IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 92,963

OWENS CORNING,

Petitioner,

v.

DEWARD BALLARD,

Respondent.

INITIAL BRIEF ON THE MERITS OF OWENS CORNING

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

The record on appeal consists of the materials for which the following abbreviations are provided:

"R. __ ":	Record on appeal prepared by the clerk of the Fifteenth Judicial Circuit Court, in and for Palm Beach County, from Docket No. CL-93-10817-AD.
"S.M. __":	"Owens Corning's Supplemental Memorandum in Support of its Post-trial Motions" from Docket No. CL-93-10817-AD in the Fifteenth Judicial Circuit Court in and for Palm Beach County, as approved for filing by an order of the district court dated November 20, 1997.
"S.R. __":	"Supplemental Record" filed in the Fourth District Court of Appeal on March 17, 1998, as approved for filing by an order of the district court dated April 29, 1998.
"Tr. __":	Trial transcript.
"1/21 Tr. __":	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 Tr. __":	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.

INTRODUCTION

This case presents two questions of great public importance. The first question, certified by the district court, arises out of the enactment of legislation in 1986 that declares presumptively unlawful any punitive damage award in excess of three times the compensatory award, and requires a plaintiff to overcome the presumption with clear and convincing evidence. The Court is called upon to identify what manner and degree of evidence is required for that showing, over and above that which warranted punitive damages in the first place. At stake is $25.825 million of a $31 million punitive damage award imposed on Owens Corning in purported furtherance of Florida's interests in punishing conduct and deterring similar conduct in the future.

The second question arises out of this Court's decision in *Kinney System, Inc. v. Continental Ins. Co.*, 674 So. 2d 86 (Fla. 1996), which condemned the use of Florida courts for lawsuits having no connection with Florida and directed the courts to dismiss such cases under the doctrine of *forum non conveniens*. At stake is the application of *Kinney* to untold thousands of cases brought by foreign plaintiffs against foreign defendants, like this one, that continue to clog the Florida courts.[1]

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[1] The Court has jurisdiction to decide all issues properly presented in a case that has been certified. *E.g., Feller v. State*, 637 So. 2d 911, 913 (Fla. 1994); *Tillman v. State*, 471 So. 2d 32, 34 (Fla. 1985) ("The district court's certification . . . gives this Court jurisdiction, in its discretion, to review the district court's 'decision' . . . . Once the case has been accepted for review here, this Court may review any issue arising in the (continued . . .)

STATEMENT OF THE CASE AND FACTS

1993-94

In December 1993, Deward Ballard filed a form complaint against Owens Corning and 22 other entities alleging he had been injured by exposure to asbestos dust. (R. 1). Mr. Ballard was an electrician who worked in 1960s and 1970s in states other than Florida, was exposed to asbestos products manufactured by a host of different companies (one of which was Florida-based W.R. Grace & Co.), and had been diagnosed as having "asbestosis."[2]

In February 1994, Mr. Ballard filed "exposure sheets" (R. 58-62) – a form of notice used in asbestos litigation to identify work sites where a plaintiff claims to have been exposed to particular products containing asbestos so that, among other reasons, defendants can pursue their right to apportion damages among named and unnamed defendants under Florida law. He there declared that he was exposed to Owens Corning products between 1960 and 1972 at three job sites in Alabama, Illinois and Tennessee. (R. 61).

Owens Corning answered the complaint and served preliminary interrogatories on Mr. Ballard. (R. 75). In May, Mr. Ballard served interrogatory answers stating that he had never worked in

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(. . . continued)
case that has been properly preserved and properly presented.").

[2] "Asbestosis" is a non-malignant, non-cancerous disease in the form of dead scar tissue that clogs the small airways to the lungs. *Celotex Corp. v. Meehan*, 523 So. 2d 141, 150 n.2 (Fla. 1988) (Barkett, J., dissenting); *Matter of Celotex Corp.*, 175 B.R. 98, 104-05 (Bankr. M.D. Fla. 1994).

Florida and had no contact whatever with Florida. In September, Mr. Ballard filed a notice that the case was at issue. (R. 242; 2/27 Tr. 50).

1995

Mr. Ballard joined with 19 other asbestos-claim plaintiffs to request that the circuit court set up a master docket for the large number of asbestos lawsuits that had been filed and were pending in the Palm Beach County Circuit Court. On June 26, the trial court granted these plaintiffs' motion, establishing an "In re: Asbestos Litigation Repository File" docket and creating for that purpose Docket No. 95-50000. (S.R. 4). On July 12, the court entered an Omnibus Order that implemented the master docket. (S.R. 9).

In December 1995, Mr. Ballard was privately diagnosed with "mesothelioma." (2/27 Tr. 5, 60).[3] Owens Corning was not notified of this diagnosis at the time.

1996

On January 25, the Court issued its decision in *Kinney Systems, Inc. v. Continental Ins. Co.*, 674 So. 2d 86 (Fla. 1996).

