IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,004

W.R. GRACE & CO.-CONN.,
a Connecticut corporation,

Petitioner

vs.

THOMAS WATERS and
ELOISE AGNES WATERS, his wife,

Respondents

Third DCA Case Nos. 90-1838; 90-2010; 91-282

INITIAL BRIEF OF PETITIONER
W.R. GRACE & CO.--CONN.

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INTRODUCTION

Petitioner, a former manufacturer of asbestos-containing products, has invoked this Court's jurisdiction pursuant to Art. V, § 3 (b)(4), Fla. Const., to review a decision from the Third District Court of Appeal which passes upon a question certified by the court to be one of great public importance. The question under review is whether Florida law permits additional punitive damages against a defendant based on a course of conduct that occurred twenty or more years ago, and for which punitive damages have already been assessed.

In this brief, the parties will be referred to as WATERS and GRACE, or alternatively, as they stood in the trial court. The symbol "R" will be used to designate the record on appeal; the symbol "T" will be used to designate the transcript of trial testimony; the symbol "A" will be used to designate the Appendix to Initial Brief of Petitioner, filed herewith.

All emphasis is supplied by counsel, unless otherwise indicated.

STATEMENT OF CASE AND FACTS

The Case

Plaintiffs, THOMAS WATERS and his wife, ELOISE AGNES WATERS, filed this action seeking compensatory and punitive damages against several manufacturers of asbestos-containing products alleging that THOMAS WATERS had developed asbestosis as a result of exposure to those manufacturers' products. (R. 1-11). Neither the Complaint nor the Amended Complaint contained specific allegations of

corporate misconduct on the part of GRACE. (R. 1-11; 80-103). In addition to general allegations of negligence applicable to all defendants, the Amended Complaint alleged:

> 30. The Plaintiff's illness was a direct and proximate result of the negligent, grossly negligent, reckless, willful and intentional conduct of the defendants as set forth herein...

(R. 88).

GRACE filed a motion for partial summary judgment on the issue of punitive damages asserting that GRACE's conduct, as a matter of law, did not rise to the level required for imposition of punitive damages in Florida. (R. 51-52). In addition, GRACE argued that since punitive damage judgments had been entered against it in other jurisdictions, a partial summary judgment should be entered on the punitive damages claim in accordance with a prior "standard ruling" by the trial court. (R. 52).[1] Finally, GRACE argued that plaintiffs' claim for punitive damages was barred by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (R. 52). The trial court granted GRACE's motion on the basis of the court's "standard ruling," and partial summary judgment was entered in favor of GRACE on the issue of punitive damages. (R. 66).

Just prior to trial, plaintiffs filed a Motion to Amend the

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[1] The record on appeal includes the opinion in the case of City of Greenville v. W.R. Grace & Co., 827 F.2d 975 (4th Cir. 1987); R. 635-655, affirming the assessment of $2 million in punitive damages against GRACE, in addition to the judgment relied upon in GRACE's motion, which was later reversed on other grounds. Mercer University v. Corporation of National Gypsum Co., 877 F.2d 35 (11th Cir. 1989).

Complaint to Add Counts of Strict Liability, Additional Acts of Negligence and Reinstate Punitive Damages. (R. 656-664). Defendants objected to the amendment on the basis of the trial court's prior omnibus order, and the fact that the motion was made on the eve of trial. (T. 19). This motion was denied as trial commenced. (T. 31). The case proceeded to trial July 9, 1990 through July 17, 1990 against two defendants, GRACE and United States Mineral Products Co. ["USM"], on a theory of negligent failure to warn. (T. 4, 31).

The Trial

A. Testimony regarding exposure

WATERS at the time of trial was 62 years old. (T. 392). He worked as a tile setter from the late 1950s until 1988. (T. 395, 439). He never sprayed fireproofing himself, but testified that he worked around fireproofing products, including GRACE products which he identified as "Zonolite" and Monokote", at five job sites between the early 1950s and the early 1970s. (T. 400, 402, 412-420). WATERS testified that he worked 50 to 100 feet away from where plasterers were spraying. (T. 462).

The testimony regarding the extent to which plaintiff, as a tile setter, would have been exposed to fireproofing products -- the only products at issue in the trial -- was in sharp conflict. Plaintiff's "expert" on plastering and the sequencing of jobs testified that fireproofing was put in while tile setters were on the job, although they would not have been in the same room working together. (T. 503, 514-515). Defendants called two witnesses who

both testified that a tile setter would not have been exposed to fireproofing sprays because tile setting was a finishing trade. (T. 810-812; 998-999). Fireproofing, on the other hand, is one of the first trades on the job. (T. 998).

Plaintiff was diagnosed as having asbestosis in June of 1986 by Dr. Charles Tate. (T. 430). In the history given to Dr. Tate, plaintiff did not mention exposure to fireproofing sprays. (T. 451-452). Rather, he gave a history of exposure to asbestos while performing his job as a tilesetter. (T. 251). The asbestos was in the powder he used to make cement to hold the tiles in place. (T. 251). He poured the powder out of bags, causing clouds of dust to "boil up" in his face. (T. 251).

B. Dr. Tate Incident

On the first day of trial, after jury selection, plaintiff called Dr. Charles Tate as his first witness. (T. 137). Dr. Tate testified as to his educational background and qualifications as an expert. (T. 138-143). After Tate was tendered as an expert, he explained the process of breathing, and the workings of the lung in generic terms. (T. 144-153). Just after Dr. Tate had begun to explain asbestosis, he collapsed on the witness stand, suffering from what appeared to be a heart attack. (T. 155, 160).

Although the record reflects only an interruption in the proceedings, defendants' motions for mistrial described the actual scene: Dr. Tate slumped over with his eyes wide open and appeared to have suffered a heart attack. (T. 160, 163). The plaintiff, MR. WATERS, screamed "Oh my God" three or four times. (T. 161,

163). Paramedics were called to attend to the witness and they brought in oxygen. (T. 162). All of this occurred in the presence of the jury. (T. 160).

The judge announced that he would send the jury home for the day, and advised the parties that motions for mistrial would be entertained the following morning. (T. 155-157). In discharging the jury[2], the court stated:

> The paramedics are here. We have been chatting and he will be going to Jackson to be checked on for sure, but under any circumstance he probably would not be asked to testify again in the case.
>
> So rather than have you guys waiting around, he was the witness we were going to use the balance of the afternoon on, I will just send you home and ask you leave your pads with us and tomorrow morning be back up here in the jury room by nine o'clock if you will, please.
>
> 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.

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[2] It is not clear from the record that the judge's comments were made within the hearing of the attorneys. (T. 157). The record reflects that the Court spoke to the jury while at the jury room door.

(T. 157-158).

Defendants moved for mistrial based on the prejudicial impact of the incident on the jury. (T. 160-164). Defendants argued that the traumatic nature of the event was likely to create sympathy for plaintiff, who also suffered from a heart condition. (T. 161, 162). Defense counsel stated that they had been personally shaken by the dramatic event and thought the jurors would likewise have been affected. (T. 161, 163, 164). Counsel for GRACE argued:

> ... I don't know if the jury would even know if you asked them what effect it would have on them, but I think it had to have some effect on them and I think the potential for prejudice is there.
>
> Again, I can't explain to you what I would say the mechanics of that prejudice would be, but I think this creates a very different atmosphere in this case. We don't have a dispassionate situation anymore in terms of the climate of the courtroom ever since that moment.

