable to" Grace.[29/]

In sum, the trial court did not abuse its discretion in denying Grace's motion for mistrial because Dr. Tate fainted. Grace's current claims of prejudice are both waived and without merit. It is not entitled to a new trial.

[29/] Grace relies on March v. State, 458 So. 2d 308 (Fla. 5th DCA 1984), where the judge began each trial session with a long, sermon-like prayer. The prayer expressed the judge's personal religious beliefs and implied the defendant was guilty. The Fifth District criticized such partisan prayers, but did not reverse. It explicitly found nothing wrong with a brief, non-denominational, non-judgmental prayer to begin the session. 458 So. 2d at 310.

CONCLUSION

For the foregoing reasons, the WATERS respectfully request this Court to affirm the decision of the Third District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of May, 1993, to: all counsel on the attached list.

Respectfully submitted,

COLSON, HICKS, EIDSON, COLSON,
& MATTHEWS
4700 S.E. Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2310
Telephone: (305) 373-2310

COOPER & WOLFE, P.A.
700 Courthouse Tower
44 West Flagler Street
Miami, Florida 33130
Telephone: (305) 371-1597

By: _____
MARC COOPER
Fla.Bar No. 198358

By: _____
DAVID H. POLLACK
Fla.Bar No. 0955840

COUNSEL LIST
W.R.Grace v. Waters
Sup.Ct. Case no. 81,004

Timothy Clark, Esq.
Counsel for **U.S. Mineral**
New World Tower #1319
100 N. Biscayne Boulevard
Miami, FL 33132
Tel: 374-4043
Fax: 374-4236

Nancy Little Hoffmann, Esq.
Counsel for **U.S. Mineral**
4419 W. Tradewind Avenue
Suite 100
Ft. Lauderdale, FL 33308
Tel: (305) 771-0606
Fax: (305) 772-4117

Betsy Gallagher, Esq.
Kubicki, Draper, Gallagher
& McGrane
Counsel for **W.R. Grace**
CN Bank Building, PH
25 West Flagler Street
Miami, FL 33130-1712
Tel: (305) 374-1212
Fax: (305) 374-7846

Roger E. Podesta, Esq.
Jonathan E. Richman, Esq.
DEBEVOISE & PLIMPTON
Counsel for **Owens-Corning**
875 Third Avenue
New York, NY 10022
Tel: (212) 909-6000

Richard Crump, Esq.
CROSBY, SAAD, BEEBE, CAVENDER
& CRUMP, P.C.
Counsel for **Owens-Corning**
P.O. Drawer 850249
Mobile, AL 36685-0249
Tel: (205) 476-3000

Malcolm E. Wheeler, Esq.
PARCEL, MAURO, HULTIN
& SPAANSTRA
Counsel for **PLAC**
1801 California Street
Suite 3600
Denver, CO 80202
Tel: (303) 297-4551

Edward T. O'Donnell, Esq.
HERZFELD AND RUBIN
Counsel for **PLAC**
801 Brickell Avenue
Suite 1501
Miami, FL 33131
Tel: (305) 381-7999

Kenneth J. Wilson, Esq.
Counsel for **Waters**
2202 Jackson Street
P.O. Box 365
Barnwell, SC 29812

COLSON, HICKS, EIDSON, COLSON,
& MATTHEWS
Co-Counsel for **Waters**
4700 S.E. Financial Center
200 South Biscayne Boulevard
Miami, FL 33131-2310
Tel: (305) 373-2310

COOPER & WOLFE, P.A.
Co-Counsel for **Waters**
700 Courthouse Tower
44 West Flagler Street
Miami, FL 33130
Tel: (305) 371-1597