SUPREME COURT OF FLORIDA

CASE NO. **90,001**

SUSAN F. WOOD, individually and as Personal Representative of the Estate of BETTIE W. WOOD, and JONATHAN H. WOOD, JR., Appellants,

versus

ELI LILLY AND COMPANY, a New Jersey corporation, and UPJOHN COMPANY, INC., a Delaware corporation, Appellees.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA PURSUANT TO ARTICLE V. SEC. 3(b)(6) OF THE FLORIDA CONSTITUTION

Eleventh Circuit Court of Appeals Case No. 95-4924

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

District Court Case No. 89-6255-CIV GONZALEZ

INITIAL BRIEF OF PLAINTIFFS/APPELLANTS

WEAVER & WEAVER, P.A.
Attorneys for Appellants
Of Counsel to
KRUPNICK, CAMPBELL, MALONE, ROSELLI, BUSER, SLAMA & HANCOCK, P.A.
700 Southeast Third Avenue
Suite 100
Fort Lauderdale, FL 33316
Tele: (305) 763-2511

TABLE OF CONTENTS

Pase

TABLE OF CITATIONS

Other Sources Cited:

STATEMENT OF THE CASE AND OF THE FACTS

The United States Court of Appeals for the Eleventh Circuit has certified the following question to the Supreme Court of Florida:

> IN A NEGLIGENCE ACTION CONCERNING THE DRUG DIETHYLSTILBESTROL, ("DES") IN WHICH A PLAINTIFF RELIES ON THE MARKET SHARE THEORY OF LIABILITY TO RECOVER FROM THE DEFENDANTS, AS DESCRIBED IN *CONLEY* V. *BOYLE* ***DRUG*** *CO.*, 570 SO. 2D 275 (FLA. 1990), DOES THE STATUTE OF LIMITATIONS COMMENCE RUNNING ON THE DATE THAT *CONLEY* WAS ISSUED OR ON THE DATE THAT THE PLAINTIFF KNEW, OR REASONABLY SHOULD HAVE KNOWN, OF HER INJURY?

A summary of the facts involved in this case is found in the certification from the United States Court of Appeals for Eleventh Circuit, a copy of which is included in the appellants' Appendix, at 1.

Plaintiffs, SUSAN F. WOOD and JONATHAN H. WOOD, JR., are the brother and sister of BETTIE (BETSY) W. WOOD, who died December 11, 1991. SUSAN, BETSY, and JONATHAN WOOD, JR. were exposed to the drug diethylstilbestrol (DES) in utero because of their mother's ingestion of the DES drug during her pregnancies with the three children.

DES is a synthetic compound of the female hormone estrogen. Plaintiffs' mother, BETTY DORSCHEID WOOD, ingested DES between April and December, 1956; February and November, 1958; and July, 1961 and March, 1962.

The original Complaint was filed in the Circuit Court of the Seventeenth Judicial Circuit Court in and for Broward County, Florida on March 1, 1988, Case No 88-5578-CS against LILLY, UPJOHN and other DES manufacturers. The named Plaintiffs were BETTIE W. WOOD, SUSAN WOOD and JONATHAN WOOD, JR.; however, the Complaint was signed by only BETTIE WOOD. On March 25, 1988, before service of responsive pleadings, another Complaint entitled "First Amended Complaint" was filed against LILLY, UPJOHN and other DES manufacturers. The First Amended Complaint was signed by BETTIE W. WOOD, SUSAN F. WOOD and JONATHAN H. WOOD, JR. After BETSY'S death from cancer in 1991, her estate was substituted as a party plaintiff.

The action was removed to the United States District Court for the Southern District of Florida and then dismissed because of the inability of Plaintiffs to identify the manufacturer of the DES ingested by their mother. In the District Court's September 19, 1989 Memorandum Opinion and Order of Dismissal the Court noted:

> Although this Court is compelled to dismiss Plaintiffs' cause of action, it is the opinion of this Court that the inability of innocent children to redress grievous injuries which they allegedly suffered because of their mother's ingestion of DES is (a) matter which the Supreme Court of Florida needs to address. In addition, while this Court is not empowered to certify questions concerning such matters to the Supreme Court of Florida, the Eleventh Circuit Court of Appeals has such power pursuant Rule 9.150, Fla. R. App. P.
>
> Accordingly, this Court recommends that Plaintiffs seek appellate review of this Order. In the event that a decision by the Florida Supreme Court in Conley is not forthcoming, the Eleventh Circuit Court of Appeals would still be empowered to certify

the same question presented in Conley to the Supreme Court of Florida. (Appendix 2 at page 11 of the September 19, 1989 Order of Dismissal.)