(T. 163). The court indicated that he was not inclined to order a mistrial, and wanted to hear from the jury. (T. 165).

The court questioned the jurors on the issue of whether the event would interfere with their ability to be fair in listening to the case. (T. 183). Receiving no response, the judge proceeded with the trial, implicitly denying defendants' motions for mistrial. (T. 184).

C. Medical Issues

Dr. Robert Mezey, a physician specializing in pulmonary disease and internal medicine, testified that plaintiff suffered from pulmonary asbestosis, emphysema and asthma. (T. 222). He did

not examine WATERS, and his opinion was based on a review of medical records and x-rays, including those of Dr. Tate. (T. 221, 238, 250-253, 260, 268). Dr. Mezey testified that Dr. Tate was "revered as one of the founding pulmonary doctors in Miami." (T. 238). Dr. Mezey went on to testify that he agreed with Dr. Tate's opinion that plaintiff's asbestosis was severe. (T. 238).

Mezey relied upon the history of asbestos exposure given by WATERS to Dr. Tate. (T. 250). Although Mezey acknowledged Tate's diagnosis was not based on exposure to fireproofing sprays, he nonetheless testified that such exposure would have been a contributing factor to WATERS' development of asbestosis. (T. 241-242, 252).

Dr. Jack Kamerman is a family physician who treated WATERS for severe upper respiratory problems. (T. 299). Kamerman testified that he knew WATERS had been treated by Dr. Tate, "a very well known pulmonologist in this community and professor emeritus at the University of Miami." (T. 300). Kamerman reviewed Dr. Tate's report, which he used in his evaluation and treatment of WATERS. (T. 301). He testified that Tate's diagnosis was pulmonary asbestosis and chronic obstructive pulmonary disease. (T. 301). Kamerman took a history from plaintiff regarding his exposure to asbestos, performed some additional tests, and took more x-rays. (T. 302). After taking and reading the chest x-rays, he agreed with Dr. Tate's conclusions. (T. 306, 365). Dr. Kamerman expressed his opinion that WATERS suffered from pulmonary asbestosis, emphysema and chronic obstructive pulmonary disease.

(T. 306).

Dr. Alan Feingold is a board certified pulmonary physician who testified on behalf of the defendants. (T. 830, 832). Feingold examined WATERS in May of 1989. (T. 842). At that time WATERS told Feingold that he may have had some asbestos exposure, but was not sure. (T. 853). Feingold assumed there was exposure. (T. 859). WATERS did relate a history of smoking cigarettes. (T. 843).[3] Feingold testified that the chest x-rays showed that most of WATERS' upper lung was gone as a result of emphysema, caused by smoking. (T. 845-847). WATERS also had chronic bronchitis, which was likewise caused by smoking. (T. 848). Feingold testified that WATERS did not have asbestosis. (T. 872).

On cross examination, when specifically asked about his disagreement with Dr. Tate's report, Dr. Feingold testified that it was "a little ludicrous to say the man has mild pulmonary emphysema when you're confronted with those CT scans." (T. 891-892). Feingold further testified that he disagreed with Drs. Mezey, Tate and Kamerman as to the causes of the abnormalities visible on WATERS' x-rays: "if you tell me another doctor makes a diagnosis of asbestosis to explain the man's x-rays, I would say they are mistaken." (T. 902).

In closing argument, counsel for plaintiff highlighted the disagreement between the experts as to whether WATERS suffered from

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[3] WATERS testified that he started smoking when he was 19 or 20 years old, and built up to smoking approximately a pack a day. (T. 432-433). In 1965, he stopped smoking for approximately 10 years. (T. 433). He testified that he stopped smoking in 1986 when Dr. Tate "scared [him] to death." (T. 431-432).

asbestosis, noting that "Dr. Tate, a professor emeritus from the University of Miami, saw Mr. WATERS in May of 1986 and diagnosed mild emphysema and severe asbestosis." (T. 1078-1079). It was argued that Drs. Kamerman and Mezey agreed with that diagnosis, and that Dr. Feingold was the only doctor who disagreed. (T. 1079-1081).

The Verdict

The jury returned a verdict finding that GRACE and USM had negligently failed to warn of the dangers of exposure to asbestos, and found that the failure to warn on the part of both defendants was a legal cause of damage to plaintiffs. (T. 1148-1149). The jury found WATERS comparatively negligent, and attributed 10 percent of the fault to WATERS, 40% to USM and 50% to GRACE. (T. 1149). Damages were awarded to THOMAS WATERS in the amount of $566,785 and to ELOISE WATERS in the amount of $150,000. (T. 1149). After set-offs and reductions for comparative negligence, final judgment was entered against defendants in the amount of $446,594.10 for THOMAS WATERS and $118,191,40 for ELOISE WATERS. (R. 841-842).

GRACE filed a timely Motion for New Trial and for Remittitur, which raised as error the trial court's denial of defendants' motions for mistrial. (R. 794-799). Defendants' post trial motions were denied, and they appealed to the Third District Court of Appeal. (R. 830, 831-832). WATERS cross-appealed the trial court's orders striking the strict liability claims, and the summary judgment in favor of GRACE on the issue of punitive

damages.

The Appeal

The Third District Court of Appeal affirmed the judgment in favor of WATERS, on the grounds that defendants had not preserved the argument that they were prejudiced by not being able to cross-examine the witness, and that the trial court's finding that the defendants had suffered no prejudice by the emotional incident was not an abuse of discretion. (A. 4).

On the cross-appeal, the district court held that the trial court had improperly stricken plaintiffs' claims sounding in strict liability, and had improperly entered summary judgment in favor of GRACE on the issue of punitive damages. (A. 5). With regard to the punitive damages claim, the court stated:

> On the issue of punitive damages, the trial court granted USM's and Grace's motions to strike punitive damages on grounds that if a defendant has once had punitive damages assessed against it, it will no longer be subject to punitive damages. As recently stated by the Second District Court of Appeal:
>
> > 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 and the trial court's reason, if relevant at all, would be an issue of mitigation to be considered by the trier of fact. See Johns-Manville Sales Corp. v. Janssens, 463 So. 2d 242 (Fla. 1st DCA 1984), review denied, 467 So. 2d 999 (Fla. 1985).
>
> Baione, 17 F.L.W. at D 1299.[4] ...

[4] Baione v. Owens-Illinois, Inc., 599 So. 2d 1377 (Fla. 2d DCA 1992).

(A. 5). The court reinstated the claims for strict liability against both defendants, and reinstated the claim for punitive damages against GRACE only, finding that WATERS had waived any claim for punitive damages against USM, and remanded for further proceedings. (A. 6).

Judge Nesbitt dissented in part, stating:

> I agree with the majority's opinion except that I would affirm the order striking the Waters' claims for punitive damages against W.R. Grace & Co. Since Grace has already had punitive damages assessed against it in other suits, I think the trial judge was eminently correct in striking the claim for punitive damages. The views of Judge Friendly expressed in Roginsky v. Richardson - Merrell, Inc., 378 F.2d 832, 838-842 (2d Cir. 1967), pointing out the desirability of limiting multiple punitive damages awards, has proven its accuracy. Not only may such awards contribute to a company's bankruptcy, but they may result in a denial of compensatory damages to plaintiffs whose injuries manifest at some later date. To continue to inflict punitive damages on a company for decisions which may have been made years earlier, is to perpetuate the sins of the boardroom, penalizing not only the shareholders but society as a whole, and deny the company its competitive place in the market.

