**ORIGINAL**



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.

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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

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# REPLY BRIEF OF PLAINTIFFS/APPELLANTS

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## PREFACE

This Reply Brief is submitted in response to the Answer Brief of Appellee, THE UPJOHN COMPANY, as well as the Answer Brief of Appellee, ELI LILLY AND COMPANY.

## ARGUMENT

Appellants do not agree with the statement of UPJOHN at page 2 of its Answer Brief that "to answer the certified question, this Court should assume, as the trial court adjudicated, that Susan Wood and Betsy Wood knew of their injuries and the alleged acts of negligence more than four years before March 1, 1988, the date they filed suit." UPJOHN claims disagreement with Appellants' statements of the facts regarding whether or not SUSAN WOOD had an actionable injury four years or more before March 1, 1988, as well as her knowledge thereof. Yet UPJOHN makes no attempt to state any factual basis for the disagreement. It is submitted there is no factual basis to disagree with the fact that SUSAN WOOD had no actionable injury until the January 1987 ectopic pregnancy that was related to DES and the resulting therapeutic abortion.

More specifically, not disputed is the fact that when Dr. Nuss examined SUSAN WOOD in 1976, while he suspected cell changes that were compatible with intrauterine DES exposure, SUSAN WOOD was diagnosed by Dr. Nuss as having only vaginal adenosis. Also undisputed is the testimony of Dr. Nuss 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 also testified there was no evidence of malignancy (See R. 183, Exhibit "E" page 87), and he told SUSAN that her condition only needed to be watched.

Also undisputed is the fact that in 1978, SUSAN WOOD was given a routine annual examination by Dr. Nuss. At that time, SUSAN WOOD still had only adenosis. Although 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 only had a concern about developing clear cell adenocarcinoma; not a fear. (See R. 150 page 100.)

In its Answer Brief filed with the Circuit Court of Appeals, Eleventh Circuit, UPJOHN devoted only a page and a half in attempting to justify the summary judgment against SUSAN WOOD, individually. (A copy of UPJOHN'S Answer Brief filed with the Eleventh Circuit is attached as Exhibit **"A"** in the Appendix to this Reply Brief. See page 26 and 27 of the Answer Brief). LILLY, on the other hand, devoted four pages. (Exhibit **"B"** in the Appendix to this Brief. See pages 36 through 39). Their argument that SUSAN WOOD had an actionable injury and knew of it four years before she filed suit is basically that SUSAN WOOD was put on notice of her "injury" in 1976 when Dr. Nuss diagnosed her adenosis and in 1978 she developed a "concern" that she would get cancer. The DES manufacturers conclude that SUSAN WOOD must have filed suit

on or before August of 1980 in order to avoid having her claims bared by the statute of limitations. UPJOHN and LILLY also incorrectly claimed that the fact that SUSAN WOOD has not been diagnosed with cancer is irrelevant under Florida law.

The flaw in Appellees' arguments regarding SUSAN WOOD are that they assume that "adenosis" is an injury sufficient in and of itself upon which to base a cause of action. Ignored is the testimony of Dr. Nuss to the effect that adenosis is merely normal cells in an abnormal place. Also ignored are the facts in Jolly v. Lilly, 44 Cal. 3d 1103 at 1107, 751 P.2d 923 at 925, 245 Cal. Rptr. 658 at 660 (1988) relied on so heavily by the DES manufacturers. In Jolly v. Lilly, 44 Cal. 3d 1103, 751 P.2d 923, 245 Cal. Rptr. 658 (1988), the plaintiff learned in 1972 that her mother had ingested DES. The Plaintiff was diagnosed in 1972 as having adenosis. In 1976, she had an abnormal pap smear and underwent a dilation and curettage, described as a surgical procedure to removal abnormal tissue. Jolly v. Lilly, 44 Cal. 3d 1103, 751 P.2d 923, 245 Cal. Rptr. 658 (1988). In 1978, plaintiff underwent a complete hysterectomy and a partial vaginectomy in order to remove malignancy. Jolly v. Lilly. 44 Cal. 3d 1103, 751 P.2d 923, 245 Cal. Rptr. 658 (1988) . Under those circumstances, the Court held the statute began to run in 1978, not 1972 when adenosis was first diagnosed, and not 1976 when plaintiff underwent the dilation and curettage because of the abnormal pap smear. Jolly v. Lilly, 44 Cal. 3d 1103, 751 P.2d 923, 245 Cal. Rptr. 658 (1988). At a minimum, it is a question of fact as to whether the diagnosis of