Plaintiffs appealed to the United States Court of Appeals for the Eleventh Circuit (Case No. 89-6106), and while the appeal was pending, the Florida Supreme Court rendered its opinion in Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990). Because of the change in the Florida law, on May 3, 1991 the United States Court of Appeals for the Eleventh Circuit, in a non-published decision, vacated the District Court's Order and remanded for reconsideration in light of Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990). A copy of the unpublished May 3, 1991 opinion is contained in Appendix 3 of this Brief.

Depositions were taken and UPJOHN moved for summary judgment on the claims of SUSAN WOOD and THE ESTATE OF BETSY WOOD arguing the statute of limitations barred the claims. LILLY also moved for summary judgment on the claims of THE ESTATE OF BETSY WOOD arguing the statute of limitations barred the claims. LILLY did not move for summary judgment on the claims of SUSAN WOOD until after the District Court granted UPJOHN'S motions.

Plaintiffs moved for partial summary judgment on Defendants' statute of limitations affirmative defense arguing the statute of limitations could not bar Plaintiffs' claims because suit was filed in 1988, approximately two years before their cause of action was recognized by the Florida Supreme Court in Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990).

On December 8, 1994, the District Court entered an order ruling as a matter of law that SUSAN F. WOOD'S claims against UPJOHN and THE ESTATE'S claims against UPJOHN and LILLY were barred by the statute of limitations. Accordingly, the Court granted UPJOHN'S motions for summary judgment; granted LILLY'S motion for summary judgment against the ESTATE; and denied Plaintiffs' Motion for Partial Summary Judgment on Defendants' Statute of Limitations Defense.

Thereafter, LILLY moved for summary judgment against SUSAN WOOD asserting the statute of limitation defense and on February 10, **1995**, the District Court granted the motion for summary judgment of LILLY on the claims of SUSAN F. WOOD.

BETSY WOOD

BETSY W. WOOD was born on December 25, 1956, in Jacksonville, Florida. BETSY learned of her exposure to DES from Dr. Robert C. Nuss, a gynecologic oncologist in Jacksonville, Florida. Dr. Nuss saw BETSY in June of **1977**, examined her, did a PAP smear and biopsy and the biopsy came back "adenosis". Among other things, Dr. Nuss observed that she had certain "cervical changes compatible with diethylstilbestrol exposure" but she did not have cancer. He advised "only follow-up on a yearly basis". Dr. Nuss saw no cause for concern as there was nothing wrong with BETSY (See R. **157**, Exhibit "B", pages 53 and 54).

In August of 1978, Dr. Nuss saw BETSY. (See R. **157**, Exhibit "B", **Page** 55). At that time, she was asymptomatic (See R. 157, Exhibit "B", page 55 and the visit was simply a routine follow-up (See R. **157**, Exhibit "B", page 55). She was examined and a biopsy

was done that was inconclusive (See R. **157**, Exhibit "B", page 56) so she had a "large biopsy" under general anesthesia (See R. 157, Exhibit "B", page 56). It was that biopsy that was interpreted as showing clear cell adenocarcinoma (See R. **157**, Exhibit "B", page 56). Although Dr. Nuss was of the view that BETSY'S clear cell adenocarcinoma was associated with her DES exposure (See **R. 157**, Exhibit "B", page **58)**, he could not say her exposure to DES was the cause of her clear cell adenocarcinoma because he does not know what causes it. ***(See*** R. 157, Exhibit "B", page 59).

Thereafter, Dr. Nuss had discussions with BETSY about the diagnosis (See R. **157**, Exhibit "B", page **59** and 60) and recommended that they proceed with a "radical vaginectomy", i.e. the removal of her uterus and a portion of her vagina and surgical creation of a new vagina (See R. **157**, Exhibit "B", pages 61 and 64). In November of **1978**, BETSY experienced a "wide local excision". In addition, Dr. Nuss wrote Dr. Herbst about BETSY (See R. **157**, Exhibit "B", page 63). Dr. Herbst maintains the "Herbst Registry" to register persons with DES exposure.