(A. 7).

A divided court certified the question as follows:

> This court sua sponte certifies to the Florida Supreme Court the question posed by the dissent as one of great public importance, pursuant to Florida Rule of Appellate Procedure 9.125 (a).

(A. 8). Petitioner filed its timely notice to invoke jurisdiction to review the question certified as stated.

POINTS INVOLVED ON APPEAL

POINT I

WHETHER FLORIDA PUBLIC POLICY OR DUE PROCESS PERMITS THE AWARD OF ADDITIONAL PUNITIVE DAMAGES AGAINST A DEFENDANT FOR CONDUCT WHICH OCCURRED TWENTY OR MORE YEARS EARLIER, AND WHERE THE GOALS OF PUNISHMENT AND DETERRENCE HAVE BEEN ADEQUATELY SERVED BY PRIOR PUNITIVE DAMAGE AWARDS.

POINT II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR MISTRIAL AFTER PLAINTIFF'S PRIMARY MEDICAL WITNESS COLLAPSED ON THE STAND IN FRONT OF THE JURY, THE JUDGE ASKED THE JURORS TO PRAY FOR THE WITNESS, FAILED TO ASCERTAIN WHETHER WITNESS' COLLAPSE WOULD INTERFERE WITH JUROR'S ABILITY TO BE FAIR AND IMPARTIAL, AND DEFENDANTS WERE UNABLE TO CROSS-EXAMINE THE WITNESS.

SUMMARY OF ARGUMENT

The imposition of punitive damages is justified in Florida only where such an award satisfies the goals of punishment and deterrence. Limiting multiple punitive damage awards against defendants who have already been subjected to prior awards is perfectly consistent with Florida's public policy. Multiple punitive damage awards are not necessary as punishment when a manufacturer has already been punished by another jury for the same conduct. Moreover, deterrence is amply satisfied not only by a prior award of punitive damages, but even more so when the award is viewed in the context of the crushing burden of defending tens of thousands of asbestos cases. See Celotex Corp. v. Pickett, 490 So.2d 35, 39 (Fla. 1986) (McDonald, J., dissenting).

The trial court's approach strikes a sensible and practical balance between the policies of punishment and deterrence, and Florida's interest in maintaining corporate resources in order to compensate the thousands of future plaintiffs who will inevitably file claims for asbestos-related injuries. As the burden of asbestos litigation continues to take its toll, and the number of manufacturers forced into bankruptcy grows, the desirability of limiting multiple punitive damage awards is obvious. The need for such a limitation was foretold by Judge Friendly in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838-842 (2d Cir. 1967). As recognized by Judge Nesbitt below, the prescient observations made twenty five years ago in that case have special force in the context of asbestos litigation.

In addition, the imposition of repetitive punitive damage awards for a single course of conduct violates the concept of "fundamental fairness" inherent in the constitutional guarantee of due process. The state's interest, if any, in extracting additional punishment pales in comparison to the due process right of defendants to be free from the imposition of multiple punishment for the same conduct.

At this stage in asbestos litigation in Florida, the trial court's ruling is both logical and fair. Preserving corporate assets to ensure the continued availability of compensation for future plaintiffs outweighs any interest in redundant punishment and deterrence, and in providing a windfall to one plaintiff at the expense of future claimants.

The trial court abused its discretion in denying GRACE's motion for mistrial and for a new trial based on the collapse of Dr. Tate in the presence of the jury. The district court's holding in this regard ignores the collective impact of the several factors present which combined to produce irreparable prejudice to defendants. The unique facts of this case -- which include an emotional and chaotic scene in the presence of the jury, coupled with an understandable but nonetheless inappropriate admonition by the trial court to pray for the witness -- when viewed in light of Dr. Tate's pivotal role in the overall case, combined to deprive defendants of the cold neutrality of the jury, and therefore, a fair trial.

ARGUMENT

POINT I

NEITHER FLORIDA PUBLIC POLICY NOR DUE PROCESS PERMITS THE AWARD OF PUNITIVE DAMAGES AGAINST A DEFENDANT FOR CONDUCT WHICH OCCURRED TWENTY OR MORE YEARS EARLIER, AND WHERE THE GOALS OF PUNISHMENT AND DETERRENCE HAVE BEEN ADEQUATELY SERVED BY PRIOR PUNITIVE DAMAGE AWARDS.

Introduction

The issue certified to this Court as one of great public importance is whether Florida law permits the imposition of successive punitive damage awards against a defendant which has already been subjected to prior punitive damage awards for the same conduct. GRACE submits that Judge Nesbitt was correct: the time has come to limit the imposition of multiple punitive damage awards for the same course of conduct, whether as a matter of Florida public policy, or as a matter of due process.

In her dissenting opinion in Pacific Mutual Life Ins. Co. v. Haslip, 111 S.Ct. 1032, 1056, 113 L.Ed.2d 1 (1991), Justice O'Conner stated:

> Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm.

The devastating potential for harm is nowhere more evident than in asbestos litigation. Not only do multiple punitive damage awards violate the concept of "fundamental fairness" inherent in the constitutional guarantee of due process, the continued imposition of such awards threatens the solvency of defendant corporations, and may well result in the unavailability of compensatory damages

for future claimants. The social costs of punishing a defendant again and again for the same course of conduct are simply too great to ignore.

In this case, the Third District Court of Appeal reversed a longstanding ruling by Judge Harold Vann who administered the asbestos litigation docket in Dade County and elsewhere in Florida pursuant to administrative orders from this Court, beginning in 1980. Following the instincts of numerous courts and commentators from across the country, Judge Vann issued a "standard ruling" which eliminated claims for punitive damages upon a showing that the defendant had already been subjected to a prior punitive damage award for the same conduct.[5] Because in the context of mass tort litigation -- and asbestos litigation in particular -- multiple punitive damage awards do not serve the goals of punishment and deterrence, the trial court's ruling correctly reflected Florida's public policy.

Florida Law

Florida law provides a doctrinal basis for the limitation of punitive damages as a matter of law.

This Court has recognized that, as a matter of Florida public policy, "[a] defendant does have a right to be free from unreasonable punishment inflicted by an excessive punitive damages

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[5] Although the record in this case does not reflect the date the initial ruling was made, GRACE invoked the "standard ruling" in this case in 1988. (R. 51-52). During the ten year period of Judge Vann's supervision, literally thousands of asbestos personal injury cases have passed through the Florida court system. Despite the number of cases affected, the ruling remained unchallenged until 1992.

award." St. Regis Paper Co. v. Watson, 428 So. 2d 243, 248 (Fla. 1983), citing Louisville & Nashville Railroad v. Street, 164 Ala. 155, 51 So. 306 (1910). On the other hand, "a plaintiff has no right to punitive damages." Id. at 247. See also Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965); Gordon v. State, 585 So. 2d 1033 (Fla. 3d DCA 1991), affirmed, 608 So. 2d 800 (1992).