adenosis was actionable so as to start the running of the statute of limitations.

Regarding the claim that SUSAN WOODS' concern about getting cancer being a basis for the running of the statute of limitations, Appellees' arguments ignore Florida law to the effect that a plaintiff may not recover for an enhanced risk of contracting cancer in the future. Eagle-Picher Industries, Inc. v. Cox, 481 so. 2d 517 (Fla. 3rd DCA 1985); Florida Power & Light Corp. v. Bowers, 799 F. Supp. 94 (S.D. Fla. 1992).

It is clear that if SUSAN WOOD ever contracts cancer, the statute of limitations would then begin to run on the cancer claim. Eagle-Picher Industries, Inc. v. Cox, 481 So. 2d 517 (Fla. 3rd DCA 1985).

UPJOHN incorrectly claims at page 3 of its Answer Brief that "no one is suggesting that the statute of limitations began to run until the appellants' alleged injuries became manifest and they had knowledge of them." If SUSAN WOOD did not have an actionable injury until January of 1987 when she had the ectopic pregnancy related to DES and as a result the therapeutic abortion (a fact that is not challenged by LILLY or UPJOHN), not only is UPJOHN suggesting the statute of limitations began to run before SUSAN WOOD'S injuries became manifest and she had knowledge of them, UPJOHN asks the Court to assume she had the injury as well as knowledge thereof four years prior to filing suit.

Appellees' argument that no new cause of action was created in Conlev will not withstand analysis. The issue the Florida Fourth

District Court of Appeal certified to the Florida Supreme Court was as follows:

> DOES FLORIDA RECOGNIZE A CAUSE OF ACTION AGAINST A DEFENDANT FOR MARKETING DEFECTIVE DES WHEN THE PLAINTIFF ADMITTEDLY CANNOT ESTABLISH THAT A PARTICULAR DEFENDANT WAS RESPONSIBLE FOR THE INJURY? Conley v. Bovle Drug Co., 570 So.2d 275, at 278 (Fla. 1990)

This Court restated the question-as follows:

> DOES FLORIDA RECOGNIZE A CAUSE OF ACTION AGAINST A DEFENDANT FOR NEGLIGENTLY MANUFACTURING AND MARKETING DES OF THE TYPE WHICH CAUSED A PLAINTIFF'S INJURY WHEN THE PLAINTIFF AFTER A REASONABLE EFFORT IS UNABLE TO ESTABLISH THAT A PARTICULAR DEFENDANT WAS RESPONSIBLE FOR THE INJURY? Conlev v. Bovle Drug Co., 570 So.2d 275, at 279 (Fla. 1990).

In answering the restated question in the affirmative, this Court quashed the decision of the Fourth District Court of Appeals, affirmed the trial court's order dismissing the **action based on Ms.** Conley's inability to identify the drug company which manufactured or distributed the drug causing her injury, and remanded for a hearing to determine whether Ms. Conley was entitled to proceed under the market-share alternative theory of liability as adopted in the opinion and for further proceedings in accordance with the opinion.

Before Conlev, if a DES Plaintiff could not identify the manufacturer of the DES taken by the Plaintiff's mother, no cause of action was stated and the suit was dismissed. After Conlev, the Plaintiff could proceed against DES manufacturers under the market share alternate theory of liability.