The "wide local excision" experienced by BETSY in November of 1978 is also referred to as a partial vaginectomy because part of BETSY's vagina was cut out (See R. **157**, Exhibit "B", page 65).

Dr. Nuss saw BETSY the following summer, i.e. July of 1979, examined her, did some biopsies and at that point in time, the biopsies showed vaginal adenosis only. That is to say, the biopsies did not show any tumor recurrence in BETSY. (See R. **157**, Exhibit "B", page 66). In July of **1979**, Dr. Nuss did not think there was any recurrent cancer (See R. **157**, Exhibit "B", page 144).

In March of 1980, Dr. Nuss again saw BETSY, examined her, did a Pap smear and another biopsy and again no tumor was discovered. (See R. **157,** Exhibit "B", page 66). In 1980, Dr. Nuss saw no recurrent cancer. (See R. **157,** Exhibit "B", page 144).

In December of 1980, Dr. Nuss again saw BETSY, did another biopsy and the results were again benisn (See R. **157,** Exhibit "B", pages **66** and **67).** Specifically, Dr. Nuss told BETSY "everything looks fine, the smears are normal, the exam doesn't show any recurrent disease", et cetera, everything is fine. (See R. **157,** Exhibit "B", page 145).

Dr. Nuss did not see BETSY from December of 1980 until late February of 1984 (See R. 157, Exhibit "B", page **67).** During that time period, on November **8,** 1983, Dr. Nuss sent a letter to Dr. Herbst, regarding BETSY WOOD. In the letter, Dr. Nuss told Dr. Herbst that according to telephone conversation and conversation with her physician father, BETSY was doing well without evidence of disease, and "as recently as six months ago she was alive and well without evidence of disease" (See R. **157,** Exhibit "C").

Although Dr. Nuss examined BETSY on February 29, 1984 at which time he did a biopsy, the specimen from the biopsy was sent to the Department of Pathology, University of Jacksonville on February 29, 1984 and it was "reported" on March 1, 1984 (See R. **157,** Exhibit "D").

On March 2, 1984, Dr. Nuss wrote BETSY WOOD a letter confirming his telephone conversation that it was apparent to him both under clinical examination and on the basis of the biopsy,

that the cancer had recurred in the vagina (See R. **157,** Exhibit "E").

On March 2, **1984,** Dr. **Nuss** wrote Dr. Herbst telling him of the follow-up examination of BETSY and telling him that according to BETSY she had a normal examination one and a half years ago by a general practitioner in West Virginia. He described what he found on examination and stated biopsy revealed a recurrent adenocarcinoma (See R. **157,** Exhibit "F").

As far as Dr. Nuss knows, until 1984 when BETSY again saw him, she was not told by anyone that she was not cured. (See R. 157, Exhibit "B", page 145).

SUSAN WOOD, BETSY WOOD and the family thought BETTIE WOOD was cured until March of 1984 when they learned of the diagnosis of cancer by Dr. Nuss. (See R. 150, pages **97** and **98,).**

SUSAN WOOD

SUSAN WOOD was **born** on November 11, **1958** in Jacksonville, Florida and was examined by Dr. Robert C. Nuss in June of **1976.** (See R. **150,** page **68,** Lines **15-17** and R. **183,** Exhibit "E", page **87,** Lines 1 - **5).** When **Dr. Nuss** examined **SUSAN** WOOD in **1976,** it was on a referral from **SUSAN** WOOD'S father who was a practicing physician in Jacksonville, Florida. On SUSAN WOOD'S first visit to Dr. Nuss, he examined her, performed pap smears, and a colposcopy. As a result, he suspected cell changes that, in his opinion, were compatible with intrauterine DES exposure. At the same time he performed a biopsy and although **SUSAN** WOOD was diagnosed by Dr. Nuss as having vaginal adenosis, Dr. Nuss testified in deposition that vaginal adenosis was "normal tissue growing in an abnormal

place". (See R. 136, Appendix 7, Page 130, Line 19, and Page 131, Line 5). Dr. Nuss testified there was no evidence of malignancy (See R. 183, Exhibit "E" page 87). He told SUSAN that her condition needed to be watched.