In Florida, as elsewhere, punitive damages are awarded to further the twin policies of punishment and deterrence. Lohr v. Byrd, 522 So. 2d 845 (Fla. 1988); Fisher v. City of Miami, supra. Where those policies are not advanced, such damages do not serve their proper function, and Florida law rejects the imposition of punitive damages. See Lohr v. Byrd, supra (punitive damages may not be recovered against tortfeasor's estate because the policies of deterrence and punishment are frustrated); Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981) (employer may not be held vicariously liable for punitive damages in the absence of some fault); Fisher v. City of Miami, supra (punitive damages not available against municipal corporation for acts of employees as a matter of public policy, where such award not justified by policies of punishment and deterrence); Waldron v. Kirkland, 281 So. 2d 70 (Fla. 2d DCA 1973) (public policy not served by imposing vicarious liability for punitive damages on faultless owner of motor vehicle). Because the imposition of multiple punitive damage awards for the same conduct[6] does not serve the interests of

[6] As the court in Leonen v. Johns-Manville Corp., 717 F.Supp. 272, 282 (D. N.J. 1989), observed:

punishment and deterrence, the trial court properly struck the punitive damages claim against GRACE as a matter of law.

The Scope of Asbestos Litigation and Concerns of "Overkill"

In his dissenting opinion, Judge Nesbitt expressed the belief that the trial court properly struck the punitive damages claim, noting the prophetic observations of Judge Friendly in Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839-41 (2d Cir. 1967):

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering... We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill... [A] sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin. [7]

Courts and commentators have recognized that the concern for "overkill" brought about by the imposition of multiple punitive damage awards is particularly acute in the context of asbestos tort litigation. See, e.g., Racich v. Celotex Corp., 887 F.2d 393 (2d Cir. 1989); In re: School Asbestos Litigation, 789 F.2d 996 (3d

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> Courts which have addressed the problems connected with the assessment of punitive damage awards in successive mass tort litigations, particularly in the asbestos cases, have almost unanimously treated the conduct of asbestos defendants as the same act or series of acts. [citations omitted].

See also Jones, Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process, 43 Ala. L. Rev. 1, 2 n.3 (1991).

[7] Ultimately, the court in Roginsky ruled that it was bound by constraints of diversity to avoid creating new state law.

Cir. 1986), cert. denied sub nom Celotex Corp. v. School Dist. of Lancaster, 479 U.S. 852, 107 S.Ct. 182, 93 L.Ed.2d 117 (1986); Jackson v. Johns-Manville Sales Corp., 727 F.2d 506 (5th Cir. 1984) ("Jackson I"), opinion vacated and rehearing granted, 750 F.2d 1314 (5th Cir. 1985), opinion after certification declined, 781 F.2d 394 (5th Cir. 1986), cert. denied, 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986); Juzwin v. Amtorg Trading Corp., 705 F.Supp. 1053 (D. N.J. 1989) ("Juzwin I"), vacated 718 F.Supp. 1233 (D. N.J. 1989) ("Juzwin II"); Hanlon v. Johns-Manville Sales Corp., 599 F.Supp. 376 (N.D. Iowa 1984); Surrick, Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?, 87 Dick. L. Rev. 265, 295-296, 300 (1983); Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation, 40 Ala. L. Rev. 919, 920 (1989).

The unprecedented scope of the asbestos tort litigation has not gone unnoticed in Florida. In Eagle-Picher Industries, Inc. v. Cox, 481 So. 2d 517 (Fla. 3d DCA 1985), rev. denied, 492 So. 2d 1331 (1986), the Third District Court of Appeal held that Florida's public policy required the rule against splitting causes of action to be modified to accommodate the unique problems associated with asbestos-related litigation. In support of its conclusion, the court relied upon data appended to the decision in Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314, 1334 (5th Cir. 1985) (en banc) ("Jackson II"):

> "No other category of tort litigation has ever approached, either qualitatively or quantitatively,

> the magnitude of the claims premised on asbestos exposure."
> ...
>
> "Between the early 1970's and 1982 the asbestos companies and their insurers expended over $1 billion in litigation expenses, damage awards and settlements. This figure does not include the costs incurred by state or federal governments, expenses and compensation in workers' compensation claims, or the costs resulting from the Chapter 11 proceedings initiated by Johns-Manville, Unarco, and Amatex."
>
> * * *
>
> "The long latency periods for asbestos-related disease, usually ranging between 15 and 40 years, make it difficult to ever determine if all claimants within a given time period have been identified."
>
> * * *
>
> "[A] 1981 study for the Department of Labor estimated that more than 21 million living American workers have been significantly exposed to asbestos during the past 20 years."

The potential for asset depletion led the court in Cox to restructure the rule against splitting causes of action, stating:

> Given the immensity of the demands made and yet to be made upon asbestos litigation defendants, the finite resources available to pay claimants in mass tort litigation, and the real danger that over-compensation of early claimants who may not contract cancer will deplete these finite resources to the detriment of future claimants who do, public policy requires that the resources available for those persons who do contract cancer not be awarded to those whose exposure to asbestos has merely increased their risk of contracting cancer in the future.

Eagle-Picher Industries, Inc. v. Cox, supra at 525.

The same concerns support the limitation of multiple punitive damage awards as a matter of Florida public policy. As the years of costly litigation have worn on, at least fifteen manufacturers of asbestos-containing products have sought the protection of the

bankruptcy courts, and others are sure to follow.[8] While several courts in the early 1980s discounted Judge Friendly's observations, expressing the view that the concerns of "overkill" were speculative and "exaggerated," those criticisms have proven unfairly cynical and myopic.[9] As Judge Nesbitt pointed out, time has proven the accuracy of Judge Friendly's observations. At this point, after millions upon millions of dollars in punitive damage awards[10] and fifteen manufacturer bankruptcies, it can hardly be said that the concerns of asset depletion and corporate annihilation are not legitimate. See Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 142 (1986) ("Today, Judge Friendly's fears have become reality.") As the court noted in Campolongo v. Celotex Corp., 681 F. Supp. 261, 262 (D. N.J. 1988): "[T]he specter of remediless claimants and culpable bankrupt corporations is a prospect more real than fanciful and a foundation for judicial concern."

The Goals of Punishment and Deterrence have been Adequately Served

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[8] See Brickman, The Asbestos Litigation Crisis: Is there a Need for an Administrative Alternative?, 13 Cardozo L. Rev. 1819, n.2 (1992); Hensler, Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman, 13 Cardozo L. Rev. 1967, 1972 n.23 (1992).

[9] See e.g., Acosta v. Honda Motor Co., 717 F.2d 828, 838 (3d Cir. 1983) (predictions in Roginsky were "somewhat excessive."); Fischer v. Johns-Manville Corp., 472 A.2d 577, 586, 193 N.J. Super. 113 (N.J. Super. A.D. 1984), aff'd, 512 A.2d 466, 103 N.J. 643 (1986); State ex rel. Young v. Crookham, 290 Or. 61, 618 P.2d 1268 (1980) ("Hindsight demonstrates that the apprehension of the Roginsky court was heavily exaggerated").

[10] See Brickman, supra at 1868 n. 198; Wheeler, supra at 923-924.

The economic destruction threatened by the continued imposition of multiple punitive damage awards in mass tort litigation can not be justified by the minimal extent to which the traditional goals of punishment and deterrence are advanced by such awards, if indeed they are advanced at all. This is particularly true when, as in the instance of GRACE, the manufacturer ceased making the products at issue twenty or more years ago.

