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IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 92,963

OWENS CORNING,

Petitioner,

v.

DEWARD BALLARD,

Respondent.

ANSWER BRIEF ON THE MERITS OF DEWARD BALLARD

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE
FROM THE FOURTH DISTRICT COURT OF APPEAL

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Record Reference Abbreviations Used in This Brief

"R__":	Record on appeal prepared by the clerk of the Fifteenth Judicial Circuit, Palm Beach County, CL-93-10817-AD.
"PB__":	Petitioner's Brief in this case.
"1/21/97__":	Transcript of punitive damages phase of the trial held on January 21, 1997, as filed with the district court on October 9, 1997, pursuant to an order dated October 17, 1997.
"2/27/97__":	Transcript of post trial hearing held on February 27, 1997, as filed with the district court on October 9, 1997, pursuant to an order dated October 17, 1997.
"T__":	Trial transcript.
"PL Exh__:"	Plaintiff's exhibit in evidence.

Statement Of The Case And Facts

The recitation of the "facts" by Owens Corning (OC) is misleading because in many instances the facts are wrong and incomplete.

In February 1994, OC was placed on notice by Mr. Ballard's attorneys that he was exposed to products manufactured by 18 other defendants in this case which may have contained asbestos. (R58-62). At the same time, OC was notified that none of Mr. Ballard's exposure to asbestos occurred in Florida, but that he had been exposed to asbestos products manufactured by W. R. Grace, which has its principal place of business in Florida. *Id.*

In May 1994, Mr. Ballard responded to interrogatories concerning his work history, smoking history, military history, marital status and medical history. OC learned then that Mr. Ballard was not a Florida resident and had not been diagnosed in Florida. OC elected not to propound any additional interrogatories during the remaining thirty-one (31) months of this case.

In 1995, Mr. Ballard was diagnosed by his treating doctors as having lung cancer. Mr. Ballard's medical records were then reviewed by Dr. Douglas Pohl at the request of plaintiff's counsel. In January 1996, Dr. Pohl provided plaintiff's counsel with his report that reflected his belief that Mr. Ballard's treating doctors had misdiagnosed his cancer and that he thought Mr. Ballard had mesothelioma. Upon receiving this conflicting diagnosis, Plaintiff's counsel advised Mr. Ballard's treating doctors of Dr. Pohl's diagnosis. Ultimately, the treating

doctors agreed with Dr. Pohl, and despite the fact that OC had not propounded any supplemental medical discovery to Mr. Ballard, plaintiff's counsel voluntarily disclosed the confirmed diagnosis of mesothelioma to OC.

In August 1996, a hearing was held to discuss setting this case for trial. Despite the fact that OC had been advised twenty-seven (27) months earlier that the only contact this case had with the state of Florida was that one defendant had its principal place of business in Florida, and that *Kinney*[1] had been decided by this court eight months earlier, OC did not object to this case proceeding to trial in Florida on January 6, 1997.[2]

Ten months after this court had decided *Kinney*, almost three years after this case had been filed, and three months before the trial was to take place, OC moved to dismiss this case for *forum non conveniens*. The motion was heard on October 31, 1996, during which OC claims the undeveloped status of the case was made known to the court. (PB p.35). That is not supported by the record. OC has failed to provide to this court a transcript of the October 31, 1996 hearing, but clearly Judge Baker was not advised by OC that this case was not ready for trial:

> "When I ruled on your *forum non conveniens* case [sic], I mean, in my judgment, you know, not only was it [the Ballard case] ready, it

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[1]*Kinney Systems, Inc., v. Continental Ins. Co.*, 674 So. 2d 86 (Fla. 1996)

[2]OC claimed post trial that it did not agree to this case being set on the January 6 docket. However, the record is devoid of any objection and Judge Baker told OC at the post trial that they did not object. (2/27/97 p.63).

> was set for trial, you know. And I was under the impression that you [OC] agreed that it was ready."

(2/27/97 p.62). The record shows that the first time that OC ever claimed that this case was not ready for trial was at the post trial hearing held on February 27, 1997. (2/27/97 p.15).

OC also claims that at the October 31, 1996, hearing it opposed Mr. Ballard's motion to expedite claiming it was not ready for trial "because of the mesothelioma diagnosis and the dramatically expanded exposure sheets." To the contrary, Judge Baker stated post trial that if OC had told him before this case was tried that they were not ready he would have continued the case. (2/27/97 p.65).

From the time that this case was set for trial in August 1996 until the day the trial began on January 9, 1997, OC did not propound any interrogatories, request for production, request to admit, did not take the deposition of a single doctor who treated Mr. Ballard, did not take the deposition of the plaintiff's only expert witness, Dr. Pohl, and did not take the deposition of a single product identification witness. The only discovery conducted by OC was the relatively brief deposition of Mr. Ballard. As OC explained to Judge Baker post trial, "Your Honor, we may not even do any discovery in this court after a case is set for trial." (2/27/97 p.70).

In November 1996, Mr. Ballard's lawyers in Louisiana filed a case primarily alleging premises liability against certain

Louisiana premises owners.[3] However, Mr. Ballard was not exposed to any OC product in Louisiana. The record does not support OC's factual assertion that Mr. Ballard concealed the Louisiana claim; rather the record demonstrates that OC did not ask Mr. Ballard by interrogatory or during his deposition about any other lawsuits he had filed.

OC claims that the trial court denied its motion to amend its answer to allege the fault of nonparties as required by *Nash v Wells Fargo Guard Services, 678 So. 2d 1262 (Fla. 1996)*. (PB p.6). The court did not deny that motion. (T13-21). Rather, the court repeatedly gave OC an opportunity to proffer its *Fabre*[4] evidence and OC repeatedly refused to comply with the court's request. (T13-21).

On January 6th and 7th, 1997, the parties appeared for trial. The court heard certain pretrial matters but did not commence the trial. (T1-28). OC did not request a continuance or in any way suggest that it was not ready for trial on January 6, 1997. (T1-28, 67-68).

On January 9, 1997, the parties again appeared before the court. (T75). OC never suggested to Judge Baker that it was not ready for trial.

On January 10, 1997, the parties appeared to begin their voir dire of the jury. (T177). Before beginning the trial, Judge Baker asked "Both sides ready to proceed?" OC responded

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[3]Mr. Ballard also sued manufacturer Rapid American which had contested jurisdiction in Florida.

[4]*Fabre v. Marin*, 623 So. 2d 1182 (Fla. 1993).

"Yes, your Honor." (T177). The trial began without OC ever suggesting to Judge Baker that this case was not ready for trial or that any discovery needed to be done.

At trial the evidence showed that Owens Corning Fiberglas (OC) was formed in 1938 by Corning Glass Works (CG) and Owens Illinois Glass Company (OI). (T500, 509). Upon the formation of OC, OI and CG each received one-half of the stock of OC (T504), and each appointed one-half of the officers and directors of OC. (T505). OC was formed for the purpose of making new products with fiberglass. (T500). One of the products that OC offered for sale in the early 1940's was fiberglass insulation. (T508-9). Prior to 1942, OC, OI and CG did not manufacture or sell asbestos containing products. (T508-9, 516). At this time, OC and its parents competed in the marketplace with other companies who manufactured asbestos containing insulation. (T521). In the late 1930's and early 1940's, OC was confronted with a marketing problem concerning its new fiberglass insulation. The problem was that the fiberglass insulation "itched" the skin of the workers. (T517). Because fiberglass irritated their skin, the workers believed that fiberglass products could pose a pulmonary health hazard. For this reason, the workers began to demand a wage premium to work with fiberglass insulation manufactured by OC and OI. (T517-18). Initially, OC sought to avoid the "itch" problem by having medical experts document that there was no health risk associated with the inhalation of dust from its fiberglass products. (T517-18). Once OC received word of the good health

story of fiberglass it actively went about communicating that good news to the workers. (T517-18). In fact, OC prepared bulletins of the good health story of fiberglass and had them posted on job sites so that all the workers would know that fiberglass did not pose a health risk. (PL Exh 99). By 1941, it was obvious to OC that merely spreading the word about the safety of fiberglass was not enough to overcome the concerns of the workmen. (PL Exh 4). To further combat the problem, in 1941 OC developed what is called its "Strategy for 1942". *Id.* OC's plan was to first "gather as a weapon-in-reserve" the medical articles concerning asbestos disease. *Id.* According to OC in 1941, there were "scores of publications" documenting the lung hazards of asbestos. *Id.* Once they had gathered the "weapon", the next step in the plan was to offer the workers insurance protection against fiberglass health hazards. *Id.* If the insurance offer did not stop the wage premium demands, the next step in the plan was to use the "weapon-in-reserve to let them stew", then "to spread word among the locals (union workers)", and "to play all the stops on asbestosis." *Id.* OC's president was informed of the strategy and compilation of the asbestos articles was approved. (PL Exh 3).