In 1978, SUSAN WOOD was given a routine annual examination by Dr. Nuss. At that time, SUSAN still had only adenosis.

SUSAN WOOD learned of her sister BETSY'S diagnosis of clear cell adenocarcinoma before the end of 1978. (See R. 150, page 78, Line 9 and Page 79, Line 1). There was no diagnosis of cancer regarding SUSAN WOOD in 1976 or 1978. In fact, as of the deposition of SUSAN WOOD (March 31, 1994) there had not been a diagnosis of cancer regarding SUSAN WOOD (See R. 150, page 51).

In January of 1987, SUSAN WOOD had an ectopic pregnancy that was related to DES and as a result had a therapeutic abortion (See R. 150, pages 46, 47, 48 and 49).

Regarding SUSAN WOOD's fear of getting cancer, prior to 1985 SUSAN WOOD's fear of developing cancer was not similar to her current fear of developing cancer (See R. 150 page 100). Prior to 1985, SUSAN WOOD had a concern about developing clear cell adenocarcinoma, not a fear (See R. 150 page 100).

Following the District Court's December 8, 1994 Order granting defendants' motions for summary judgment and denying Plaintiff's motion for partial summary judgment, Plaintiffs timely filed a Notice of Appeal resulting in United States Court of Appeals Eleventh Circuit Case No. 95-4051.

Following the entry of the District Court's February 10, 1995 Order granting LILLY'S motion for summary judgment against SUSAN

WOOD, Plaintiffs timely filed a Notice of Appeal resulting in United States Court of Appeals Eleventh Circuit Case No. **95-4383.**

On June **28, 1995,** this Court dismissed Case No. **95-4051** and Case No. 95-4383 for lack of jurisdiction.

On June 19, **1995** the District Court entered four final judgments in which the District Court certified there was no just reason for delay in accord with Rule 54(b), Fed.R.Civ.P. Plaintiffs timely filed a Notice of Appeal regarding the June 19, **1995** Final Judgments resulting in United States Court of Appeals Eleventh Circuit Case No. **95-4924** (the above-styled appeal).

On February **26, 1997** the United States Court of Appeals for the Eleventh Circuit certified to the Supreme Court of Florida the following question:

> IN A NEGLIGENCE ACTION CONCERNING THE DRUG DIETHYLSTILBESTROL, ("DES") IN WHICH A PLAINTIFF RELIES ON THE MARKET SHARE THEORY OF LIABILITY TO RECOVER FROM THE DEFENDANTS, AS DESCRIBED IN *CONLEY* V. *BOYLE* ***DRUG*** **CO., 570 SO. 2D 275** (FLA. 1990), **DOES** THE STATUTE OF LIMITATIONS COMMENCE RUNNING ON THE DATE THAT *CONLEY* WAS ISSUED OR ON THE DATE THAT THE PLAINTIFF KNEW, OR REASONABLY SHOULD HAVE KNOWN, OF HER INJURY?

SUMMARY OF THE ARGUMENT

I.

Conlev v. Boyle Drus Co.

Until the **1990** decision of the Florida Supreme Court in Conlev v. Boyle Druss Co., 570 So. 2d 275 (Fla 1990), neither SUSAN **WOOD** nor **THE** ESTATE OF BETSY WOOD had a maintainable cause of action against the drug manufacturers responsible for the DES taken by SUSAN and BETSY'S mother. The lawsuit was filed March 1, **1988** and the case was dismissed, because the proper DES manufacturer could not be identified. An appeal was taken and was pending at the time of the Conlev decision. Upon the rendition of Conley v. Boyle Drug Co., the dismissal was reversed and remanded by the United States Court of Appeals for the Eleventh Circuit for proceedings consistent with Conley v. Boyle. The DES claims cannot be barred by the statute of limitations because they could not have been maintained until 1990 when Conlev was rendered.

ARGUMENT

SUMMARY JUDGMENT

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. Celotex Corp. v. Catrett, **477 U.S. 317, 106** S. Ct. **2548,** 91 L. **Ed. 2d 265 (1986);** Clark v. Coats & Clark, Inc., **929** F.2d 604 (11th Cir. 1991).