Initially, there can be little doubt that prior punitive damage awards for the same conduct constitute punishment. Like many other defendants in the asbestos litigation, GRACE has already been punished.[11] It has paid $2 million in punitive damages, in addition to the many, many millions more it has paid in compensatory damage settlements and verdicts.

Moreover, in the context of asbestos litigation, the doctrine of joint and several liability serves a punitive function, because it requires the dwindling number of solvent defendants to pay more than their fair share of the compensatory damage burden, with no possibility of contribution. As the number of bankrupt defendants grows, the solvent defendants are forced to pay an ever-increasing portion of the enormous burden of compensatory damages without regard to the degree of the actual harm they may have caused.[12]

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[11] R. 635-655.

[12] In fact, the record reflects that is exactly what happened in this case. WATERS was exposed to several products manufactured by companies which have declared bankruptcy, including Celotex, Eagle-Picher and Carey Canada. (T. 1028-1031). Indeed, his medical records reflected that he never gave a history of exposure to spray fire-proofing. (T. 251-252; 282-283; 859). With respect to the phenomenon of witnesses "re-recollecting" the extent to which

Quite plainly, GRACE has been punished enough. Where a defendant has already been punished by the imposition of other punitive damage awards, the state's interest in maintaining the availability of the remedy for the purpose of extracting additional punishment diminishes to the vanishing point.

Moreover, at this mature stage in asbestos litigation, the continued imposition of punitive damages against defendants who have already been subjected to prior awards serves no valid deterrent function. Deterrence has been satisfied both by prior punitive damage awards and by the crushing burden of compensatory damages. See Celotex Corp. v. Pickett, 490 So. 2d 35, 39 (Fla. 1986) (McDonald, J., dissenting).[13]

Additionally, GRACE stopped marketing asbestos-containing fireproofing products in 1973 -- twenty years ago. (T. 722-723, 993). Thus, there can be no deterrence in multiple punitive damage awards for conduct that has ended. See Magallanes v. Superior Court, 213 Cal. Rptr 547, 167 Cal.App.3d 878 (1985) (wherein the court stated: "[T]he objective of deterrence has little relevance where the offending goods have long since been removed from the marketplace."); Drayton v. Jiffee Chemical Corp., 395 F. Supp. 1081 (N.D. Ohio 1975), modified, 591 F.2d 352 (6th Cir. 1978) (little

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bankrupt manufacturers' products were present on job sites, see Brickman, supra at 1822.

[13] See Surrick, supra at 295-296 (recognizing that, in asbestos litigation, the "retributive and deterrent functions normally reserved to punitive damages are being substantially performed by the compensatory damages that defendants are being called upon to pay...")

deterrent value in imposing punitive damages against product manufacturer where there had been a change in the product formulation). See also Brickman, supra at 1864.

In his thoughtful concurring opinion in Baione v. Owens-Illinois, Inc., supra at 1380, Judge Altenbernd expressed concern over the attenuated deterrent effect of punitive damages in the context of asbestos litigation:

> Punitive damages serve a valid purpose when they punish persons for their recent, inappropriate decisions. As the period becomes longer, it becomes increasingly difficult to justify this element of damages. See Celotex Corp. v. Pickett, 490 So. 2d 35 (Fla. 1986)(over strong dissent, the supreme court approved punitive damages for fifteen-year-old conduct). I am convinced that the harm to our present economy and, thus, to our society from imposing punitive damages for corporate acts committed long ago by retired or deceased employees outweighs any arguable future deterrent effect that such awards might create.

In context of this case, the deterrence function, if any, served by continued imposition of multiple punitive damage awards is no more than "deterrence in the air." See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67, 101 S.Ct. 2748, 69 L.Ed.2d. 616 (1981). The negligible deterrent effect of repeated punitive damage awards does not outweigh the societal concerns for continued corporate viability, and the defendants' right to be free from excessive punishment. See St. Regis Paper Co. v. Watson, supra.

A similar conclusion was reached in a California DES case, as a matter of state public policy. In Magallanes v. Superior Court, supra, the court determined that punitive damages were not

recoverable as a matter of law in market share liability cases, based in part upon the potential for "overkill" and concerns of asset depletion. Finding that the goals of punishment and deterrence were met by "the enormity of the present and prospective awards of compensatory damages," the court concluded:

> [T]he foregoing public policy considerations, i.e., preservation of rights of future claimants to compensatory damages, the potential for overkill, the punitive effect of numerous and substantial compensatory awards to present and future claimants, the attenuated deterrent effect of long belated awards, and the inherent unfairness of punitive damages in the market share scheme, preclude such damages in market share liability cases.

167 Cal. App.3d at 886, 888, 213 Cal. Rptr. at 552, 554.

Because the goals of punishment and deterrence have been adequately served by the imposition of prior awards, and because plaintiffs have no right to the recovery of punitive damages, the trial court properly applied Florida law when he issued his "standard ruling" which eliminated claims for punitive damages upon a showing that the defendant had been subjected to a prior award for the same conduct. See Lohr v. Byrd; supra; St. Regis Paper Co. v. Watson, supra; Fisher v City of Miami, supra.

Due Process Concerns

Apart from public policy considerations of maintaining the availability of compensatory damages for future claimants, the imposition of unlimited punitive damage awards against a defendant for the same course of conduct raises serious substantive due process implications. See Racich v. Celotex Corp., supra (multiple imposition of punitive damages for the same course of conduct may

raise serious constitutional concerns; issue not properly preserved); McBride v. General Motors Corp, 737 F.Supp. 1563 (M.D. Ga. 1990) ("due process may place a limit on the number of times and the extent to which a defendant may be subjected to punitive damages for a single course of conduct"); Juzwin I, supra (multiple punitive damage awards violate due process); Juzwin II, supra; Jones, supra; V. Schwartz & L. Magarian, Multiple Punitive Damage Awards in Mass Disaster and Product Liability Litigation: An Assault on Due Process, 8 Adelphi L. J. 101 (1992).

Repeated civil punishment for the same course of conduct -- imposed without regard to the protections against double jeopardy and the higher evidentiary standards which accompany criminal punishment -- violates the concept of "fundamental fairness" inherent in due process. See Lassiter v. Department of Social Services, 452 U.S. 18, 24, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); Jeffries, supra.[14] The substantive due process analysis is the same regardless of whether the analysis is undertaken under the United States or the Florida Constitutions. See Department of Law

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[14] See also In re: "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 728 (E.D. N.Y. 1983), aff'd, 818 F.2d 145 (2d Cir. 1987), cert. denied sub nom Pinkney v. Dow Chemical Co., 484 U.S. 1004, 108 S.Ct. 695, 88 L.Ed.2d 618 (1988) ("There must be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); In re: Northern District of California "Dalkon Shield" IUD Products Liability Litigation, 526 F.Supp. 887, 899-900 (N.D. Cal. 1981), rev. on other grounds, 693 F.2d 847 (9th Cir. 1982); cert. denied sub nom A.H. Robins Co., Inc. v. Abed, 459 U.S. 1171, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983) ("A defendant in a civil action has a right to be protected against double recoveries ... simply because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process.")

Enforcement v. Real Property, 588 So. 2d 957, 960 (Fla. 1991) (substantive due process may implicate the harshness of remedies); State ex rel Furman v. Searcy, 225 So. 2d 430 (Fla. 4th DCA 1969).