On August 15, the trial court entered an order in the master "In re" docket setting 20 of the oldest asbestos cases on the

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[3] "Mesothelioma," a disease wholly unrelated to asbestosis, is a rare form of malignant cancer, invariably fatal, in which the cells multiply uncontrolled in the chest wall surrounding organs in the chest cavity. *Celotex Corp., supra*; *Matter of Celotex Corp., supra*, at 105.

trial calendar for January 6, 1997. (S.R. 13). Mr. Ballard's case was number 5 on the list. (S.R. 17). At that time, the court identified 240 asbestos cases pending on the "In re" docket. (S.R. 17-21).

On October 1, Owens Corning moved to dismiss Mr. Ballard's lawsuit and 11 others on the ground of *forum non conveniens* and in light of this Court's decision in *Kinney*. (S.R. 22). An affidavit attached to the motion states that 7,422 asbestos cases were pending in Florida against Owens Corning at the time. (S.R. 31).[4]

At the time this motion was filed, the only record activity in Mr. Ballard's lawsuit consisted of his complaint and initial exposure sheets, Owens Corning's answer to the complaint, and Mr. Ballard's notice (filed in September of 1994) that the case was at issue. The only discovery that had been undertaken was Owens Corning's service of preliminary interrogatories and Mr. Ballard's answers to those interrogatories, indicating that Mr. Ballard was suffering from "asbestosis" as a result of exposure to asbestos dust at job sites outside of Florida. Mr. Ballard's deposition had not been taken. No expert or other witnesses had been identified by the parties. There had been no judicial

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[4] An administrative order entered in the master "In re" docket on October 22 stated that over 700 asbestos cases were pending in the Fifteenth Judicial Circuit.

involvement in his lawsuit on procedural matters, on discovery issues, or for any other purpose.[5]

On October 15, Mr. Ballard disclosed his mesothelioma diagnosis to Owens Corning. (2/27 Tr. 5). A day later, he served "amended" exposure sheets, leaving unchanged as to Owens Corning only one of the job sites shown on his initial exposure sheets, adding eight new sites in six states not previously disclosed, and expanding the period of alleged exposure from 1955 to 1973. (R. 247, 253). A week later, Mr. Ballard moved to expedite his trial. (S.R. 33).

On October 31, a hearing was held on Owens Corning's *forum non* motion and Mr. Ballard's motion to expedite. The trial court denied Owens Corning's motion, and over Owens Corning's objection granted Mr. Ballard's motion to expedite. ("In Re" Docket at 376, 378).[6] On November 19, but unbeknownst to the trial court or Owens Corning, Mr. Ballard filed suit in Louisiana against a number of asbestos manufacturers other than Owens Corning, alleging essentially the same asbestos injuries that he was asserting in his Florida lawsuit. (S.M. Ex. A; 2/27 Tr. 6-8, 36, 40-41).

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[5] In the circuit court's "In re" master docket, the only judicial action that directly affected Mr. Ballard was an order that set his and 19 other cases for trial on the January 6, 1997 calendar.

[6] Attached as Appendix 1 is the docket sheet for the "In Re" master docket, dating from the opening of that docket to the date of Mr. Ballard's trial.

Based on Mr. Ballard's claim of having mesothelioma as well as the significant new information contained in his amended exposure sheets, Owens Corning moved to amend its pleadings to supplement the affirmative defense of apportionment already pled, to specifically name non-parties, and to conform its pleadings to the new evidence. (S.M. App. C). The trial court denied Owens Corning's motions. In December, Owens Corning took Mr. Ballard's deposition.

1997-98

Trial began on January 9, 1997. Jury verdicts were rendered awarding Mr. Ballard $1.845 million in compensatory damages, later reduced to $1.725 million, and $31 million in punitive damages. (Tr. 1429; R. 415-17, 418, 801). On January 30, Owens Corning learned for the first time of the parallel lawsuit that Mr. Ballard had brought in Louisiana against other defendants. (2/27 Tr. 8).

Mr. Ballard alleged that his condition was caused by exposure to a variety of products containing asbestos, including Kaylo – a product manufactured and distributed by Owens Corning that was used to insulate high-temperature piping and similar applications. Kaylo was distributed or manufactured by Owens Corning from 1952 through 1972. (1/21 Tr. 90).

Owens Corning realized a profit of $1.4 million from its manufacture and sales of Kaylo. (1/21 Tr. 90-92). The net worth of Owens Corning, as established at trial, was a *negative* $563 million, a figure established by Owens Corning's 1966 third-

quarter Form 10Q as filed with the Securities and Exchange Commission. (Owens Corning Trial Ex. 719 at 3-4). Through September 1996, Owens Corning had paid $383 million out of its own funds, over and above insurance, to resolve asbestos claims. (1/21 Tr. 162). Asbestos indemnity payments of $57 million were made in the third quarter of 1996 (2/27 Tr. 26), and were running at an annual rate of $225 million as of early 1997. (1/21 Tr. 108, 111-12). Fully one-half of Owens Corning's net earnings are devoted to resolving asbestos claims. (1/21 Tr. 80, 114).