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the non-movant and resolve all reasonable doubts in that party's favor. Spence v. Zimmerman, **873** F.2d **256** (11th Cir **1989).** The Eleventh Circuit has explained the reasonableness standard:

> In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness," [citations omitted] The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one. WSB-TV v. Lee, **842** F.2d **1266** (11th Cir **1988).**

I.

CONLEY V. BOYLE DRUG CO.

Conley v. Boyle Drus Company, 570 So. 2d 275 (Fla. 1990) precludes entry of summary judgment in Defendants' favor.

In its September 19, 1989 Memorandum Opinion and Order of Dismissal, the Court ruled Plaintiffs had no cause of action against Defendants because they were unable to identify the alleged tortfeasor responsible for their injuries. It was not until the Florida Supreme Court in 1990 announced its opinion in Conley v. Boyle Drus Company, 570 So. 2d 275 (Fla. 1990) that a cause of action accrued for Plaintiffs.

To rule otherwise would deprive Plaintiffs of due process of law and deny them access to the courts in violation of Article I, Section 21, Florida Constitution, which provides:

> The Courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial **or** delay.

The operation of the statute of limitations as determined by the District Court operates to bar Plaintiffs' cause of action before it accrued, so that no judicial forum was available to them. Diamond v. E.R. Squibb & Sons, 397 So. 2d 671 (Fla. 1981).

In Penthouse North Association, Inc. v. Lombardi, 461 So. 2d 1350 (Fla. 1985), the Florida Supreme Court held an action by a condominium association against its directors for an alleged breach of fiduciary duty in reference to a rent escalation agreement brought thirteen years after the execution of the agreement but before the escalation rent was demanded was not barred by the statute of limitations. The court reasoned that "the obligation to

pay rent is a contingent one which becomes an enforceable debt only as the rent is earned through the lessee's use of the property . . . A statute of limitation does not commence to run until the cause of action accrues." Although the alleged wrong took place in 1966, "[t]he harm, or damages, did not materialize until the escalated rent was demanded." Although the statute of limitations was therefore found not to bar the suit, the court rejected an argument that the date of accrual of the cause of action began when the Supreme Court recognized a cause of action for unconscionability in Avila South Condominium Association, Inc. v. Kappa Corp, 347 So. 2d 599 (Fla. 1977). In so ruling, the court stated:

> This Court has often changed common-law tort rules or recognized new causes of action without affecting time-barred claims (no citation). This may seem unfair to those plaintiffs who would have had viable claims if the change of law had occurred earlier, but potential and actual liability must end with finality at some point (no citation). Persons should have the right to conduct their affairs without fear of liability for their actions once an appropriate limitation period has passed (no citation).

The Court's language in that regard is dicta and therefore not binding on this Court. It is easy to make such a statement when the result is a finding of no bar by the statute of limitations. Such a rule becomes untenable when the otherwise recognized cause of action is barred by the statute of limitations, particularly in the unique circumstance of a DES claim.

That is particularly so in the case at bar. In the District Court's September 19, 1989 Memorandum Opinion and Order of

Dismissal of Plaintiffs' action the Court dismissed the case expressly recognizing the fact that the Florida Supreme Court's ruling in Conley v. Boyle would determine whether Plaintiffs have a viable cause of action where they are admittedly unable to identify the tortfeasor responsible for their injuries. This Court, in reversing the dismissal, remanded to the District Court for further consideration in light of Conley v. Boyle Drug Co.

In Conley v. Boyle Drug Co., 570 So. 2d (Fla. DCA 1990), the Florida Supreme Court expressly stated that:

> because of the delay between the mother's ingestion of the drug and the manifestation of the injury to the plaintiff, DES cases must be accorded different treatment than other products liability actions for statute of repose purposes. Conley at **283.**
>
> * * * * *
>
> Likewise, recognition of such an approach to liability where the manufacturing and marketing practices involved and the delayed harmful effect on the nonconsuming plaintiff make identification impossible would not be the first time this Court has relaxed the identity requirement where it would be unjust to adhere rigidly to traditional principles of tort law. Conley at **283.**
>
> * * * * *
>
> This Court has consistently recognized its "continuing responsibility to the citizens of this state" to modernize traditional principles of tort law when such becomes necessary "to ensure that the law remains both fair and realistic as society and technology change." Conley at 284.