The evidence showed that from its inception, OC used the health of American workers as a marketing tool. First, good health information about its fiberglass products was highly publicized to workers while OC threatened to tell workers about the bad health aspect of its competitors' asbestos products. In 1942 OC's strategy changed when OI developed a new product they

called Kaylo insulation. Unlike prior OC or OI insulation, Kaylo contained significant amounts of asbestos. (PL Exh 19). The "strategy for 1942" was not implemented and the next time that OC would undertake to tell American workers about the dangers of asbestos was thirty (30) years later when asbestos was removed from Kaylo.

When Kaylo was first developed, OI hoped that it might not be as dangerous to workers as other asbestos products. (PL Exh 18). To investigate this potential in 1943, OI had Kaylo dust studied at the Saranac Laboratory. *Id.* However almost immediately, Mr. Bowes director of OI research and an OC director, was informed by Saranac that Kaylo dust had "all the ingredients for a first class hazard". (PL Exh 19). In 1944, Saranac informed OC Director Bowes that Kaylo dust had proven to be "toxic". (PL Exh 20). After further study, in 1948 Bowes was further advised by Saranac that Kaylo "must be regarded as a potentially hazardous material." (PL Exh 14). In 1952, Saranac prepared a final written report concerning Kaylo wherein it again noted the "toxic" properties of Kaylo dust. (PL Exh 16 p.3).

OC claims that the Saranac documents demonstrated only that Kaylo dust, when inhaled in extraordinary amounts by laboratory animals over long periods of time, was capable of producing lung fibrosis characteristic of asbestosis. However, the Saranac report unequivocally advised OC that "very small numbers of [asbestos] fibers" are capable of producing asbestos disease. (PL Exh 15 p.6-7). As OC president John Thomas testified, the Saranac studies should have been a "red flag" (T545), and we

should have warned the workers at that time. (T545).

In 1953, OC became the national distributor of Kaylo which continued to be manufactured by OI.

In 1956, OC's medical consultant and director of Saranac Laboratories, Dr. Schepers, wrote to OC advising them, "I suppose you already know that asbestos is fairly well incriminated as a carcinogen". (PL Exh 88 p.5). OC's response to Dr. Schepers' letter was:

> This is certainly not what I had in mind when I asked Dr. Schepers to give us a letter incorporating favorable statements based upon past experiments with fiberglass in the laboratory. I personally do not like the general tenor of the letter. It is certainly nothing that we could show customers or a union.

(PL Exh 98). Dr. Schepers was correct that by 1956 OC had already learned that asbestos was carcinogenic. In fact, OC had been advised eleven years before, that asbestos caused cancer of the pleura, the cancer that Mr. Ballard developed. (PL Exh 63 p.3).[5]

Despite all that it knew in 1956 concerning the danger which Kaylo presented to workers, and specifically that Kaylo was a "toxic" carcinogen, OC claimed in its sales brochure that Kaylo was:

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[5]In the 1940's OC was a member of an organization known as the Industrial Health Foundation (IHF). The IHF produced for its members a periodical known as the IHF Digest. In the January, 1945 issue of the IHF Digest an abstract of medical research appeared stating that cancer of the pleura was caused by exposure to asbestos. (PL Exh 63).

Non-irritating to the skin and non-toxic.
Offers pleasant handling characteristics.

(PL Exh 84; PL Exh 96).

In 1958, Owens Corning acquired the Kaylo product line from Owens Illinois and from that point forward was the sole manufacturer of Kaylo.

Asbestos fibers come in several forms. (T854). Although most insulation products contained only chrysotile asbestos, Kaylo contained amosite and chrysotile asbestos. (PL Exh 45). This is important because amosite asbestos is much more potent in its ability to cause cancer of the pleura (mesothelioma) than is chrysotile. (T860). The differences between amosite and chrysotile asbestos were also important in the replacement of asbestos in Kaylo.

In the early 1960's, OC investigated the feasibility of removing asbestos from its Kaylo product. (PL Exh 95). The person in charge of this research was Dick Shannon. *Id.* In 1962, Shannon reported to the executives at OC that his research had revealed that OC could replace the amosite asbestos in Kaylo with phenolic glass fibers. *Id* at p.29. He prepared an extensive report on this subject. *Id.* In this report he noted that amosite asbestos had the advantage of low cost but its disadvantage was the health hazard it presented. *Id* at p.10-11. In the report he did a cost analysis of Kaylo produced with amosite asbestos verses Kaylo produced with phenolic glass fibers. *Id* at p.41-42. The cost comparison revealed that Kaylo

produced with phenolic glass fibers cost less than one cent per pound more to produce than Kaylo using amosite asbestos. *Id.* Despite Shannon's suggestion to do so, OC never substituted safe phenolic glass fibers for the dangerous amosite in Kaylo. In fact, OC increased the amount of amosite in the post 1962 Kaylo (PL Exh 95 p.8; PL Exh 45), which made the product dustier. (PL Exh 39).

OC's decision to use the cheaper amosite in dustier Kaylo had significant health consequences to workers like Mr. Ballard who were exposed to Kaylo dust in the 1960's and early 1970's. This is because not only was the amosite particularly carcinogenic but also because it comprised more than 80% of the asbestos used in Kaylo. (PL Exh 45).

A 1963 OC internal document reveals:

> [A]sbestos found in Kaylo and breathed through the lungs causes asbestosis which often leads to cancer.

(PL Exh 40). OC knew in the 1960's that perhaps one asbestos fiber could cause mesothelioma. (PL Exh 42).

In 1962 OC developed a product known as GPL-400 and marketed it under the name MultiTemp. (PL Exh 40). OC recognized that this new product which did not contain any asbestos was safer than Kaylo. *Id.* For a short period of time OC sold MultiTemp but ceased manufacturing the safer product solely because it was not as profitable as Kaylo. (PL Exh 119).

In 1964, OC learned that one of its competitors, Johns Manville (JM), was going to place warning labels on its asbestos containing insulation. (PL Exh 26). Rather than consider how it

might take steps to protect persons exposed to deadly Kaylo dust, OC reasoned:

> The question before us is whether or not [OC] should protect itself against more stringent and punitive health laws and the possibility of third party actions by following the J-M lead.

(PL Exh 26). OC elected not to warn customers of the dangers of Kaylo dust in 1964. As John Thomas, former president of OC testified, OC knew that a warning on its product could reduce sales. (T574).

In 1965 OC monitored the fact that JM was warning and stated:

> The fact that Johns Manville is labeling their product is in itself pressure on the whole industry to consider labeling. I do not know how many states will allow suit to be brought against negligent manufacturers despite the existence of a workmans compensation law . . . this problem is one for the legal department to decide.

(PL Exh 27). OC refused to place any warning on Kaylo during 1965.

In November 1966, OC again considered the warning issue, stating:

> [Warning] involves not only protecting ourselves now, but the legal liability we might get into on claims brought against us before we started to label the product . . .

(PL Exh 47). OC claimed it was mere coincidence that on December 23, 1966 the day they were sued in the first asbestos case, that OC directed that a rubber stamp be purchased and that boxes of

Kaylo began being stamped with a "warning". (T766-7).

In 1967, OC again considered the removal of asbestos from Kaylo to determine what could be used to replace all of the asbestos in Kaylo, "if and when the day arrives when the whole industry is 'forced' to remove asbestos from their products." (PL Exh 34). OC wanted to make sure that "if and when 'D' day for the removal of asbestos arrives, [OC] won't be alone." *Id.* OC explained its motivation:

> This program . . . must be carried out so that in the event the health hazard aspect of asbestos fibers becomes a major national or political hot potato, OC will have an alternate fiber to switch to so as to stay in business.