From 1946 through 1968 the American Conference of Government Industrial Hygienists maintained that asbestos was safe so long as dust concentrations did not exceed five million particles per cubic foot (Tr. 1035-36), and under normal handling conditions Kaylo did not produce dust in excess of that standard. (Tr. 1166). A study warning of hazards of exposure to asbestos at certain levels was published in December 31, 1965, at which time Owens Corning believed Kaylo would not produce the adverse effects described in the study. (Tr. 1167-68). Nonetheless, Owens Corning put warning labels on Kaylo in 1966, years before such warnings were required by law or regulation. (Tr. 726-28). During the period of Mr. Ballard's alleged exposures (1955-73), Kaylo was not regarded as dangerous to humans under normal handling conditions. (Tr. 1156-59).

Until 1972, Owens Corning was unable to replace the asbestos in Kaylo with an asbestos-free product that would satisfy customer demand. (Tr. 1190, 1199, 1208-09). From July 12 to November 13, 1972, Owens Corning test-marketed "AF Kaylo,"

advertised as asbestos-free but which the evidence at trial suggested accidentally contained a small amount of asbestos. No asbestos-containing product was sold by Owens Corning thereafter. (Tr. 779-82).

SUMMARY OF ARGUMENT

Against a backdrop of profound and long-standing judicial deference to the amounts of punitive damages awarded by Florida juries, the Florida Legislature in 1986 abolished that deference and declared that a punitive damage award exceeding three times the compensatory award was presumptively excessive. In doing so, the Legislature concluded that a punishment three times the size of a compensatory award presumptively exhausted Florida's interests in punishing the tortfeasor and deterring similar conduct.

The Legislature required punitive damage claimants seeking to overcome this legislative judgment to do so by "clear and convincing" evidence from the record as a whole, and it excluded intentional torts from the list of torts to which the three-times cap applied. The three-times cap was reached in this case at $5.175 million, requiring Mr. Ballard to justify an additional $25.875 million awarded by the jury. No showing was made by Mr. Ballard that would justify leaving that excessive portion of the award to survive the Legislature's limitation.

The parties and the trial court understood that Owens Corning's *forum non* motion for dismissal of Mr. Ballard's lawsuit would have been granted under an application of the *Kinney*

"factors." The trial court denied the motion, however, and the district court upheld that ruling, based on an apparent application of the "ready for trial" or "substantially completed discovery" tests for cases pending when the Court issued the *Kinney* decision.

The district court's affirmation of the trial court's ruling was erroneous. When Owens Corning's motion was filed, there had been no discovery relevant to Mr. Ballard's mesothelioma lawsuit, and Owens Corning was not remotely ready for a trial on that claim. The district court's decision completely thwarts the Court's intention to unclog the Florida courts by having the *Kinney* principles applied to thousands of cases pending on January 25, 1996, that had been improperly filed in Florida and were neither advanced in discovery nor ready for trial, like Mr. Ballard's lawsuit. The district court's decision directly conflicts with a decision of the Third District, which applied *Kinney's* "ready for trial" test to a case where discovery was far more advanced than here, to hold that the circuit court's refusal to dismiss was an abuse of discretion. *Sun & Sea Estates, Ltd. v. Kelly*, 707 So. 2d 863 (Fla. 3d DCA 1998).

ARGUMENT

I. The district court erred in sustaining an award of punitive damages greater than three times the jury's award of compensatory damages.

The district court certified the following question as one of great public importance:

> Is the statutory presumption as to excessive punitive damages, found in section 768.73(1), Florida Statutes, overcome in a case where the punitive damages award is almost 18 times the compensatory damages awarded, when it is based on clear and convincing evidence that the award was less than 2% of the defendant's company's net worth, and that the defendant's conduct was more egregious than the standard of wanton and willful disregard for the safety of the plaintiff?

23 Fla. L. Weekly at D1078. A copy of the district court's decision is attached as Appendix 2.

The question as phrased by that court is obviously fact-specific.[7] Inherent in the inquiry, however, is the very important public question of what principles of law govern the application of the punitive damage "cap" statute – section 768.73(2)(b) – to any award that exceeds the limit of three times compensatory damages and assigns to a plaintiff the burden of demonstrating, by clear and convincing evidence from the record as a whole, that the presumptively unlawful portion of a jury award is not excessive. The answer to that question is found in the statute, as interpreted in light of the common law regarding punitive damages at the time the statute was enacted.

The trial court and district court decisions must be repudiated because they rely on factual findings that are not supported by the record, and because they overlook facts favorable to Owens Corning that, under the applicable statutory

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[7] The record establishes that the "fact" set out in the certified question concerning Owens Corning's net worth was not established by clear and convincing evidence, and was flatly contrary to the only evidence on the point.

standard, must be weighed heavily in determining whether the statutory presumption of excessiveness may be defeated. Mr. Ballard's asbestos personal injury case is a classic case for application of the statutory cap.