## ARTICLE I, SECTION 21, FLORIDA CONSTITUTION

UPJOHN'S only attempt to respond to Appellants' argument at page 12 of their Initial Brief that to affirm the summary judgment against Appellants deprives Appellants of due process of law and denies them access to the courts in violation of Article I, Section 21, Florida Constitution is the claim that "appellants were not precluded from bringing their claims before the courts on a timely basis. Nothing would have stopped them from bringing their claims earlier, instead of sitting on their rights". It is submitted, if SUSAN WOOD had filed suit in 1976 or 1978 or any time before her ectopic pregnancy her law suit would have been dismissed because she had sustained no compensable injury. As in Diamond v. E.R. Squibb & Sons, 397 So. 2d 671 (Fla. 1981), the application of the statute of limitations by the United States District Court to bar the claim of SUSAN WOOD operates to bar her cause of action before it accrued, so that no judicial forum was available to her.

LILLY'S response at page 16, 17 and 20 of its Answer Brief that the instant case presents an entirely distinguishable set of circumstances from those involved in Diamond v. E.R. Squibb & Sons, 397 so. 2d 671 (Fla. 1981) assumes "the claims of the Plaintiffs accrued in the late 1970s". (See page 17 of LILLY'S Answer Brief). Yet it is undisputed that the first actionable injury sustained by SUSAN WOOD did not occur until the ectopic pregnancy suffered in 1987. Had SUSAN WOOD filed suit based on the diagnosis of adenosis or her concern over getting cancer, her law suit would have been dismissed even if she could had identified the manufacturer of the DES ingested by her mother.

## WILEY V. ROOF

LILLY argues that it has a constitutionally protected property right to be free from a DES claim that accrued under this Court's Conley v. Bovle decision citing Wiley v. Roof, 641 So. 2d 66 (Fla. 1994) which is clearly distinguishable. Wiley involved a legislative change in the statute of limitations applicable to intentional torts based on abuse. Plaintiff Roof's amended complaint alleging sexual abuse had been dismissed because of the expiration of the applicable four year statute of limitations. While Roof's appeal was pending before the Second District Court of Appeal, the Florida Legislature amended section 95.11 to enlarge the statute of limitations. This Court held the legislature could not "revive a cause of action that has already been barred by the expiration of the pre-existing statute of limitations." Wiley, at 67. However, in Wiley the statute of limitations had clearly run. However, in the case at bar, LILLY asks the court to assume with no factual support that the statute of limitations had run. Such an assumption, at least as to SUSAN WOOD, is clearly erroneous.

## DAMIANO V. MCDANIEL

LILLY implies this Court overruled Diamond v. E.R. Sauibb & Sons, Inc., in Damiano v. McDaniel, 689 So. 2d 1059 (Fla. 1997). Damiano involved the applicability of the medical malpractice statute of repose. In its Answer Brief LILLY quotes footnote number 4 at page 1061 of DAMIANO. However, LILLY leaves out the last sentence of footnote number four, to wit:

> Moreover, Diamond was a products liability action involving an entirely different statute of repose.

The case at bar involves a products liability claim, not a medical malpractice claim. If this Court intends to overrule its holding in Diamond v. E.R. Squibb & Sons, Inc. it should clearly say so.

## INCLUSION OF THE MARKET SHARE THEORY IN PLAINTIFFS" 1988 COMPLAINT

Appellees suggest Plaintiffs could have included the market share alternate theory of liability in their 1988 Complaint. However, no attempt is made to suggest what if any difference it would make had the market share theory been plead in the 1988 Complaint. It is submitted there would be no difference. The DES manufacturers would have removed the suit to the United States District Court and the District Court would have dismissed the suit for failure to identify the specific DES manufacturer. An appeal would have been taken and while on appeal the Conlev v. Boyle, opinion would have been rendered. The Eleventh Circuit Court of Appeals would have reversed and remanded and ultimately the parties would be in the same circumstance regarding the statute of limitations.