(PL Exh 35). OC's documents reveal that in 1967, OC conducted a "low gear" program for removing asbestos from Kaylo. (PL Exh 34). In fact, despite knowing the health hazards, in 1967 OC did not even remove the amosite asbestos (80% of the asbestos in Kaylo) which it had known since 1962 could be replaced with phenolic fibers. Rather, OC elected in 1967 to spend its Kaylo research money on stress corrosion problems so that it could sell more Kaylo. (PL Exh 110). Even though the director of Kaylo research, Dick Shannon, knew in 1967 that if OC changed its process there was a 90% chance of removing all asbestos from Kaylo, that research was consistently canceled by OC. (PL Exh 119). According to Shannon, the problem with removing all asbestos by this new process was that OC would be "giving a death sentence" to a piece of equipment known as the SID cylinder. *Id* at p.2. To avoid killing the SID, OC continued to manufacture

asbestos containing Kaylo.

In 1968, the OC effort to remove asbestos from Kaylo remained "on the shelf". (PL Exh 37 p.3). Even while noting that asbestos in Kaylo caused cancer, OC stated:

> Because of adverse publicity, possible court action and for protection of our (OC) position in the calcium silicate market (Kaylo), it is necessary for OC to eventually remove asbestos from Kaylo.

Id. (PL Exh 111). In 1968, OC declared:

> If and only if the asbestos threat reaches the danger point would it want to reconsider an asbestos free product such as MultiTemp.

(PL Exh 122 p.8).

In January 1972, OC stated that it needed immediate development of an asbestos free product. This was because people would no longer buy an asbestos product like Kaylo, because OSHA was about to restrict the use of asbestos products. (PL Exh 147). Once OC needed asbestos free Kaylo to make money it was immediately available. OSHA regulation of asbestos products became effective July 7, 1972. (PL Exh 151). Five days later, July 12, 1972, OC announced the availability of its asbestos free Kaylo. (PL Exh 152).

Dr. Konzen, OC medical director, wrote in 1972:

> Occupational exposure to asbestos is known to be causally related to carcinoma of the lung and malignant mesothelioma of the covering or the pleura of the lung.
>
> * * *
>
> The best method of protection against asbestos fibers is obtained by controlling the generation of fibers by substituting a

> less hazardous material - in this case, fibrous glass.
>
> * * *
>
> Personal respiratory protection is a poor third choice . . . to control exposure to asbestos.
>
> * * *
>
> For reasons of worker health, asbestos free Kaylo has been developed . . . . To date, observations of fibrous glass exposed workers, some for a long as thirty years, had not demonstrated chronic adverse pulmonary effects from exposure to fibrous glass.

(PL Exh 87 p.1-3). This memorandum was then sent to the OC marketing department for dissemination to its customers. (PL Exh 166). In 1942, before OI developed asbestos Kaylo, OC threatened to use the health hazards of asbestos (weapon-in-reserve) to promote the sale of fiberglass insulation. Thirty years later, when it removed asbestos from Kaylo, OC executed its "strategy for 1942", and began to tell workers about the dangers of asbestos to enhance the sale of its fiberglass products (i.e., Asbestos Free Kaylo). (R759).

When asbestos containing Kaylo was manufactured by OC, a vacuum system was used to collect Kaylo dust at the plant. (PL Exh 134 p.32). On a normal day the vacuum system would collect more than 5 tons of Kaylo dust or "offware". *Id.* From the beginning, OC found that it could put the collected Kaylo offware into a new batch of Kaylo. *Id.* Once OC developed "asbestos free" Kaylo, rather than waste the "offware" from the old Kaylo, it put the asbestos containing debris in the new "asbestos free" Kaylo batches. OC documented the contamination of the new product:

> I discussed the use of the words "asbestos free" with Mr. Glosser and was assured that these words will not be used on Kaylo 10 labels prior to the time that all asbestos (including that in offware additions to the batch) is removed from the products.

(PL Exh 156).

At a team meeting held on July 25, 1972, OC personnel discussed how they were going to handle the fact that the new asbestos free product had been intentionally contaminated with asbestos. (PL Exh 154). They decided that it would be best to avoid claiming the new Kaylo was "asbestos free" and to claim instead that "no asbestos had been used as a reinforcement agent." *Id.* OC's deadly semantics game continued when they decided that instead of calling the contaminated product "Asbestos Free Kaylo", they would call it AF Kaylo. (PL Exh 156). However, despite knowing that it was not true, OC claimed that AF Kaylo was "asbestos free". OC made this claim in the notice that accompanied shipments of AF Kaylo:

> Included in this shipment covered by the attached invoice is a quantity of the new Kaylo 10 **Asbestos Free** product, which has been produced without employing asbestos as a reinforcement material . . . The Kaylo 10 AF . . . .(emphasis added).

(PL Exh 157 p.6).

After the verdict was rendered, OC filed its post trial motions. After a three-hour hearing Judge Baker took OC's motions under advisement for two weeks and entered his order denying the motions on March 13, 1997. (R758-61).

In his order, Judge Baker gave his reasons for not remitting

the jury's punitive damage award. He began by recognizing that Florida Statute §768.73(1)(a) established a presumption that a punitive award more than three times the compensatory award, such as this one, is excessive. (R758). He recognized that since the punitive award in this case exceeded three times the compensatory award he was required by §768.73(1)(b) to review the evidence to determine if the punitive award was supported by clear and convincing evidence. (R758). Judge Baker did not, as OC claims, look at only a portion of the evidence or engage any inference in favor of the plaintiff. (R758-61). After reviewing all of the evidence presented to the trier of fact and resolving conflicts in the evidence, Judge Baker found that there was clear and convincing evidence that the jury's punitive damage award was not excessive.[6] (R761).

In the district court, OC never claimed that something more than willful and wanton misconduct was required to support a treble award of punitive damages. OC did not claim in the lower courts that it was entitled to have Judge Baker review the evidence in the light most favorable to OC.

Summary of Argument

Certiorari should be denied in this case because the district court correctly applied unambiguous legal principles in its affirmation of the trial court's judgment. As to the punitive verdict, the district court properly opined that the trial court had not abused its discretion when it found by clear

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[6]Judge Baker's order is attached hereto as Exhibit 1 of the Appendix.

and convincing evidence that the punitive damage award was not excessive in light of the facts and circumstances presented to the trier of fact. Florida's interest to hurt and thereby punish and deter OC's willful and wanton conduct would not have been achieved by a $5 million punitive award which, according to OC, would not significantly impact the company.

Certiorari should not be granted in order for this court to consider arguments made by OC for the first time in this court. OC did not argue in the lower courts that actual malice with specific intent to injure is required by §768.73 to support more than treble punitive damages. OC also did not argue in the lower courts that it is entitled to have all inferences from the evidence construed in its favor. Respondent believes OC is clearly wrong on both points; however, if there is any doubt, then these issues should only be decided by this court after having been fully developed in the courts below.

Certiorari review is not required in this case to instruct that factual inferences should not be made in the plaintiff's favor when applying §768.73. The district court did not so hold, and the trial court did not engage any inferences in favor of the respondent.

Review by *certiorari* is not required to resolve a conflict between the fourth district's opinion in this case and the third district opinion in *Sun & Sea Estates, Ltd., v. Kelly*, 707 So. 2d 863 (Fla. 3d DCA 1998). The fourth district correctly affirmed the denial of OC's *forum* motion because OC could not show that the trial court was wrong in finding OC had agreed with its

ruling. The third district was not confronted with the issue of whether the appellant had invited the ruling complained of.

ARGUMENT

I. Punitive Damages

A. The Certified Question

Mr. Ballard agrees with OC that the question certified is specific to the facts of this case. In essence, the district court has simply asked this court if it agrees with its decision. Respondent recognizes that this court has the authority to review any case wherein the district court certifies a question to be of great public importance[7], but this court has said:

> Sustaining the dignity of decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own powers by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case.

Lake v. Lake, 103 So. 2d 639, 642 (Fla. 1958). Review by *certiorari* here amounts to nothing more than a second appeal and respondent respectfully suggests that the court should decline to review this case because as in *Novack, supra* n.5, a decision by this court is neither justified nor required.

If this court decides that it should answer the question certified, the answer must be "yes". Florida Statute §768.73 is unambiguous. It clearly specifies what a trial court is required to do when it confronts a punitive verdict greater than three

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[7]*Novack v. Novack*, 195 So. 2d 199 (Fla. 1967).

times the compensatory award. First, the trial court must recognize a presumption that the punitive award is excessive. §768.73(1)(a), Fla. Stat. (1987). To sustain the presumptively excess portion of the punitive verdict the trial court must find that the facts and circumstances presented to the jury demonstrate by clear and convincing evidence that the punitive award is not excessive. §768.73(1)(b), Fla. Stat. (1987). That is precisely what the trial judge did in this case.