With its enactment of section 768.73, the Legislature established a presumption that an amount equal to three times compensatory damages is sufficient to satisfy the punishment and deterrence goals of punitive damages. § 768.73(1)(a)-(b), Fla. Stat. Ann. (1987).[8] An asbestos personal injury case against a defendant such as Owens Corning is the most inappropriate case for finding that the cap should be exceeded. There is no immediate or ongoing threat to the public health or welfare. Owens Corning ceased manufacturing asbestos-containing Kaylo over 25 years ago. Any exposure that may give rise to an injury took place long ago. Thus, this is not a case in which a huge punitive damage award can be justified as the only available means to assure an immediate cessation of the harmful conduct.

In addition, there is no basis for believing that a huge punishment in a single case is necessary to accomplish the public goals of punishment and deterrence, either as to Owens Corning individually or as to former manufacturers of asbestos-containing products collectively – many of whom are now bankrupt and unable to pay their fair share of compensatory damages in this extensive

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[8] In Florida, as elsewhere, "[p]unitive damages are imposed in order to punish the defendant for extreme wrongdoing and to deter others from engaging in similar conduct." *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 825 (Fla. 1986).

litigation. The prospect of multi-million dollar compensatory awards (such as Mr. Ballard's $1.8 million compensatory damage award) has provided adequate incentive for individual plaintiffs to sue on their own behalf in order to recover their own compensatory and punitive damage awards. As demonstrated below, Owens Corning currently pays at least a half, if not more, of its annual profits in indemnity and defense costs associated with its asbestos liability. (Tr. 80). Clearly, this is precisely the ***opposite*** of the kind of case in which a large award in excess of the $5.175 million permitted under the cap is needed to ensure that the governmental goals of punitive damages are met.

A. The legislative limitation contemplates stringent standards for court review of presumptively excessive awards.

In 1985, this Court declared (and has since reiterated on several occasions) that punitive damages may be imposed only for "willful and wanton misconduct equivalent to criminal manslaughter." *Como Oil Co. v. O'Loughlin*, 466 So. 2d 1061, 1062 (Fla. 1985). At that time, it was well understood that punitive damages serve to punish for extreme wrongdoing and to deter others from engaging in similar conduct – not to provide a means for plaintiffs to recover extra damages. *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981). Thus, punitive damages were designed to serve expressly defined interests of the state, not private interests, with the level of punishment to vindicate these state interests largely left to Florida juries:

> Since the degree of punishment to be inflicted on the defendant is peculiarly within the province of the jury, courts will hold punitive damages excessive only in unusual circumstances.

Wackenhut Corp. v. Canty, 359 So. 2d 430, 436 (Fla. 1978).

Against this background, the Legislature in 1986 adopted "tort reform" legislation that altered existing Florida law in several important respects.[9] With regard to the general problem of excessive verdicts (including compensatory and punitive damages), the Legislature made express its intention "that awards of damages be subject to close scrutiny by the courts . . . ." § 768.74(3), Fla. Stat. (1987). This heightened scrutiny was made applicable to all cases sounding in tort or contract. § 768.71, Fla. Stat. (1987).

With regard to a narrower class of cases and damage awards, however, the Legislature went much farther. Exercising its plenary authority to regulate the recovery of punitive damages in Florida's courts – to the point of extinction, if it chose (*see Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994)) – the Legislature declared that a punitive damage award "may not exceed three times the amount of compensatory damages awarded." § 768.73(1)(a), Fla. Stat. (1987).

Reversing a long tradition of extreme judicial deference to juries, the Legislature declared that any portion of a punitive

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[9] The Legislature is presumed to know the existing law when a statute is enacted, including judicial decisions. *Collins Investment Co. v. Metropolitan Dade County*, 164 So. 2d 806 (Fla. 1964); *Wood v. Fraser*, 677 So. 2d 15 (Fla. 2d DCA 1996).

damage award in excess of three times the compensatory award "is presumed to be excessive." § 768.73(1)(b), Fla. Stat. (1987). Thus, the Legislature declared that Florida's interests in punishment and deterrence are presumptively exhausted by a punitive damage award three times the compensatory damage award. This statutory limitation, however, was made applicable only to an enumerated list of civil actions "involving willful, wanton, or gross misconduct" that ***do not*** encompass intentional torts. § 768.73(1)(a), Fla. Stat. (1987).

In the course of enacting this sea change of judicial deference to juries, the Legislature imposed on the courts the dual responsibilities of reviewing carefully awards of less than three times compensatory damages (§ 768.73(1)(c), Fla. Stat. (1987)), and determining *de novo*, where a jury had awarded more than three times the compensatory award, whether a successful punitive damage claimant has overcome the statutory presumption of excessiveness. The statute directed

> the defendant is entitled to remittitur of the amount in excess of the limitation unless the claimant demonstrates to the court by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact.

§ 768.73(1)(b), Fla. Stat. (1987).[10]

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[10] The largest punitive damage award previously affirmed in a Florida asbestos case is $8.25 million in *Owens-Corning Fiberglas Corp. v. Dudley*, 667 So. 2d 783 (Fla. 2d DCA 1995) (affirming *Dudley v. Owens-Corning Fiberglas Corp.*, Thirteenth Judicial Circuit Case No. 93-9601 (1994)), *cert. denied*, 517 U.S. 1244 (1996). In that case, the jury (continued . . .)