The United States Court of Appeals for the Eleventh Circuit, in reversing the dismissal by the District Court, recognized the fact that DES cases are unique and, because of that uniqueness, the

Florida Supreme Court has held that the statute of repose does not apply to DES litigation. Diamond v. E.R. Squibb and Sons, 397 So. 2d 671 (Fla. 1981). This Court also recognized the fact that the Florida Supreme Court carved the exception for DES cases even though the Court has applied the statute in other cases where the statute bars a cause of action before the action accrued. Pullum v. Cincinnati, 476 So. 2d 657 (Fla. 1985).

Beeman v. Island Breakers, 577 So. 2d 1341 (Fla. 3rd DCA 1991) for the same reason provides no support for the ruling of the District Court. Although the Florida District Court of Appeal rejected a similar argument to that made in Penthouse North Association (regarding the effect of Avila South Condominium Association, Inc. v. Kappa Corp.), it also found the statute of limitations did not bar the claim.

In any event, neither Penthouse North nor Beeman control because in those cases the identity of the proper Defendant was always known by Plaintiffs. In the case at bar, it was not until the Conley decision that Plaintiffs knew who to sue. Under these circumstances, the statute of limitations must begin on the date of the Conley v. Boyle Drug opinion, namely November 1, 1990.

CONCLUSION

No genuine issue of material fact exists regarding the accrual of Plaintiffs' cause of action until the 1990 decision of the Florida Supreme Court in Conley v. Boyle Drug Inc., 570 So. 2d 275 (Fla. 1990), and partial summary judgment on Defendants' statutes of limitations defense should have been granted in favor of Plaintiffs and against Defendants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 28th day of March, 1997, to Hugh J. Turner, Jr., Esquire, English McCaughan & O'Bryan, Suite 1100, 100 N.E. Third Avenue, Ft. Lauderdale, FL 33301, counsel for ELI LILLY AND COMPANY, John A. Reed, Jr., Esquire and R. Kimbark Lee, Esquire, Lowndes, Drosdick, Doster, Kantor & Reed, P.A. 215 N. Eola Drive, P.O. Box 2809, Orlando, Florida 32802, counsel for UPJOHN.

WEAVER & WEAVER, P.A.
Attorneys for Appellants
KRUPNICK, CAMPBELL, MALONE,
ROSELLI, BUSER, SLAMA &
HANCOCK, P.A.
700 Southeast Third Avenue
Suite 100
Fort Lauderdale, FL 33316
(954) 763-2511

By: _____
BEN J. WEAVER
Florida Bar No. 139763

APPENDIX TO BRIEF OF APPELLANTS

TAB

Susan F. WOOD, individually and as Personal Representative of the Estate of Bettie W. Wood, and Jonathan H. Wood, Jr., Plaintiffs–Appellants,

v.

ELI LILLY AND COMPANY, a New Jersey corporation, and Upjohn Company, Inc., a Delaware corporation, Defendants–Appellees.

No. 95–4924.

United States Court of Appeals,
Eleventh Circuit.

Feb. 26, 1997.

Appeal from the United States District Court for the Southern District of Florida (No. 89–6255–CIV–JAG); Jose A. Gonzalez, Jr., Judge.

Before HATCHETT, Chief Judge, DUBINA, Circuit Judge and COHILL *, Senior District Judge.

PER CURIAM:

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA PURSUANT TO ARTICLE V. SEC. 3(b)(6) OF THE FLORIDA CONSTITUTION

TO THE SUPREME COURT OF FLORIDA AND ITS HONORABLE JUSTICES:

It appears to the United States Court of Appeals for the Eleventh Circuit that this case involves an unanswered question of Florida law that is determinative of this appeal. Therefore, we certify the following questions of law, based on the background recited below, to the Supreme Court of Florida for instructions.

The original complaint in this case was filed in the Broward County, Florida, Circuit Court on March 1, 1988, Case No. 88–5578–CS. The named plaintiffs were Bettie W. Wood, Susan Wood and Jonathan H. Wood, Jr. Bettie W. Wood died in 1991, and her estate was substituted as a party plaintiff.

Defendants removed the action to the United States District Court for the Southern District of Florida. The gravamen of the complaint is that the plaintiffs were exposed to the drug diethylstilbestrol ("DES") *in utero* because their mother ingested DES during her pregnancies with the three plaintiffs, and that each subsequently suffered illnesses allegedly related to DES.