In §768.73, the legislature did not provide that if justified by the facts of a particular case that a punitive award may not be larger than some arbitrary ratio between the punitive award and the compensatory award. Florida Statute §768.73 creates a presumption, but the ratio between compensatory and punitive damages is not a determinative factor in assessing the excessiveness of a particular punitive award. *Lassitter v. International Union of Operating Engineers*, 349 So. 2d 622 (Fla. 1976). After the presumption has been engaged, this court's rationale in *Lassitter* for not relying upon an arbitrary ratio as opposed to the facts in a particular case to evaluate the excessiveness of a punitive award remains valid. *American Medical International, Inc., v. Scheller*, 590 So. 2d 947 (Fla. 4th DCA 1991).

The experience of the United States Supreme Court in the use of ratios underscores their legitimate role as a "red flag" of excessiveness but they have not been a determinative factor. In *Browning-Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc.* 109 S.Ct. 2909 (1989), the Court confronted the claim that a

$6 million punitive award in a case where the compensatory award was $51,146 was excessive. Even though the ratio was 117:1 the Court did not find it to be excessive. *Id.*

In *Pacific Mutual Life Insurance Co., v. Haslip*, 111 S.Ct. 1032 (1991), the Court explained as to punitive damages "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id* at 1043. The Court recognized that under the facts of *Haslip* a ratio of 4:1 "may be close to the line" of excessiveness. *Id.*

In *TXO Production Corp., v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993), the ratio was 526:1. *Id* at 2718. One might have thought that after having said 4:1 was "close to the line", the Court would find 526:1 over the line. However, the Court recognized that the amount awarded in punitive damages "is based on a host of facts and circumstances unique to the particular case . . . " *Id* at 2720. The *TXO* ratio was found not to be excessive where the facts demonstrated a large amount of money was at stake, the defendant acted in bad faith, the defendant engaged in trickery and deceit, and the defendant was wealthy. *Id.* The Court also noted that if one considered all of the harm which could result from the defendant's misconduct the ratio between the punitive damages and the potential harm was only 10:1.[8]

In *BMW of North America, Inc., v. Gore*, 116 S.Ct. 1589

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[8]If one considers the potential harm caused by OC's misconduct (over $1 billion) the ratio is much less than 1:1.

(1996), the misconduct was repainting a new car and not disclosing that fact to the purchaser. Although not permitted in Alabama where the car was sold, the failure to disclose the repair was authorized by most states. *Id.* Even though the ratio between punitive and compensatory damages in *BMW* was 500:1, the Court reiterated its "rejection of a categorical approach". *Id* at 1602. Instead, the Court found that BMW's misconduct did not involve deliberate false statements, acts of affirmative misconduct, concealment of evidence or improper motive. *Id* at 1599. The Court also reasoned that, unlike *BMW*, cases involving "trickery and deceit" are more reprehensible than those involving negligence. *Id.* The Court explained that punitive damages should reflect "the enormity of the offense", and *BMW* only involved economic loss. *Id.* Finding that "none of the aggravating factors associated with particularly reprehensible conduct is present", the Court found the $2 million punitive award excessive. *Id.*

One inescapable conclusion from the Supreme Court's use of ratios as a "red flag" in punitive damage cases is that it is the underlying facts of the case which determine if the damages are excessive. In cases such as the one at bar, which involve most if not every aggravating factor for assessing punitive damages, the ratio has not been helpful. *TXO Production Corp., v. Alliance Resources Corp., supra.*

In §768.73 the legislature was very precise as to how ratios were to be used in punitive damage cases. Nothing in that statute, the common law of Florida, or Federal common law

suggests that a punitive award which the facts and circumstances show is not excessive should be found to be so solely because the ratio is 18:1. To the extent that the district court was concerned about the relationship between the punitive award and compensatory award in this case it should not have been. *Lassitter v. International Union of Operating Engineers, supra.*

The fact that in this case the judgment represents only 2% of OC's wealth further demonstrates the verdict was not excessive. Despite less egregious misconduct with less potential for human pain, suffering and death, courts have approved relatively much larger awards than in this case.[9] Holding a 2% punishment excessive under these facts would encourage rather than deter egregious conduct and jeopardize the lives of millions of people.

In summary the answer to the certified question is self evident. When a defendant's misconduct is more egregious than willful and wanton misconduct, and all of the facts and circumstances of the case show by clear and convincing evidence that the jury's punitive award is not excessive, the verdict

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[9]*Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977), (approved punitive award of 6.2% of defendant's net worth); *Sperry Rand Corp., v. A.T.O., Inc.*, 447 F.2d 1387 (4th Cir. 1971), (approved punitive verdict of 23% of defendant's net worth); *Fuchs v. Kupper*, 22 Wis.2d 107, 125 N.W. 2d 360 (1963), (cited with approval by this court in *Bould* in which punishment of 12 1/2% of defendant's net worth was approved); *Malco, Inc. v. Midwest Aluminum Sales*, 14 Wis.2d 57, 109 N.W. 2d 516 (1961), (cited with approval by this court in *Bould* wherein the court approved punitive verdict of 7 1/2% of defendant's net worth); *Zambrano v. Devanesan*, 484 So. 2d 603 (Fla. 4th DCA 1986), *rev. den.* 494 So. 2d 1150, (approved punitive award that was 14% of defendant's net worth).

should not be found to be excessive merely because it is 18 times the compensatory award or is $31 million. This is especially true when the award is less than 2% of the defendant's wealth.

B. OC's Argument

OC contends, without any support, that in evaluating the excessiveness of this verdict the lower courts applied only the evidence relied on by Mr. Ballard, and drew inferences from that evidence in Mr. Ballard's favor. (PB p.16). Nothing in the record remotely suggests that is what happened. Rather the record shows that the lower court reviewed the "evidence" - not part of the evidence- and made factual determinations applying the clear and convincing standard. As this court has stated, when a judge is charged with the responsibility to make factual findings by clear and convincing evidence:

> The trial judge is responsible for finding facts and for resolving any conflicts in the evidence.

In Re: Adoption of Baby E.A.W. v. J.S.W., 658 So. 2d 961, 967 (Fla. 1995). This is exactly what Judge Baker did in this case. As will be shown, Judge Baker understandably found much of OC's evidence unbelievable or irrelevant.

OC witness Jerry Helser is an employee of OC paid to travel around the country and tell the OC "story" that he told in this case. (T744). By its verdict, the jury must have concluded that Jerry Helser was not telling the truth. The findings of fact by Judge Baker also are inconsistent with a belief that Jerry Helser told the truth. A trial judge's opportunity to observe a witness, such as Mr. Helser, and evaluate his veracity in the

context of a "living trial" is one of the primary reasons this court has permitted very limited review of a denial to remit punitive damage verdicts. *Lassitter v. International Union of Operating Engineers, supra.* The testimony of Jerry Helser justified the Judge and jury's conclusion that Jerry Helser, despite his oath, did not tell the truth.

Jerry Helser specifically denied that OC "exerted maximum pressure" to sell its inventories of asbestos containing Kaylo after July 1972 when it began to market "asbestos free" Kaylo AF. (T783). In fact, Mr. Helser claimed that in 1972, there were no inventories of asbestos containing Kaylo because it had been "all sold out". (T783). However, Mr. Helser was confronted with an OC internal document written in July 1972 which stated that the assignment for July - December 1972 was to "Exert maximum pressure to move the current slow moving inventories of Kaylo products out of the Berlin Plant." (PL Exh 155).

Jerry Helser testified under oath that all of the Owens Corning asbestos rendered obsolete by the development of "asbestos free" Kaylo in 1972 was sold to the U.S. Government. (T784). However, Judge Baker and the jury saw an OC internal document which showed that in fact the obsolete amosite asbestos was sold to North American Asbestos Company. (PL Exh 169).

Jerry Helser denied that OC ever placed any asbestos containing "offware" in its asbestos free Kaylo. (T779). Judge Baker and the jury observed Mr. Helser when he was shown the internal OC document which stated that "asbestos (including that in offware additions to the batch)" was added to the new

"asbestos free" Kaylo. (PL Exh 156). Judge Baker watched as Mr. Helser continued to deny that "asbestos free" Kaylo was contaminated with asbestos containing offware. (T779-81).