The Legislature underscored its intention to rein in runaway punitive damage awards by imposing on punitive damage claimants the extraordinary burden of having to overcome the three-times presumption by "clear and convincing" evidence. As applied to Mr. Ballard's jury award, the Legislature has determined that $25.825 million of the jury's $31 million punitive damage award is the illegal product of a flawed jury process unless Mr. Ballard can, as a threshold matter, demonstrate by clear and convincing evidence that the facts and circumstances gleaned from the record establish misconduct exceeding the "criminal manslaughter" standard of *Como*. In addition, the statute required Mr. Ballard to demonstrate that *Florida's* interests in imposing punishment on Owens Corning, not his personal interests, were not adequately vindicated by a punishment of $5.175 million.

Although the Legislature in 1986 decreed that a claim of non-excessiveness is to be demonstrated to the courts based on the entire record made before the trier of fact, the Legislature did not expressly indicate how that evidence must transcend the evidence in an "ordinary" case that would support some measure of punitive damages in the first place. At the behest of Mr. Ballard, both the trial court and the district court purported to find clear and convincing evidence to overcome the statutory

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(. . . continued)
returned a punitive damage verdict of $15 million on a compensatory award of $2.75 million. The circuit court remitted the punitive award to three times the compensatory award pursuant to the provisions of the 1986 legislation at issue here.

presumption of excessiveness by dwelling exclusively on the alleged reprehensibility of Owens Corning's conduct. As the district court put it:

> The evidence at trial showed that Owens-Corning knew of the deleterious health risks associated with Kaylo for decades, yet consciously made a purely economic decision not to warn its consumers, change its process, remove the asbestos, and/or replace the fibers with readily available, asbestos-free fibers. As a result of this conduct, Ballard was exposed to Kaylo at several job sites and developed terminal lung cancer.

23 Fla. L. Weekly at D1078.

The courts below concluded that Owens Corning's alleged conduct alone would support a claim for punitive damages. Contrary to the statutory directive that *all* evidence in the record be taken into account – including evidence favorable to Owens Corning – the courts applied only the evidence relied on by Mr. Ballard, and the inferences drawn from that evidence in Mr. Ballard's favor.

The legislative prescription for overcoming the three-times presumption is meaningless, however, if nothing more is needed than a showing of misconduct that would warrant the imposition of punitive damages in the first place, *i.e.*, that the misconduct satisfied the *Como* "criminal manslaughter" standard. *Cf. City of Tampa v. Birdsong Motors, Inc.*, 261 So. 2d 1, 5 (Fla. 1972). It would be nonsensical to attribute to the Legislature an intent to allow misconduct merely meeting, but not exceeding, the *Como* standard, in order to discharge the punitive damage claimant's burden of overcoming the statutory presumption of excessiveness

with facts and circumstances purporting to demonstrate that the full award is necessary to vindicate Florida's interests in punishment and deterrence.[11] A punitive damage awardee,

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[11] The district court faulted Owens Corning for its tactical decision not to put before the jury evidence of prior punitive damage awards against it, and precluded Owens Corning from relying on those punishments to support its federal constitutional and state law excessiveness arguments other than those based on the three-times cap, relying on *Stevens v. Owens-Corning Fiberglas Corp.*, 49 Cal. App. 4th 1645 (1996). Owens Corning asks the Court to reverse the district court on this point, because no litigant should be required to put such volatile and potentially prejudicial evidence before a jury as a prerequisite to using that evidence to support federal constitutional and state law challenges to the excessiveness of a punitive damage award. By shifting the burden to punitive damage claimants to prove non-excessiveness, the Legislature made Mr. Ballard, not Owens Corning, responsible for putting before the jury evidence which would sustain a punishment in excess of the three-times limit – including any evidence that Florida's interests in punishment and deterrence had not been fully vindicated by the imposition of over $5 million in punitive damages. As the Supreme Court of Texas has recently held, trial and appellate courts may and should consider evidence adduced at post-trial hearings in discharging their duty to determine challenges to particular punitive damage awards based on state law or federal constitutional law. *See Owens-Corning Fiberglas Corp. v. Malone*, 1998 WL 288690 (Tex. June 5, 1998).

Of course, if the court orders Mr. Ballard's complaint to be dismissed on *forum non conveniens* grounds, it need not reach this issue. If, however, the Court determines that this case was properly brought in the Florida courts and rules for or against Owens Corning on the three-times cap question, the case should be remanded to the district court to enable Owens Corning to present its federal constitutional challenge to the entirety of this punitive damage award, utilizing evidence that was presented to the circuit court post-trial.

obviously, must establish misconduct of a different order than misconduct "necessary to sustain a conviction for manslaughter." *Carraway v. Revell,* 116 So. 2d 16, 20 (Fla. 1959) (*quoting Carraway v. Revell,* 112 So. 2d 71, 75 (Fla. 3d DCA 1959)).