## JOLLY V. LILLY

Jolly v. Lilly, 44 Cal. 3d 1103, 751 P.2d 923, 245 Cal. Rptr. 658 (1988) is factually distinguishable. In 1972, plaintiff learned her mother had ingested DES, and plaintiff was diagnosed as having adenosis, a precancerous condition that required careful monitoring, In 1976, the plaintiff had an abnormal pap smear and underwent a dilation and curettage. In 1978, the plaintiff underwent a complete hysterectomy and partial vaginectomy. In 1980, the California Supreme Court rendered its decision in Sindell

v. Abbott Laboratories, 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P. 2d 924 (1980). In 1981, plaintiff filed suit.

A one year statute of limitations was applicable and the court determined the year began to run in 1978, when plaintiff underwent the complete hysterectomy and partial vaginectomy. The court should note that the statute did not begin to run in 1972 when she plaintiff learned she had adenosis, nor did it begin to run in 1976 when she had an abnormal pap smear and underwent a dilation and curettage. Thus, at least as to the individual claim of SUSAN WOOD, the applicability of the Conlev v. Boyle decision is not reached because material issues of fact exist as to when the statute began to run as to the individual claim of SUSAN WOOD.

In Jolly v. Lilly, plaintiff's argument on appeal was that the statute of limitations did not begin to run until plaintiff learned of the decision of the California Supreme Court in Sindell v. Abbott Laboratories. In rejecting the argument and affirming the summary judgment on the applicability of the statute of limitations, the California court acknowledged the holding worked a harsh result, yet determined it was justified, first because the rule encourages people to bring suit to change a rule of law with which they disagree, thereby fostering growth and preventing legal stagnation. Second, it was observed that the statute of limitations is not solely a punishment for slow plaintiffs, it serves the important function of repose by allowing defendants to be free from stale litigation, "especially in cases where evidence might be hard to gather due to the passage of time". Third, the Court concluded, to hold otherwise would allow virtually unlimited

litigation every time precedent changed. It is respectfully submitted that the decision of the California Supreme Court in Jolly v. Lilly is wrong and not binding on this Court.

To base such a ruling on encouraging people to bring suit to change a rule of law with which they disagree thereby allegedly "fostering growth in preventing legal stagnation" in the context of DES claims defies logic. Likewise, basing such a ruling on "allowing defendants to be free from stale litigation, especially in cases where evidence might be hard to gather due to the passage of time" cannot be reconciled with DES claims in general and this Court's decision in Conlev v. Boyle. By definition, DES claims involve activity that happened decades before a plaintiff could possibly have any indication of harm. In all DES claims, the information and evidence is always hard to gather due to the passage of time. Indeed, this Court emphasized:

> We have recognized 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. Conlev at page 283.

The only rationale arguable is that having to do with the concern about "allowing virtually unlimited litigation every time precedent changed". However, that concern is unfounded when the ruling is limited strictly to DES cases, especially if it is further limited to cases such as this where the plaintiffs' claims had been dismissed because plaintiffs were unable to determine the manufacturer of the DES taken by plaintiffs' mother. Conlev was decided in November of 1990 with rehearing denied on January 9, 1991. Therefore, any DES claim not brought under the Conley market

theory of liability must have been filed by November of 1994 or at the latest by January 1995. The specter of endless litigation suggested by the DES manufacturers simply does not exist.

## CONCLUSION

For the reasons stated, it is respectfully submitted the orders granting summary judgment in favor of **LILLY and UPJOHN** should be reversed as should the order denying Appellants' motion for partial summary judgment on the statute of limitations defense.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that **a** true and correct copy of the foregoing was mailed this 2nd day of June, 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.**

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## APPENDIX TO REPLY BRIEF

TAB


A — UPJOHN'S Answer Brief filed with the Court of Appeals for the Eleventh Circuit.

B — LILLY'S Answer Brief filed with the Court of Appeals for the Eleventh Circuit.