Judge Baker and the jury observed Mr. Helser when he testified that asbestos free MultiTemp (GPL 400), the asbestos free insulation developed by OC by 1962, was not sold because it did not work. (T725-6). They also watched Mr. Helser deny that the "real reason" that OC dropped MultiTemp in 1963 was its low profit margin, as his boss, Dick Shannon, had specifically written in 1967 and 1969. (T752-3; PL Exh 119; PL Exh 56).

Judge Baker and the jury also observed Jerry Helser testify that in 1962, OC could not replace the amosite asbestos in Kaylo with phenolic glass. (T754). They then observed Mr. Helser as he was confronted with Dick Shannon's 1962 internal report (PL Exh 95) to his supervisors that stated to the contrary. (T754-763).

Mr. Helser also testified that in 1967 and 1968 OC was working hard to find a replacement for asbestos in Kaylo. (T772-3).[10] But the jury then saw Mr. Helser confronted with Dick Shannon's reports to his supervisors that in 1967 OC was conducting a "low gear program in finding substitutes for asbestos" (PL Exh 34), and in 1968 "the replacement of asbestos program was placed on hold". (T773-78; PL Exh 111 p.2).

Jerry Helser also denied that in 1966 OC used the JM label

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[10]OC introduced numerous "replacement documents" which it claimed showed that OC was working hard on the replacement of asbestos in the late 60's. However, OC had determined that the effort to replace asbestos in the late 60's was limited to "screening fibers" and that asbestos would not be removed from Kaylo at that time.

as a guide in developing the label that was stamped on Kaylo. (T772). Then they saw the JM label with words crossed out which became verbatim the OC label:

> C A U T I O N
>
> "This product contains asbestos fiber.
>
> Inhalation of asbestos in excessive quantities over a long period of time may be harmful
>
> If dust is created when this product is handled, avoid breathing the dust.
>
> If adequate ventilation control is not possible, wear respirator approved by U. S. Bureau of Mines for pneumoconiosis producing dust."

(T771-72). Then they heard Jerry Helser continue to deny that the JM label was used by OC to develop the watered-down OC label. (T772).

Crocidolite asbestos is the most potent form of asbestos in the production of mesothelioma. (T860). Thus, it was important that OC deny that Kaylo ever contained crocidolite. Mr. Helser swore that "crocidolite was never used in Kaylo when Owens Corning manufactured it." (T750). In fact, Mr. Helser testified that crocidolite could not be used in Kaylo. (T747). However, Judge Baker observed Mr. Helser when he was confronted with an OC memorandum written by the Kaylo plant manager, Mr. Taylor, which said "crocidolite gives highly satisfactory performance" in Kaylo but that "prices had been too high to permit its use." (PL Exh p.16). Then Judge Baker observed Mr. Helser when he was shown a

later OC memorandum which said "there have been rare occasions when crocidolite (blue) asbestos has been employed in the Kaylo batch." (R547). Mr. Taylor explained this had been done when crocidolite could be purchased at a good price. (R547).

These are but some of the examples of the discrepancies between Mr. Helser's sworn testimony and OC's own internal documents. After they heard Mr. Helser consistently contradict OC's own documents, most of which were written by his boss, and observed his demeanor, six jurors and a distinguished Judge all decided he was not telling the truth. The record provides every reason to believe that these seven people were right and the district court could have so found. Mr. Helser's unbelievable testimony was properly rejected by the jury in evaluating OC's misconduct. Judge Baker properly rejected that testimony and determined by clear and convincing evidence that the jury's punitive award was not excessive and the district court agreed. Based on this record OC cannot demonstrate that no person would agree with Judge Baker and the district court.

Judge Baker and the jury also observed OC witness Dr. Thomas Howard. They learned that Dr. Howard was first contacted by an OC lawyer concerning asbestos litigation in 1988. (T965-6). They heard that OC lawyers met with Dr. Howard on numerous occasions for approximately two years, preparing him to be called as a witness for the first time in 1991. (T966-7). Thereafter, Dr. Howard testified in more than thirty (30) trials. (T968). In fact, Judge Baker learned that Dr. Howard derived approximately 15% of his income from consulting in asbestos

cases. (T970). Judge Baker learned that Dr. Howard had been retained by OC lawyers from all over the country. (T975-977). However, Judge Baker also learned that Dr. Howard had never published a single article in the medical literature concerning asbestos or asbestos disease. (T973).

As has already been shown, Mr. Ballard did not base his case on the imputation to OC of knowledge contained in the medical literature concerning asbestos disease caused by Kaylo. Rather, Mr. Ballard showed through the internal documents of OC and the testimony of its former president, John Thomas, that OC had actual knowledge of these hazards. Dr. Howard was not offered as a witness concerning what OC knew about the dangers of Kaylo or asbestos. (T1001). Dr. Howard could not provide any such testimony because for more than 10 years OC has never allowed this retained witness to see their internal documents. (T998). For example, OC had Dr. Howard testify in detail about the Saranac Kaylo study published in the medical literature, but they carefully avoided sharing with him the actual Saranac documents they had received concerning the Kaylo study. (T998). This concealment was crucial to adducing from Dr. Howard his opinion that the published Saranac study only showed that large amount of asbestos provoked disease. (T1023-24). However, Judge Baker saw Dr. Howard when he was confronted with the actual Saranac study which, unlike the published version, told OC that "very small numbers of fibers" could cause asbestos disease. (T998-99).

Judge Baker also observed Dr. Howard when he testified that Dr. Irving Selikoff published important work on asbestos disease

in 1965. (T1015-16). In its district court brief, OC claimed that Dr. Selikoff's work in 1964, published in 1965, was a "watershed" in the "history of asbestos knowledge." But Judge Baker and the jury saw what OC really thought about Dr. Selikoff's work when Dr. Howard was shown internal OC documents concealed from him by OC. The first one was written on May 7, 1964 and was sent to the highest executives at OC, it read:

> We [OC] will continue to follow Dr. Selikoff's activities closely and will recommend any programs that are needed to **protect our interests.** (emphasis added).

(T1016; PL Exh 117 p.2). Later, in 1965, OC wrote:

> Our present concern is to find some way of preventing Dr. Selikoff from **creating problems and affecting sales.** A direct approach might be more damaging than helpful . . . . (emphasis added).

(T1017-18; PL Exh 91). OC further explained what it thought of Dr. Selikoff's work, that Dr. Howard told the jury was so important, in a memorandum of a meeting held on July 3, 1968. The purpose of that meeting was to orient John Thomas, the president of OC regarding the status of Dr. Selikoff's work. As was explained to Mr. Thomas, OC had already taken action, "in an attempt to limit the influence of Dr. Selikoff." (T1018-19; PL Exh 55).

Judge Baker and the jury obviously gave very little weight to the testimony of Dr. Howard. This was justified because Dr. Howard's "state of the art" testimony was directly at odds with the actual knowledge of OC shown by its internal documents. Dr. Howard's "opinions" concerning the medical literature were simply

irrelevant where, as here, OC's actual knowledge had been conclusively demonstrated.

Judge Baker and the jury also heard and observed the testimony of Howard Ayer. Mr. Ayer is an industrial hygienist. He became involved in asbestos litigation in 1983. (T1053). During the 1980's he prepared for his testimony in several meetings with attorneys from OC. (T1053-54). The primary focus of Mr. Ayer's testimony in this case was the threshold limit value (TLV) adopted by the ACGIH.[11]

On direct examination, Judge Baker and the jury heard Mr. Ayer testify that the ACGIH had adopted in the 1940's the TLV of 5 mppcf for asbestos dust.[12] However, on cross examination, Mr. Ayer admitted that the TLV was intended to prevent the disease asbestosis. (T1051). The TLV according to Dr. Ayer had no reference to cancer of the pleura (mesothelioma) involved in this case. (T1051). Rather, Dr. Ayer explained that mesothelioma could be caused by brief exposures to asbestos (T1048), and could be prevented by the elimination of exposure to asbestos. (T1048-49). Although Dr. Ayer did not learn about mesothelioma until the mid 1960's (T1064), OC knew about this asbestos cancer

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[11]The ACGIH is not a governmental body and its TLV had no force of law.