In addition to declaring awards in excess of the three-times cap to be presumptively unlawful, and placing an extraordinarily high burden of proof on punitive damage claimants to overcome the presumption of excessiveness, the Legislature placed in the courts the responsibility to review *de novo* all portions of the record relied on by the adverse parties, and to determine whether any particular award is not excessive. Under this formulation, a punitive damage defendant is entitled to have the evidence in the record viewed in a light favorable to it, and against the plaintiff whose burden it is to show that the three-times cap should be lifted. Thus, *for this purpose,* the Legislature has reversed the usual notion that a litigant who prevails at trial is entitled on appeal to have the facts expressly or implicitly found by the trier of fact viewed in a light most favorable to his or her cause.

Put another way, the Legislature's declaration that a punitive damage award in excess of the three-times limit is presumptively unlawful draws into question the reliability of the jury's fact-finding process and, consequently, the validity of its verdict to the extent of the excess. In order to bypass the presumptively flawed jury process, Section 768.73(1) gives to the Florida courts the responsibility to determine, as a matter of law, whether verdicts surpassing the three-times limit may stand.

In practical terms, the legislatively crafted presumption is that the jury misfired, and that a three-times punishment exhausts Florida's interests in punishment.

Under these circumstances, it would defeat the presumption altogether to give the party with the burden of proof – here, the plaintiff – the benefit of all favorable inferences from the evidence in the record. Under Section 768.73(1)(b), plaintiffs attempting to overcome the presumption enjoy no benefit of having the facts tilted in their direction and, indeed, all reasonable inferences should be drawn in favor of the defendant.

Something more than justifies a punitive damage in the first place, without inferences favorable to the plaintiff, must be established to the satisfaction of the courts by "clear and convincing evidence." That level of proof in Florida is

> evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

In re Standard Jury Instructions, 575 So. 2d 194, 196 (Fla. 1991). Evidence cannot be said to be "clear and convincing," of course, unless it is compared with evidence to the contrary adduced by the litigant who does not bear the burden of proof. Under the burden imposed, the three-times cap must be honored and remittitur of any excess ordered unless no reasonable judge could conclude that the excessive amount should be curtailed.

Section 768.73(1)(b) does not expressly address the nature of evidence required before the courts are entitled to lift the

cap in a particular case. It states, however, that this decision is to be made "in light of the facts and circumstances which were presented to the trier of fact." Since the three-times cap is the general rule and its lifting the exception, the clause providing for lifting the cap "should be narrowly and strictly construed." *Samara Development Corp. v. Marlow*, 556 So. 2d 1097, 1100 (Fla. 1990). Applying that principle of statutory construction, the identification of "what" the punitive damage claimant must show in order to warrant lifting the three-times cap emerges from interpreting this provision in the context of the 1986 tort reform legislation.

Unlike other provisions of the 1986 legislation, the three-times cap was not made applicable to intentional torts. There might have been several bases for this legislative judgment, but the most logical is that intentional torts involve that kind of specific, focused intent to harm the victim, coupled with a substantial certainty that the harm will in fact occur, that society believes to warrant the most severe punishment. PROSSER & KEETON ON TORTS, § 8, at 37 (5th ed. 1984). Because the presumption of excessiveness should ordinarily give way where an intentional tort had been committed, it would make no sense to include such cases under the operation of the cap statute.

An intentional tort is committed where the tortfeasor has "a purpose (or desire) to bring about given consequences but also . . . a belief (or knowledge) that given consequences are substantially certain to result from the act." *Id.* at 34. This

requires a state of mind having the harmful intent when the act occurs.

The critical distinction at issue here is that the mere knowledge and appreciation of a risk – something short of substantial certainty – is not intent. A defendant who acts in belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great, the conduct may be characterized as reckless or wanton, but it is not an intentional wrong. *Id.*, § 8 at 36.

Identifying the precise reason for the Legislature's exclusion of intentional torts, however, is not essential. Whatever its unspoken rationale, punitive damage awards should be permitted to exceed the cap only where misconduct *qualitatively* exceeds in reprehensibility the level of conduct that would sustain a punitive damage award in the first instance.

Under the common law, the only established legal standard for applying that distinction is one that defines intentional torts. By excluding that class of cases from the statutory cap in Section 768.73(1)(b), the Legislature, at least by inference, has applied that principle symmetrically by allowing the lifting of the cap if, and only if, the claimant could show that the defendant intentionally – with actual malice – engaged in conduct with the specific intent to cause injury and knowledge of the substantial probability that the injury would occur.[12] In this

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[12] As this Court indicated in *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994), a class of civil actions expressly included in Section 768.73(1)(a), such as (continued . . .)

fashion, the exclusion of intentional torts from the three-times cap is rationalized with the provision allowing the cap to be lifted.

B. The evidence adduced at trial does not provide a basis to lift the three-times statutory limit on Mr. Ballard's punitive damage award.