By order dated September 19, 1989, the district court dismissed the action because of the inability of the plaintiffs to identify the manufacturer, or manufacturers, of the DES ingested by their mother.

The plaintiffs appealed to this court, and while the appeal was pending, the Florida Supreme Court rendered its opinion in *Conley v. Boyle Drug Co.*, 570 So.2d 275 (Fla. 1990) which held that a market share theory of liability could be used in DES cases to apportion liability. This theory permits a plaintiff to bring an action in such cases without requiring the plaintiff to allege or prove that a particular defendant produced or marketed the precise DES taken by (in that case) the plaintiffs mother. *Id.* at 282.

*Honorable Maurice B. Cohill, Jr., Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

In an unpublished opinion, on May 3, 1991, this court vacated the order of the district court and remanded for reconsideration in light of *Conley.*

On December 8, 1994, the district court granted the defendants' motions for summary judgment against Bettie and Susan Woods on the grounds that their claims were barred by the applicable statute of limitations—four years.

In this case, the plaintiffs' mother ingested DES during her pregnancies between April and November, 1956; February and November, 1958; and July 1961 and March, 1962, The original complaint in this case was filed March 1,1988.

In August, 1978, Bettie Wood was diagnosed with clear cell adenocarcinoma. She underwent surgery followed by yearly medical examinations with no indication of a recurrence of the cancer until she was notified on March 2, 1984, that the cancer had recurred. She died in 1991, and her estate was substituted as a party.

There has never been a diagnosis of cancer for Susan Wood, although in 1978 she was diagnosed with vaginal adenosis. In January, 1987, Susan Wood had an ectopic pregnancy and therapeutic abortion, which she alleges was related to the ingestion of DES by her mother.

The issue of when the statute of limitations began to run is now before this court.

The defendants contend, and the district court held, that the statute of limitations began running more than four years before the filing of the complaint on March 1, 1988. Bettie Wood was diagnosed with clear cell adenocarcinoma in 1978 and advised that there might be a connection between her condition and the DES taken by her mother.

Susan Wood was diagnosed with vaginal adenosis in 1976 and told that this condition was often associated with DES exposure.

The plaintiffs argue that no cause of action arose for statute of limitations purposes until the Florida Supreme Court's decision in *Conley, supra,* and that application of the statute of limitations in this case would deprive the plaintiffs of their right to access to the courts under the Florida Constitution, Art. 1, Section 21.

The district court specifically rejected plaintiffs' contentions and entered summary judgment in favor of the defendants and against Susan F. Wood individually and as Personal Representative of the Estate of Bettie W. Wood. The action involving Jonathan H. Wood, Jr. is apparently still pending in the district court.

The parties in this appeal have raised an issue of first impression under Florida law. No Florida court has addressed the question of whether the date of the decision in *Conley v. Boyle Drug Company,* 670 So.2d 275 (Fla. 1990) is the benchmark for the commencement of the running of the statute of limitations in a negligence action such as this where the plaintiffs are relying on the market share theory of liability and the Florida Constitution in order to gain access to the courts despite the fact that the alleged acts of negligence, or the knowledge thereof, occurred more than four years prior to that decision.

Accordingly, we respectfully certify the following question to the Supreme Court of Florida.

IN A NEGLIGENCE ACTION CONCERNING THE DRUG DIETHYLSTILBESTROL ("DES") IN WHICH A PLAINTIFF RELIES ON THE MARKET SHARE THEORY OF LIABILITY TO RECOVER FROM THE DEFENDANTS, AS

DESCRIBED IN CONLEY *V. BOYLE DRUG CO.*, 570 SO.2D 275 (FLA.1990), DOES THE STATUTE OF LIMITATIONS COMMENCE RUNNING ON THE DATE THAT *CONLEY* WAS ISSUED OR ON THE DATE THAT THE PLAINTIFF KNEW, OR REASONABLY SHOULD HAVE KNOWN, OF HER INJURY?

Our statement of the question is not meant to limit the scope of inquiry by the Florida Supreme Court. On the contrary, the particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified in this case. This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given. *Martinez v.* Rodriguez, 394 F.2d 156, 159 n. 6 (5th Cir.1968). The entire record in this case, together with copies of the briefs of the parties, is transmitted herewith.

QUESTION CERTIFIED.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.