[12]OC claims that Kaylo did not produce dust in excess of the TLV. (PB p.41). That is not true. Before OC made Kaylo dustier in 1962, the dust recorded when Kaylo was handled was 98 mppcf when dust suppression equipment was being used. (PL Exh 80). No evidence was introduced by OC that dust created by handling Kaylo without dust suppression equipment was within the TLV. OC never advised its customers to use dust suppression equipment despite knowing that it was not being used.

of the pleura in the mid 1940's. (PL Exh 63 p.3).

The inapplicability of the TLV to Kaylo was demonstrated by Dr. Ayer. He explained that the TLV was based upon textile workers exposed only to chrysotile asbestos. (T1049). The development of a TLV for asbestos based upon chrysotile exposure was understandable because as Dr. Ayer testified, more than 90% of the asbestos used in this country was chrysotile. (T1050). However, OC chose to use 80% amosite asbestos in Kaylo and only a small percentage of chrysotile asbestos. (PL Exh 45). Amosite asbestos is much more potent in the production of mesothelioma than chrysotile. (T860).

Dr. Ayer's testimony had very little relevance to the issues in this case. He said there was a TLV but that it was for a different type of asbestos and to prevent a different disease than was involved in this case.

In the second phase of the trial, OC called as its only witness Greg Peterson. Mr. Peterson is an employee of OC and works in their legal department. He was hardly a disinterested witness. However, even Mr. Peterson admitted that what OC had done to American workers concerning Kaylo was "very terrible". (1/21/97 p.167). He also admitted that even if the jury awarded a $10 million punitive verdict it would "not have a significant impact" on OC. (1/21/97 p.156). He was able to say that because OC is a huge company with nearly $4 billion in annual sales worldwide.

Judge Baker found that OC's net worth for punitive damage consideration was approximately $2.5 billion dollars. (R760).

This was supported in the record. While it is true that for accounting and tax purposes OC has taken "charges" of approximately $2 billion for this and other asbestos cases, Judge Baker was not required to allow OC to eliminate its worth by a simple accounting entry which resulted in a huge tax savings to OC. (1/21/97 p.124-25). He was also not required to ignore the significant value of OC's "goodwill" which enables it to sell billions of dollars of products each year, which does not appear on OC's balance sheet. He was not required to ignore the fact that the marketplace had valued Owens Corning at $2.5 billion. *Id* at 169. When all of these facts are considered, Judge Baker was not unreasonable in concluding that for purposes of punitive damages OC's "net worth" was approximately $2.5 billion.

Other courts which have considered OC's "negative net worth" argument have agreed with Judge Baker. For instance, in *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir. 1993), *cert. denied*, 510 U.S. 1031, (1993), the court recognized charges taken on OC's books have obscured the company's true value. Thus, the court accepted OC's value to be $2.2 billion despite the technicality that from an accounting standpoint it may have had a negative "net worth". *Id* at 1384. *See also, Owens-Corning Fiberglas Corp., v. Wasiak*, 917 S.W. 2d 883 (Tex.App. 1966), *affirmed, Owens-Corning Fiberglas Corp., v. Malone*, 1998 WL 288690 (Tex. S.Ct. June 5, 1998).

Mr. Peterson testified that Owens Corning had paid $383 million to resolve 179,000 asbestos cases over thirty (30) years. (1/21/97 p.164). However, Judge Baker was not required to ignore that after considering tax deductions and defense costs, the net

payment was only $182 million to victims. *Id* at 163. He was not required to ignore that the net paid by OC was only slightly more than an average of $1,000 per victim.

This court's statement in *State v. Spaziano*, 692 So. 2d 174 (Fla. 1997), is fully applicable in this case:

> After hearing and viewing the evidence presented, the trial judge issued a well reasoned order based on legal guidelines expressly set forth by this court . . . It is clear that the trial judge fully understood his responsibility in this case. We give trial courts this responsibility because the trial judge is there and has a superior vantage point to see and hear the witnesses presenting conflicting testimony. The cold record on appeal does not give appellate judges that type of perspective. It is clear to us that there is evidence in this record to support the trial court's decision. Therefore, this record does not establish an abuse of discretion by the trial judge.

Spaziano at 178.

OC argues for the first time in this court that by creating a presumption that the punitive verdict was excessive the legislature required in §768.73 that all reasonable inferences from the evidence be drawn in favor of the defendant. (PB p.19). It is a fundamental concept of our appellate process that arguments not specifically made before the trial court may not be raised on appeal. *Kozich v. Hartford Ins. Co.*, 609 So. 2d 147 (Fla. 4th DCA 1992). Because OC failed to raise this issue before either the trial court or the district court of appeal it is not properly preserved for review by this court. *Trushia v. State*, 425 So. 2d 1126 (Fla. 1982); *Morales v. Sperry Rand Corp.*,

601 So. 2d 538 (Fla. 1992). Moreover, Florida Statute §768.73 does not include such an instruction to the trial judge. When §768.73 was enacted, the legislature knew the rules of evidence concerning presumptions. Florida Statute §90.301 entitled "Presumption defined; inferences" does not instruct that evidence concerning a presumed fact be drawn in favor of the party in whose favor the presumption operates. §90.301, Fla. Stat (1978). To the contrary, §90.301(3), expressly provides that, as in any other situation, only appropriate inferences may be drawn when a presumption is created.

Judge Baker did not ignore as OC claims that OC stopped selling asbestos Kaylo in 1972, he recognized in his order that OC's misconduct spanned the period 1942-1972. OC's contention that deterrence is not required because an asbestos company stopped selling its product long ago (PB p.28) was rejected by this court in *W.R. Grace & Co., v. Waters*, 638 So. 2d 502 (Fla. 1994). This is a callous argument because OC knew when it sold Kaylo that all asbestos diseases, including the always fatal disease mesothelioma, took decades to develop. (PL Exh 87). The acceptance of OC's argument would protect those who most need severe punishment - companies who knowingly sell lethal products which appear safe to millions of workers because disease and death are delayed.[13]

OC claims incorrectly that the only financial factors Judge Baker identified to support his findings were OC's net worth and

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[13]As the CCR points out, millions of people are exposed to mass produced products.

the amount it had already paid to resolve asbestos cases. (PB p.27-8). That is not true. Judge Baker, after reviewing all the evidence, also found that OC's own witness testified that its past and projected future asbestos liability would have no significant impact on the company. OC also ignores, but Judge Baker did not, that OC's own corporate witness testified that a $10 million punitive damage award in this case would not significantly impact OC financially. (1/21/97 p.156).

OC claims that the district court erred when it refused to consider the alleged prior payment of punitive awards by OC.[14] The district court, as have many other courts, refused to consider those alleged payments because OC elected not to tender any evidence of these alleged payments at trial.[15] In doing so, the district court did not err, rather its decision is entirely consistent with this court's holding in *W.R. Grace & Co., v. Waters, supra,* and the legislative directive in §768.73(1)(b). In *Waters,* the court created a second phase of the trial so that an asbestos manufacturer could, without prejudice, attempt to build an evidentiary record to support an allegation that it had already been punished enough by the prior payment of punitive damages for the same misconduct. *W.R. Grace & Co., v. Waters, supra.* The legislature expressly restricted Judge Baker's review to only those "facts and circumstances which were presented to

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[14]These alleged payments were set forth in an affidavit of Greg Peterson.

[15]*Stevens v. Owens-Corning Fiberglas Corp.*, (1996), 49 Cal.App.4th 1645, 57 Cal.Rptr.2d 525; *Kochan v. Owens-Corning Fiberglas Corp.*, (1993), 242 Ill.App.3d 781, 610 N.E. 2d 683.

the trier of fact" in determining if the punitive award was excessive. §768.73(1)(b), Fla. Stat. (1987). Since the information in OC's affidavit was not presented to the trier of fact the district court correctly refused to consider the information in evaluating if the trial court abused its discretion.

The requirement that testimony concerning prior punitive damages be presented at trial and be subjected to the traditional safeguards of cross examination was particularly important here because as other courts have recognized, OC's affidavits are misleading.[16] Here, OC claimed in the district court that prior to the trial in this case it had been assessed $112 million in punitive damages. However, in *Owens-Corning Fiberglas Corp. v. Malone*, 1998 WL 288690 (Tex. S.Ct. June 5, 1998), OC was forced to admit at oral argument that it really had only paid $3 million in punitive damages. In this trial, Mr. Peterson, the author of the affidavit, testified that he was unaware of any punitive damages paid for the misconduct proven in this case.