The facts identified and relied on by the lower courts in this case do not justify lifting the cap to allow $25.825 million for Mr. Ballard in excess of his compensatory-trebled award of $5.175 million. In its formulation of the certified question, the court suggests that it believed an award of almost 18 times the compensatory award was justified because the punitive award was less than 2% of Owens Corning's net worth, and its conduct was "more egregious" than the standard of wanton and willful disregard for the safety of the plaintiff that would sustain an award of some punitive damages.

The circuit court's conclusion that the cap should be lifted was based on its belief that Owens Corning:

(1) concealed what it knew about the dangers of asbestos for over 30 years;
(2) intentionally misrepresented in 1956 the danger of Kaylo by advertising Kaylo to be "non-toxic" after

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(. . . continued)
"misconduct in a commercial transaction," does not lose the benefit of the three-times limit simply because the plaintiff pleads an "intentional tort" – in that case, malicious prosecution. In so holding, the Court made clear that the tort of malicious prosecution in Florida, unlike that tort as recognized in most other jurisdictions, does not require proof of "actual malice." 632 So. 2d at 1357.

having been told by a laboratory that Kaylo dust was toxic and a carcinogen;

(3) knowingly and intentionally contaminated, in 1973, its new, asbestos-free product that replaced Kaylo and then intentionally claimed that the new product was asbestos free despite knowledge that even slight exposure to asbestos in Kaylo could cause mesothelioma;

(4) refused in 1962 to market an asbestos-free product because it was not as profitable as Kaylo;

(5) refused to warn consumers of the dangers of asbestos from 1964 through 1966;

(6) made no significant effort to remove asbestos because removal did not offer any sales growth potential;

(7) had a net worth of $2.5 billion; and

(8) had paid only $182 million to resolve 179,000 prior cases between 1966-1996.

(Order entered on March 17, 1997). The circuit court concluded, as did the district court, that Mr. Ballard was entitled to a lifting of the three-times cap by reason of the nature of the misconduct and the "fact" that Owens Corning had a net worth of $2.5 billion. *Id.*

There are several independently fatal defects in the analyses of the lower courts as regards the excessive portion of Mr. Ballard's punitive damage award. First, the key underlying facts do not appear in the record, let alone stand out clearly and convincingly. Second, the alleged facts on which the courts relied are selective and myopic, and omit facts and inferences from the record as a whole which favor Owens Corning. Third, the courts utterly failed to place the award in the context of the massive amount of litigation against Owens Corning. Because of these defects, the legislatively assigned "careful review" has been performed standardlessly. Mr. Ballard was not obliged by

the courts to demonstrate what conduct *more than* that warranting punitive damages in the first place would justify the presumptively excessive $25.825 million.

1. The key fact on which the courts relied does not exist.

The 1986 legislation requires that ***all*** evidence be considered by a court called upon to evaluate a presumptively runaway jury award of punitive damages, with inferences to be drawn in favor of the defendant, not the plaintiff. Both lower courts selectively misread the evidence.

The most compelling demonstration of how the courts below misread the evidence is seen in the great weight they placed on the proposition that, because Owens Corning had a positive net worth of $2.5 billion, the imposition of an additional $25.825 million in punitive damages was justified. There was, however, no such evidence in the record; the only record evidence on the point conclusively established that Owens Corning had a ***negative*** net worth of $563 million. (Owens Corning Trial Ex. 719 at 3-4).

2. Other "facts," and inferences drawn in favor of Mr. Ballard, do not reflect the record as a whole.

Other seeming "facts" presented to the jury, and inferences drawn from the facts, were no more carefully analyzed by the courts below than was the evidence of net worth.

1. The district court's belief that Owens Corning had paid only $182 million to resolve 179,000 prior cases between 1966-1996 missed the evidentiary

mark by over $200 million, as the only record evidence establishes payments totaling $383 million out of its own funds. (1/21 Tr. 162).

2. The inference that Owens Corning falsely advertised Kaylo in 1956 is unwarranted in the face of the only record evidence on the point – namely, that lung fibrosis characteristics could be seen in laboratory animals which inhaled extraordinarily large amounts of Kaylo over long periods of time (Tr. 485-86), but that in 1956 asbestos was generally believed by established governmental standards to be safe so long as dust concentrations did not exceed five million particles per cubic foot which Kaylo, under normal handling conditions, did not produce. (Tr. 1035-36, 1166).

3. The inference that Owens Corning failed to warn customers in 1964-65 was based on a study that was not published until December 31, 1965, and in any event Owens Corning believed at the time that Kaylo would not produce the adverse effects described in the study. (Tr. 1167-68). As importantly, Owens Corning *did* put warnings on Kaylo in 1966 – years before such warnings were required by law or regulation. (Tr. 726-28).

4. The inference that Owens Corning delayed replacing the asbestos content of Kaylo was unwarranted in the face of record evidence that Owens Corning was unable until 1972 to produce an asbestos-free product

that would satisfy customer demand. (Tr. 1190, 1199, 1208, 1209).