In Pacific Mutual Life Ins. Co. v. Haslip, 111 S.Ct. 1032 (1991), the United States Supreme Court finally articulated a principle which had been foreshadowed in the literature and caselaw[15]: punitive damage awards in civil cases implicate procedural and substantive due process considerations. In Haslip, the Court, expressing "concern about punitive damages that have 'run wild'", Id. at 1043, undertook a due process analysis of the Alabama mechanism for imposition of punitive damages. The Court determined that the scheme met constitutional muster, largely on the grounds that "detailed substantive standards" used by the trial and appellate courts in post-trial review of such awards provided protections which ensured that any award of punitive damages was just and narrowly tailored to serve the goals of punishment and deterrence. The decision in Haslip makes it clear that punitive damage awards which exceed an amount which is reasonably necessary to punish and deter violate due process. Id. at 1046.

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[15] See, e.g., Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) (due process challenge to punitive damage award not properly preserved); Aetna Life Ins. Co. v. Lavoie, 106 S.Ct. 1580, 475 U.S. 813, 89 L.Ed.2d 823 (1986) (due process question raised "important issue[]" which was not reached because of disposition of case); V. Schwartz & L. Magarian, Challenging the Constitutionality of Punitive Damages: Putting Rules of Reason on an Unbounded Legal Remedy, 28 Am. Bus. L. J. 141 (1989); Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269 (1983); Note, Constitutional Defenses Against Punitive Damages: Down but not Out, 65 Ind. L. J. 141 (1989).

One of factors relied upon by the Court in Haslip to support the constitutionality of the Alabama scheme was post-trial consideration of the existence of other compensatory and punitive damage awards against the defendant for the same conduct. Id. at 1045. In this regard, it is important to note that Florida's standards for post-trial review of punitive damage awards do not presently provide a mechanism for the trial court or a reviewing court to take such a factor into consideration in determining whether an award for punitive damages is excessive. See Winn-Dixie Stores v. Robinson, 472 So. 2d 722 (Fla. 1985); Lassiter v. International Union of Operating Engineers, 349 So. 2d 622, 623 (Fla. 1977). There is no mechanism -- short of removing punitive damages from the jury's consideration, as the trial court did in this case -- for ensuring that a defendant is not unjustly subjected to the burden of repeated punishment for the same conduct.[16] As a result, it is no answer to say that existing judicial review procedures protect defendants against the violation of their due process rights by overpunishment from the imposition of multiple punitive damage awards. Cf. In re: Northern District

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[16] Indeed, the only post-trial options available to a Florida trial court upon a finding of excessiveness are a new trial or remittitur to an amount which represents the highest award which would be supported by the evidence. See Rety v. Green, 546 So. 2d 410, 420 (Fla. 3d DCA), rev. denied, 553 So. 2d 1165 (Fla. 1989). This is at least arguably inconsistent with the Haslip goal of ensuring that punitive damages are narrowly tailored to serve the goals of punishment and deterrence. Compare Lassiter v. International Union of Operating Engineers, supra, with Pacific Mutual Life Ins. Co. v. Haslip, supra at 1045 n.10 (implying that similar schemes under Vermont and Mississippi law violated due process).

of California "Dalkon Shield" IUD Products Liability Litigation, supra at 899 (potential for abuse implicit in multiple punitive damage awards is ameliorated only by the tendency of trial and appellate judges to reduce jury awards). See Jones, supra (proposing implementation of post-trial review procedure to determine whether aggregate sum of punitive damage awards violates due process).

One prominent commentator has aptly summarized the "fundamental fairness" concern triggered by the imposition of multiple punitive damage awards:

> At the core of the due process clause is the principle of basic fairness. It does not take a Ph.D. sociologist to prove that punishing an individual or a company (which is really a group of individuals) again and again for the same conduct is grossly unfair. The idea, steadfastly maintained by some advocates, that every plaintiff should get "his lick" at the defendant violates a basic sense of fairness. If a child misbehaves and is adequately punished by the mother, it seems absurd to think that the father has "equal rights" to punish the child himself.

V. Schwartz & L. Magarian, 8 Adelphi L.J., supra at 117.

The constitutionality of punitive damage awards is founded upon the state's interest in punishment and deterrence. As demonstrated above, however, multiple punitive damage awards for the same course of conduct serve no legitimate punishment or deterrence function, and their imposition creates only a windfall for a few plaintiffs -- something that does not serve any legitimate state interest. "[T]he States have no substantial interest in securing for plaintiffs ... gratuitous awards of money damages far in excess of actual injury." Gertz v. Robert Welch,

Inc., 418 U.S. 323, 349, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). As a result, any constitutional support for the imposition of multiple punitive damages has evaporated. See Brickman, supra at 1864.

Because multiple punitive damage awards violate the concept of "fundamental fairness" inherent in the constitutional guarantee of substantive due process, their imposition simply cannot continue unchecked.

Formulating a Solution to the Overkill Problem

Although it has been widely recognized that the due process concerns outlined above place limits on the extent to which a defendant may be subjected to repeated punishment for the same wrongful act or series of acts, courts and commentators have expressed increasing levels of frustration at the perceived inability of the courts to craft an effective solution, particularly in the context of asbestos litigation. See, e.g., Juzwin II, supra; Brickman, supra at 1826-1828; Jones, supra.

Concerns of federalism have prevented most federal courts, sitting in diversity, from forging new areas of state law. See, e.g., Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986) (en banc) ("Jackson III"); Jackson II, supra; Cathey v. Johns-Manville Sales Corp., 776 F.2d 1565 (6th Cir. 1985), cert. denied, 478 U.S. 1021, 106 S.Ct. 3335. 92 L.Ed.2d 740 (1986); Hansen v. Johns-Manville Products Corp., 734 F.2d 1036 (5th Cir. 1984), cert. denied, 470 U.S. 1051, 105 S.Ct. 1750, 84 L.Ed.2d 814 (1985); Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982); Roginsky v. Richardson-Merrell, Inc., supra. State courts,

on the other hand, have been reluctant to implement any solution, no doubt motivated by parochial concerns. See e.g., Fischer v. Johns-Manville Corp., 512 A.2d 466, 103 N.J. 643 (1986). See also In re: Asbestos Litigation, 829 F.2d 1233, 1244 n. 7 (3d Cir. 1987), cert. denied sub nom Owens-Illinois, Inc. v. Danfield, 485 U.S. 1029, 108 S.Ct. 1586, 99 L.Ed.2d 901 (1988); Leonen v. Johns-Manville Corp., supra at 285 n.7; Brickman, supra at 1833 n. 52.

Because the constraints of federalism have prevented federal courts from addressing the problem of "overkill," and there is no indication that Congress will effect a solution on a national scale any time soon, it is up to the states to implement procedures to alleviate the problem of overpunishment brought about by the imposition of multiple punitive damage awards. Doing nothing is no longer a viable option. As one jurist recently stated:

> [P]arochial concerns ... have influenced some states to allow punitive damages.... But it is time that some jurisdiction faces up to the realities of the situation and takes a step that might, perhaps, lead others to adopt a broader view. Courts should not wait any longer for congressional and legislative action to correct common law mistakes made by the courts. Errors created by courts can be corrected by courts without engaging in judicial activism.

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). See also Wheeler, supra, 40 Ala. L. Rev. at 921 ("The punitive damages system is a creature of the common law. Courts created it, courts developed it, and courts apply it. Courts can further refine it ..."). Accordingly, this Court should not decline to exercise its power to correct the problem created by

"overkill" in Florida, even though other courts have refused to correct the problem elsewhere.

In Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897, 907 (W. Va. 1991), the Supreme Court of West Virginia observed that the Supreme Court's decision in Haslip is "the beginning of national common law development in this area and not the end." The court, metaphorically cleaning up its own punitive damages house, called upon other state courts to rise above concerns of parochialism and to follow suit:

> [Haslip] presents an opportunity for state judges and legislators to form fair and reasonable guidelines in the area of punitive damages -- guidelines that balance the interests of injured parties against those who face an unfettered and unlimited system of punishment... The [US Supreme Court has] vested responsibility in state courts to develop fair and reasonable rules and guidelines.

Id. at 906-907, quoting V. Schwartz, L. Magarian, "Forming Guidelines Out of Vagueness: How State Courts Can Implement Haslip," 2, 6 (Draft, under review for publication in State Court Journal).

The solution suggested by the district court -- advising the jury of the existence of other punitive damage awards against the defendant arising out of the same conduct -- is no solution at all. It is almost unanimously recognized that the introduction of such evidence would be extremely prejudicial to a defendant which is trying to convince a jury that its conduct is not worthy of any punishment. See Jackson I, supra; Juzwin I, supra; Jeffries, supra at 146; Jones, supra at 29-30; Seltzer, Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency

and Control, 52 Fordham L. Rev. 37, 59-60 (1983); Wheeler, supra 72 Va. L. Rev. at 295; Note, Mass Liability and Punitive Damages Overkill, 30 Hastings L.J., 1797, 1806-1807 (1979). Indeed, this very problem was recognized in 1931 by Professor Morris in a prophetic article on the subject of punitive damages:

> [The introduction of evidence of prior awards] would not be without its dangers, for juries might assume that since the defendant has once been found guilty, their verdict must necessarily be against him. They might also fail to see that the defendant has already been punished in part, and might feel it their duty to punish him more severely because of the injury to others than the plaintiff. In other words, this evidence which is given to the jury on the theory that the defendant should have a comparatively lenient admonition, if any, might prejudice him in such a way that the defendant would be held liable regardless of a failure of plaintiff to prove his case, and be given more severe admonition than he would receive without its admission.

Morris, Punitive Damages in Tort Cases, 44 Harv. L. Rev. 1171, 1195 n.40 (1931). The plaintiffs' bar's insistence that evidence of prior punitive damage awards would actually serve a limiting function, and would be a benefit to the defendants is reminiscent of Brer Rabbit's plaintive cry: "Please don't throw me in that briar patch."[17]

The trial court's solution of eliminating repetitive claims for punitive damages against a defendant which has already been

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[17] In the overwhelming majority of cases that have gone to trial against GRACE, punitive damage claims have either been rejected by the jury, or disposed of as a matter of law on the insufficiency of the evidence to support such a claim. Obviously, the plaintiffs' bar would welcome an opportunity to introduce evidence that another jury has found defendant liable for punitive damages.

subjected to a prior award is both logical and fair at this advanced stage of asbestos litigation. Moreover, the solution is consistent with Florida law, which rejects claims for punitive damages in situations where the goals of punishment and deterrence are not advanced. See Lohr v. Byrd, supra; Fisher v. City of Miami, supra. The presumption must be that "when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct." In re: "Agent Orange" Product Liability Litigation, supra at 728.

WATERS -- who has no right to punitive damages -- cannot logically complain of this result because the final judgment on compensatory damages fairly compensates him for all of his harm.[18] In these circumstances, there is nothing unfair about "depriving" plaintiffs of a punitive damages windfall, when the result of that windfall would be the deprivation of defendant's substantive due process rights. Moreover, the cost of allowing the continued imposition of such awards could very well include denial of even compensatory damages to future claimants.

GRACE has already paid $2 million dollars in punitive damages -- a significant sum. It has already been punished. Redundant punishment is just as violative of "fundamental fairness" when it is imposed against a profitable, solvent corporation such as GRACE as it is when it is imposed upon a defendant in a more precarious

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[18] Indeed, the size of the jury award in and of itself suggests inclusion of a punitive element.

financial position. In addition, GRACE still faces an enormous burden of paying an unknown number of compensatory damage awards and settlements in the future. The bankruptcy of other defendants adds to the punitive burden GRACE faces as a result of the operation of the doctrine of joint and several liability. GRACE will continue to have to pay additional compensatory damages over and above its share of liability for harm caused by other bankrupt defendants.

The continued imposition of repetitive punitive damage awards for the same conduct can no longer be justified. The trial court's "standard ruling," which has been in effect for many years, strikes a fair balance between the various interests at stake: the need for punishment and deterrence, the defendants' right to be free from excessive punishment, the ability of future claimants to recover compensatory damages, and concerns of judicial administration and efficiency.

The question certified by the district court as one of great public importance should be answered by this Court by an affirmance of the trial court's ruling. This Court is respectfully requested to quash the decision of the district court remanding the case for trial on the issue of punitive damages against GRACE.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR MISTRIAL AFTER PLAINTIFF'S PRIMARY MEDICAL WITNESS COLLAPSED ON THE STAND IN FRONT OF THE JURY, THE JUDGE ASKED THE JURORS TO PRAY FOR THE WITNESS, FAILED TO ASCERTAIN WHETHER WITNESS' COLLAPSE WOULD INTERFERE WITH JUROR'S ABILITY TO BE FAIR AND IMPARTIAL, AND DEFENDANTS WERE UNABLE TO CROSS-EXAMINE THE WITNESS.

The district court of appeal improperly rejected defendants' argument that it was denied a fair trial by the trial court's denial of their motions for mistrial after Dr. Tate, plaintiffs' primary expert, collapsed on the witness stand. In conjunction with review of the certified question, GRACE respectfully submits that this Court should also review the district court's resolution of the new trial issue, particularly if, as the district court held, this case is to be remanded for a trial on the punitive damages claim.[19]

The trial court clearly abused its discretion in denying defendants' motions for mistrial. It is inconceivable that the dramatic and highly emotional event of Dr. Tate's collapse could not have affected the jurors. The silence of the panel in response to the trial court's questioning on the impact of the event is certainly not entitled to be viewed as an affirmative response, as it was by the trial court. As defense counsel pointed out, the jurors may not have been able to know, much less articulate, the

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[19] Once this Court accepts jurisdiction to review a decision on a question certified to be of great public importance, it may proceed to review any issue arising in the case that has been properly preserved and properly presented. Reed v. State, 470 So. 2d 1382 (Fla. 1985); Tillman v. State, 471 So. 2d 32 (Fla. 1985); Zirin v. Charles Pfizer & Co., 128 So. 2d 594 (Fla. 1961).

manner in which the event may have affected them. The fact is that none of the jurors responded to the court's inquiry one way or the other. The district court and the trial court improperly equated the absence of a response with an affirmative assurance that defendants would receive a fair trial, free of emotional taint.

It would be virtually impossible for the jurors not to have been affected by seeing a witness collapse in front of them from an apparent heart attack. Moreover, the emotional reaction of WATERS himself certainly injected an element of sympathy into the case. The dispassionate atmosphere of the courtroom was forever destroyed, and the trial court abused its discretion in denying defendants' motions for mistrial.