Next, OC contends for the first time that the enactment of §768.73 abolished the *Como*[17] standard for punitive damages greater than three times the compensatory award. OC argues that §768.73 requires actual malice with specific intent to injure to support

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[16]*Owens-Corning Fiberglas Corp., v. Wasiak*, 917 S.W. 2d 883 (Tex.App. 1966), *affirmed, Owens-Corning Fiberglas Corp., v. Malone*, 1998 WL 288690 (Tex. S.Ct. June 5, 1998); *Dunn v. HOVIC, supra*.

[17]*Como Oil Co., v. O'Loughlin*, 466 So. 2d 1061 (Fla. 1985).

treble punitive damages. As noted above, failure to make this argument below precludes OC from making this argument in this court. *Kozich v. Hartford Ins. Co., supra; Trushin v. State, supra; Morales v. Sperry Rand Corp., supra.*

The plain language of §768.73 simply does not require actual malice or specific intent to injure to permit more than a treble punitive award. When it has intended to do so, the legislature has not been shy about expressly defining specific conduct required to enhance punishment.[18] The legislature expressed no such intention in §768.73 and as will be shown below, actual malice with specific intent to injure should not be implied.

OC's insinuation that it did not have specific intent because it could not have foreseen its product caused cancer because mesothelioma is a rare cancer is misleading. Courts have recognized mesothelioma is rare in the general population, but OC knew that even minimally asbestos exposed persons were at significant risk from mesothelioma. (PL Exh.42).

Florida Statute §768.73 is not, as OC claims, "meaningless" absent an interpretation which requires the plaintiff to demonstrate actual malice with specific intent to justify a punitive award more than three times the compensatory award. (PB p.16). To the contrary, even though the legislature chose not to alter the *Como* standard, it did significantly change Florida law when punitive awards are more than treble the amount of compensatory damages. However, rather than change the already

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[18]See Florida Statute §921.0016, regarding criminal sentences departing from the recommended sentencing guidelines.

stringent punitive requirement that a defendant's conduct be the equivalent of manslaughter, the legislature elected instead to significantly increase the trial court's role in reviewing punitive awards which exceed three times the compensatory damages. The legislature accomplished this enhanced judicial scrutiny by first relieving the defendant of the burden to show that a disproportionate punitive award was excessive, *Wackenhut Corp., v. Canty*, 359 So. 2d 430 (Fla. 1978), and instead placed on the plaintiff the burden of showing that treble punitive damages are not excessive.

Second, the legislature in §768.73(1)(b) changed the current law by enhancing the standard of proof applied by the trial judge in evaluating whether the presumptively excessive punitive award was justified. Prior to the enactment of §768.73 the law only permitted a trial judge to evaluate a punitive award in unusual circumstances using the greater weight of the evidence standard applied by the jury. *Wackenhut Corp., v. Canty, supra.* Now, §768.73 directs a trial judge to apply the stricter clear and convincing standard when evaluating if the presumption of excessiveness has been overcome. §768.73(1)(b), Fla. Stat. (1987). Despite not altering the *Como* standard, these changes in the law represent a significant departure from the former judicial oversight of punitive awards explained in *Wackenhut Corp., v. Canty, supra.*

OC's implication of an actual malice with specific intent requirement in §768.73 is inconsistent with the rational implementation of §768.73. The legislature specifically provided

that the jury was not to be informed of the provision of §768.73. §768.73(2), Fla. Stat. (1987). If one accepts OC's argument that §768.73 requires actual malice with specific intent to support a treble punitive award, then it would be necessary for the jury to know that to properly determine whether more than treble punitive damages were warranted. Surely, the legislature was not enacting a new standard for the imposition of treble punitive damages and then directing that the new standard be kept secret from the jury who must initially determine if that standard had been met.

Not only did the legislature not require actual malice or specific intent in §768.73 but to do so would ignore other facts which in a particular case may justify a punishment of more than treble damages even though actual malice and specific intent are lacking. For instance, suppose multibillion dollar OC kills a single, childless, parentless worker. Under the Florida Wrongful Death Act the only damages recoverable by the worker's estate may be funeral and medical expenses. Assuming those expenses are $5,000 surely the legislature did not intend to require remittitur of a $90,000 (18:1) punitive award to $15,000 (3:1) for such flagrant misconduct merely because there was no specific intent to injure. Such a construction of §768.73 would undermine the punitive damage goals of punishment and deterrence. To protect against undermining these goals the legislature directed the trial judge to review all of the "facts and circumstances which were presented to the trier of fact", not just whether the defendant had actual malice with specific intent to injure, to

determine if the particular punitive award was excessive.

Finally, OC's interpretation of §768.73 is inconsistent with this court's decision in *Poole v. Veterans Auto Sales and Leasing Company, Inc.*, 668 So. 2d 189 (Fla. 1996). In that case this court was confronted with the argument that the enhanced scrutiny of damages generally mandated by the legislature in §768.74, Fla. Stat. (1986), had altered the factors used by courts in evaluating whether the jury's damage award was excessive. The court rejected that argument. *Id.* The *Poole* rationale applies even more forcefully to §768.73 because, unlike §768.74, the legislature did not enumerate factors to be considered by the courts in evaluating whether more than treble punitive damages were excessive.

Even if this court were to accept OC's argument that §768.73 requires more than willful and wanton misconduct that was demonstrated here. The lower courts found that OC's misconduct was more egregious than the willful and wanton standard.

OC is wrong when it claims that $5.175 million is adequate to achieve Florida's punitive damage interest. Florida's interest in permitting punitive damages is to punish the defendant and deter the defendant and others from similar future misconduct. Florida achieves these goals by permitting punitive awards that "hurt" the defendant. *Bill Branch Chevrolet, Inc., v. Burkert*, 521 So. 2d 153 (Fla. 2d DCA 1988). Here, the uncontradicted testimony of OC's law department employee was that even a $10 million punitive award would not "hurt" OC. (1/21/97 p.156).

In evaluating Florida's interest OC incorrectly focuses on the product Kaylo. Florida is not concerned with OC's specific product Kaylo, rather deterrence is directed at the concept of marketing any product in such a manner that human lives are knowingly subordinated to the corporate appetite for profits.

For years asbestos companies like the *amicus* CCR and OC here, have sought immunity from punitive damages for their egregious misconduct which caused tens of thousands of Americans to suffer a slow and painful death. Rarely has a position been so universally rejected by so many courts. *W.R. Grace v. Waters, supra.*

For instance, in *W.R. Grace & Co., v. Waters, supra,* rather than immunize asbestos defendants, this court mandated a bifurcated trial so asbestos companies would have a nonprejudical opportunity to build a record demonstrating that they had been punished enough for the conduct proven in that particular case. *Id.* This procedure takes the issue of excessiveness out of the world of speculation and conjecture and subjects it to cross-examination after which courts can do their job of evaluating excessiveness based upon the law and established facts. OC refused to subject its claim of prior punishment to the fact-finding process. The reason asbestos companies do not want to have to "prove" prior punishment is because the facts will often belie their position.

In this case, OC's legal department employee, Greg Peterson, testified in phase II. He knew the most intimate details of the impact of asbestos liability on OC. However, OC carefully

avoided eliciting from Mr. Peterson any testimony concerning prior payments of punitive damages. Respondent, however, in anticipation of the very unsubstantiated argument now being made by OC and the CCR asked Mr. Peterson if he was aware of how much OC had paid in punitive damages for the misconduct proven in this case. He was not aware of any such payments. After the trial, when OC knew Peterson would not be cross-examined he executed the affidavit filed in the district court setting forth minute details of every alleged OC punitive verdict. Had he testified to these alleged punitive damage payments at trial he would have been forced to admit, as OC was in the Texas Supreme Court, that the vast majority of the punitive damage verdicts were never paid. *Owens-Corning Fiberglas Corp., v. Malone, supra.*

OC and the CCR claim that punitive damages in asbestos litigation will deprive victims of compensatory damages and put asbestos companies in bankruptcy. The opposite was proven as to OC in this case. Mr. Peterson unequivocally testified that the entire asbestos liability (compensatory and punitive) past and future was not expected to have a significant impact on OC's financial status. (1/21/97 p.155-6). This testimony underscores the importance of subjecting the self-serving rhetoric of OC and the CCR to the fact-finding process established by this court in *W.R. Grace v. Waters, supra.*

OC and the CCR claim that no further deterrence is required in asbestos cases. In that regard this court should consider the recent statements by the current OC CEO:

> We put the asbestos issue behind us for the rest of this decade and focused our energies

> going forward on productive things like building the core of our enterprise - not shedding tears about the past.[19]

II. *Forum Non Conveniens*

"Constrained by the limited record" in this case the district court held that OC had failed to demonstrate that the trial court abused its discretion when it denied the motion to dismiss for *forum non conveniens*. *Owens Corning v. Ballard*, 23 Fla. L. Weekly D1077 (Fla. 4th DCA April 29, 1998). The record was limited because there was no transcript of the hearing held on October 31, during which OC's motion was denied. Without this transcript OC was unable to demonstrate reversible error.