It is well settled that a litigant is entitled to nothing less than the "cold neutrality of an impartial jury." Parkansky v. Old Key Largo, Inc., 546 So. 2d 1143 (Fla. 3d DCA 1989). It is the function of the trial court to ensure the integrity of the trial, and to "[reduce] the extremes of tensions and voids of the drama to as temperate a norm as the circumstances permit." Thompson v. Martin, 216 So. 2d 67, 70 (Fla. 2d DCA 1968).

> The most vital, if not the most sacred, responsibility of trial and appellate courts under our system of justice is to assure that every litigant, without exception, is accorded a fair trial or hearing of his claims or defenses. Each court must be unceasingly alert to see that no improper influence enters such proceedings.

Ford v. Nathan, 166 So. 2d 185, 188 (Fla. 1st DCA 1964). See also City of Miami v. Williams, 40 So. 2d 205, 207 (Fla. 1949) (cold neutrality of jury is indispensable to the administration of

justice); Turner v. Modern Beauty Supply Co., 10 So. 2d 488, 492, 152 Fla. 3 (1942) (every litigant entitled to have his cause considered with the cold neutrality of an unbiased jury). Having lost the calm and considered atmosphere in which the jury should have determined the verdict, the trial judge should have declared a mistrial. Okey v. Monarch Insurance Co. of Ohio, Inc., 392 So. 2d 57 (Fla. 1st DCA 1981). Defendant was clearly deprived of a fair trial, and the trial court abused its discretion in denying defendant's motion for new trial. Pier 66 Company v. Poulos, 542 So. 2d 377 (Fla. 4th DCA 1989), rev. denied, 551 So. 2d 462 (Fla. 1989); Rodriguez v. State, 433 So. 2d 1273 (Fla. 3d DCA 1983).

Defendants' counsel understandably did not immediately perceive prejudice as a result of being unable to cross-examine Tate (R. 155), because before Dr. Tate's collapse, his testimony had related solely to background information. However, as the testimony of other witnesses unfolded, it became clear that defendants did suffer prejudice as a result of not being able to cross-examine Dr. Tate regarding the basis for his opinions.

Plaintiff's other physicians relied heavily upon the history given to Dr. Tate and his findings on physical examination. The lack of an opportunity to cross-examine Tate on his diagnosis, which was based on a history which did not include exposure to defendants' products, became especially prejudicial. The jury was given an opportunity to see Dr. Tate, and to hear his impressive credentials before his collapse; thereafter, they heard other witnesses testify regarding his stature in the community and his

opinions. Defendants were deprived of a fair trial by the inability to cross-examine this pivotal witness, and to test the validity of his opinions. Coco v. State, 62 So. 2d 892 (Fla. 1953).

The prejudice to defendants in this case was cemented when the judge asked the jurors to keep Dr. Tate in their prayers. (T. 158). The trial court's request to the jury to pray for the witness asked the jurors to become Dr. Tate's advocate with the Almighty. The judge asked the jurors to take Dr. Tate with them into the most intimate of relationships -- that between an individual and his or her God. The specter of seeing a witness collapse on the stand, apparently from a heart attack, was sufficiently traumatic that it is natural to expect that a religious juror would put Dr. Tate on his prayer list, particularly when asked to do so by the judge. A supplicant naturally forms an intimate bond with one for whom he is seeking God's blessing and mercy. When that person is a key witness in a lawsuit being decided by the supplicant/juror, the inherent danger that the juror could decide the case not solely on the merits is obvious. It asks too much of jurors to invite them to assume the role of an advocate for a witness with the Almighty, and then expect them to be able to set aside that role upon entering the jury room.

In this case, the critical issue at trial with respect to causation and damages was whether the jury believed Dr. Tate's diagnosis of severe asbestosis or whether they believed Dr. Feingold when he testified that plaintiff's lung problems were caused by emphysema so severe that most of the upper lung itself

was gone. (T. 845, 846). Although other physicians for the plaintiff testified that they too had diagnosed asbestosis, there can be no question that the medical issue in this case boiled down to Tate's opinion versus that of Dr. Feingold. Dr. Mezey never examined WATERS and stated that he relied upon the history and physical examination performed by Tate. (T. 221, 225-226, 250). Dr. Kamerman did not even hold himself out as an expert in asbestos disease, but nonetheless testified that he had diagnosed plaintiff as having asbestosis. (T. 326-327). Plaintiff's counsel highlighted the fact that Dr. Tate agreed with that diagnosis in order to bolster the opinions which Kamerman was only marginally qualified to render. (T. 306, 365, 1079-1081).

Asking the jurors to pray for the witness created an inherent risk that the jurors would assume the role of advocates for the opinions of Dr. Tate. This risk, coupled with the inability of defendants to cross-examine Dr. Tate about the basis for his opinions, developed into a significant handicap for defendants at trial. By soliciting the jurors' prayers for the witness, the trial court inadvertently injected into the trial an element which simply did not belong there.[20] Cf. March v. State, 458 So. 2d 308, 311 (Fla. 5th DCA 1984) (wherein the court stated: "We caution trial judges ... to avoid the risk of causing the reversal of what might otherwise be a correct result by injecting matters into the trial of a case that might be best left for other times and other

[20] Petitioner does not in any way suggest that the trial court acted with anything less than a good heart and understandable motives in eliciting the jurors' prayers for the ailing witness.

places.") Because the evidence on the pivotal questions of diagnosis and causation was so close, it cannot be said that defendants were not thereby prejudiced.

The trial court could easily have cured the prejudice to defendants by declaring a mistrial, without causing prejudice to plaintiffs. The incident occurred on the first day of trial before any substantive testimony had been taken. The trial court could and should have declared a mistrial, and started jury selection anew on the following day. The ease with which the trial court could have alleviated the prejudice to defendants makes the abuse of discretion all the more apparent.

In the instant case, the evidence from both sides presented a close question on two pivotal issues -- whether WATERS suffered from asbestosis, and whether exposure to defendants' products was a substantial contributing factor to his disease. Given the significance of Dr. Tate's opinions on both of these issues, and the predominant role attributed to him by plaintiffs' witnesses during the trial, there is a reasonable probability that a different result would have been reached by a different and impartial jury if the judge had not denied defendants' motions for mistrial; thus, the error was not harmless. Parkansky v. Old Key Largo, Inc., supra at 1145. The defendants were denied a fair trial. The trial court clearly abused its discretion in denying defendant's motion for new trial. The final judgment entered against GRACE should be reversed, and the case remanded for a fair trial on the merits, without the taint of undue sympathy brought

about by the emotional circumstances surrounding the collapse of Dr. Tate.

CONCLUSION

This Court is respectfully requested to answer the question certified by the district court of appeal in favor of limiting multiple punitive damage awards, affirming the partial summary judgment entered in favor of GRACE, and quashing the decision of the Third District Court of Appeal. Moreover, this Court is respectfully requested to reverse the final judgment for plaintiffs and the cost judgment, and to remand for a new trial on the merits.

Respectfully submitted,

BY: _____
GAIL LEVERETT

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 22d day of March, 1993, to: MARC COOPER, ESQUIRE, 700 Courthouse Tower, 44 West Flagler Street, Miami, FL 33130; ALAN K. PETRINE, ESQ., 100 South Biscayne Boulevard, Miami, FL 33131; and to THOMAS HART, ESQ., 1611 Allen Street, Post Office Box 365, Barnwell, South Carolina 29812.

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BY: Leverett
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