It is well settled that the decision of a trial court has a presumption of correctness and the appellant has the duty to demonstrate reversible error based upon the record. *Applegate v. Barnett Bank*, 377 So. 2d 1150 (Fla. 1979). To be reversible error the record must demonstrate not only an error, but that the error was preserved for review. *Maulden v. Corbin*, 537 So. 2d 1085 (Fla. 1st DCA 1989). For an error to be preserved for appellate review, the record must demonstrate a timely objection. *City of Orlando v. Birmingham*, 539 So. 2d 1133 (Fla. 1989).

In the instant case, OC failed to demonstrate in the "limited" record presented to the district court that the trial court committed reversible error when it denied OC's *forum non conveniens* motion. The district court was confronted with a

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[19]Annual Meeting Remarks by Glen H. Hiner, Chairman and Chief Executive Officer, dated 4-16-92. (PL Exh 131).

record which demonstrated a disagreement as to what occurred at the October 31 hearing. The record showed that the trial judge recalled that OC had agreed at the hearing that this case came within the *Kinney* trial ready exception. (2/27/97 p.62). Respondent also remembered that OC had agreed. OC claimed post trial it had not agreed. (2/27/97 p.15). This factual dispute was crucial to the resolution of OC's appellate contention that the trial court had erred. If OC had agreed with the ruling there could not be reversible error. *Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475 (Fla. 1995)(a party cannot complain about a ruling it invited the court to make); *Held v. Held*, 617 So. 2d 358 (Fla. 4th DCA 1993)(a party cannot claim as error on appeal that which he invited below). The absence of the October 31 transcript prevented OC from discharging its burden of demonstrating that it had not agreed with Judge Baker's ruling, and thus, OC could not claim that ruling was error. *Owens Corning v. Ballard, supra*. Where, as here, "the record brought forward by the appellant is inadequate to demonstrate **reversible** error", the district court must affirm the trial court. *Applegate v Barnett Bank, supra*. (emphasis supplied).

The district court cited in support of its holding *Carenza v. Sun Int'l Hotels, Ltd.*, 699 So. 2d 830 (Fla. 4th DCA 1997), leaving no doubt that its decision was based on the inadequate appellate record furnished by OC.[20] The court, however, did note

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[20]This case is not in conflict with *Sun & Sea Estates, Ltd., v. Kelly, supra*, because that case did not turn, as this case did, on the appellant's failure to provide a sufficient record.

that this case had been pending three years, the motion was made shortly before trial, and OC had not requested a continuance. These facts clearly questioned the credibility of OC's post trial contention that it had not agreed that this case came within the *Kinney* ready for trial exception. After all, the record did show that from October 31, until trial on January 9, the only discovery conducted by OC was a brief deposition of the plaintiff which provided little, if any, new information. Thus the district court knew that OC was as ready for trial on October 31 as it was when the trial began. The fact that OC had not requested a continuance clearly indicated to the district court that OC believed it was ready for trial on October 31 and certainly its pretrial actions were consistent with the trial judge's recollection that OC had agreed that this case came within the *Kinney* trial ready exception.

OC's argument in this court that it was not ready for trial misses the point.[21] The issue is not whether OC was ready, but rather, what it told the trial judge on October 31. This court is "constrained" by the same record presented to the district court which makes it impossible for OC to demonstrate that it did not agree this case came within the *Kinney* exception.

OC's argument that the district court's "primal" error was not evaluating the ready for trial issue as of January 25, 1996, when *Kinney* was decided is also misplaced. For purposes of this

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[21]A review of the record by this court would show that OC was ready to put on the historical defense it presented in this case, but the court does not have to address that question to find the district court was correct.

case it does not matter what date was used to evaluate the issue because OC cannot show that whatever date was used it did not agree with the trial court. However, OC is wrong that the *Kinney* ready for trial exception is evaluated as of January 25, 1996.

The obvious and logical reference by the court to "now" in *Kinney* is that the court reasonably assumed that a defendant, if he was entitled to relief under the new *forum non conveniens* rule, would seek that relief promptly. If a defendant did that, then the time that its motion was filed would roughly coincide with the "now" eluded to by this court.

OC's interpretation of "now" would undermine the very purpose of *Kinney* which was to reduce the expenditure of Florida resources in cases that should be tried elsewhere. Under OC's interpretation of "now" a defendant is free to wait as long as it wishes, even years, to file its motion to dismiss under *Kinney* and then to have the ready for trial or significant discovery exceptions determined as of January 25, 1996. Such an interpretation would thrust upon the Florida courts the burden of prosecuting cases for years instead of having those cases promptly filed in the more appropriate jurisdiction. Clearly, this court was not condoning a defendant causing the expenditure of Florida resources simply by its delay in filing a motion to dismiss for *forum non conveniens*. *See, In re: Air Crash Disaster,* 821 F.2d 1147 (5th Cir. 1987), vacated on other grounds *sub nom, Pan Am World Airways, Inc. v. Lopez,* 490 U.S. 1032 (1989). (The reason federal courts require a timely motion is that "a defendant's dilatoriness promotes and allows the very

incurrence of cost and inconvenience the doctrine is meant to relieve").

Adopting an interpretation of "now" which encourages prompt motions to dismiss under *Kinney* is also important to prevent defendants, such as OC, from using *Kinney* to prejudice plaintiffs. For instance, when a plaintiff files a personal injury action for an injury which will almost certainly result in death (i.e., such as mesothelioma in this case), it is advantageous for the defendant to delay filing its *Kinney* motion for as long as possible. The reason is that in many states, including Florida, the damages available for personal injury are much greater than those for wrongful death.[22] Allowing the case to proceed in Florida for as long as possible before it is dismissed will delay the trial in another jurisdiction. This delay increases the chances that the plaintiff will die before trial and his estate will be entitled to lesser damages. In this case, the fact that OC chose to wait ten (10) months after *Kinney* was decided to file its motion made it highly unlikely that Mr. Ballard, unmarried and without a minor child, would survive to try his case in another jurisdiction.

The district court under well settled principles of appellate procedure correctly held that OC had not discharged its duty to demonstrate reversible error based upon the record. As in *Novack, supra*, review by this court of the district court's

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[22]In Florida, a decedent's estate is not entitled to recover for the decedent's pain and suffering which is often a substantial portion of the damages in a personal injury action. §768.21 Fla. Stat.

opinion affirming the trial court is not necessary.

Conclusion

Certiorari should not be granted in this case. The certified question concerns private issues between the parties not of "public importance". The trial court did exactly what the legislature directed when it confronted the punitive verdict. The district court correctly concluded that the trial court did not abuse its discretion when it found by clear and convincing evidence that the punitive verdict was not excessive. The district court also correctly refused to reverse the trial court's denial of OC's *forum* motion where OC could not show that the trial court was incorrect in finding that OC agreed with its ruling that this case came within the *Kinney* trial ready exception.

For all of these reasons respondent respectfully requests that *certiorari* be denied.

Respectfully submitted,

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Certificate of Service

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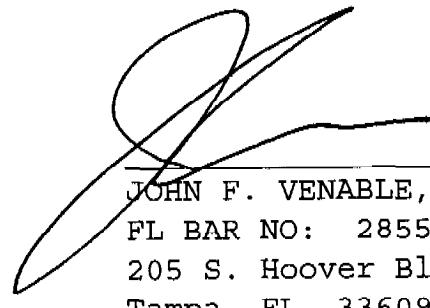

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