5. The inference that Owens Corning callously sold contaminated Kaylo "asbestos-free" is unwarranted in light of the record evidence that AF-Kaylo, which was test-marketed for only 4 months, may have accidentally contained a small amount of asbestos, but absolutely no asbestos-containing product was subsequently manufactured or sold by Owens Corning. (Tr. 779-82).

3. The district court's oversight of the excessive portion of the jury verdict was standardless and visceral.

The district court paid lip service to the legislatively prescribed requirement that Mr. Ballard was obliged to demonstrate, by clear and convincing evidence, that a punitive damage award was justified in an amount more than three times the compensatory award. The court simply recited that Owens Corning's misconduct was "more egregious" than the standard of wanton and willful disregard for the safety of the plaintiff, and justified the "facially disproportionate" award as "not against the manifest weight of the evidence." 23 Fla. L. Weekly at D1078. Although the "more egregious" test comports with the Legislature's intention to erect a higher barrier against presumptively excessive punitive damage awards, it is not a particularly meaningful or useful standard when the task assigned

is to evaluate an entire record for evidence above and beyond willful and wanton conduct.

Inquiry should have been made as to whether the record established that Owens Corning not only had an intent to harm people when it marketed Kaylo, but that it knew there was a high probability that Kaylo would do so. There was not a high probability; indeed, the disease of mesothelioma for which Mr. Ballard recovered judgment is "a rare cancer." *Chesterton v. Fisher,* 655 So. 2d 170 (Fla. 3d DCA 1995). There is not a shred of evidence that Owens Corning ever had an intent to harm persons who might come into contact with Kaylo.

But even if the record showed by clear and convincing evidence that Owens Corning's conduct met either an intentional tort or "more egregious" standard (which it did not), that would not end the matter. The satisfaction of the substantive evidentiary standard is only the first step of the inquiry required by the cap statute. A second step requires analysis of whether a punishment exceeding the three-times cap is necessary to vindicate Florida's interests in punishment and deterrence.

The district court at no point considered why a punishment of over $5 million was not sufficient to vindicate Florida's interests in punishment and deterrence for a product that had been discontinued and taken off the market more than 25 years ago. Yet the Legislature admonished the Florida courts to look at the whole record, not just the evidence favorable to the plaintiff. The only two facts identified by the lower courts regarding Owens Corning's financial situation, albeit incorrectly

in both instances, were its net worth and the amount of money it had paid and was paying to resolve asbestos claims. Overlooked from the record was the fact, highly relevant to deterrence, that Owens Corning has neither manufactured nor sold an asbestos product for over a quarter of a century. *See Magallenes v. Superior Court*, 167 Cal. App. 3d 878, 886 (1985) ("the objective of deterrence has little relevance where the offending goods have long since been removed from the marketplace").

Also overlooked was (i) the fact that the profit realized by Owens Corning from Kaylo was only $1.4 million, (ii) the fact that Owens Corning had paid out $57 million to resolve asbestos claims in the third quarter of 1996 alone, (iii) the fact that its annual expenses to resolve claims were running about $225 million and absorbing fully one-half of its net earnings, and (iv) the fact that the company anticipates spending more than $1.7 ***billion*** in the future to resolve asbestos-related claims that, as of the date of trial, totaled more than 150,000 in number (most of which potentially involve punitive damages).

In sum, the lower courts did not do the job assigned them by the Legislature. It falls to this Court to put teeth into the legislative standard limiting punitive damage awards that are deemed by law to be excessive.

II. Mr. Ballard's lawsuit should have been dismissed on the principles of *forum non conveniens* set forth in *Kinney*.

The Court has never shied away from addressing and resolving cases on the basis of issues decided by the district courts *other than* the issue that predicated the Court's acceptance of

jurisdiction. *E.g., Savoie v. State*, 422 So. 2d 308, 310 (Fla. 1982); *Jacobson v. State*, 476 So. 2d 1282, 1285 (Fla. 1985). For two reasons, this case warrants the Court's review of the *forum non conveniens* issue addressed in the district court's decision.

First, an extraordinarily large number of asbestos (and other mass tort cases) that were pending when *Kinney* was decided are still pending in the trial courts of the state.[13] The Court went out of its way in *Kinney* to direct that the new *forum non conveniens* principles be applied to pending cases. The district court's interpretation of *Kinney's* applicability to then-pending cases effectively nullifies the Court's strong desire to rid the Florida courts of cases that inhibit or substantially delay the use of the state's scarce judicial resources by Florida's citizenry.

Second, the district court's decision conflicts with a decision of the Third District which, on less compelling dismissal facts, held that a *failure* to dismiss under the discovery-completed and case-ready tests of *Kinney* was an abuse of the trial court's discretion. *Sun & Sea Estates, Ltd. v. Kelly, supra*, a copy of which is attached as Appendix 3. The correct resolution of this conflict, by the Court's embrace of *Sun & Sea Estates*, will go a long way toward meeting the

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[13] The level of judicial time and resources expended on asbestos cases in just the Palm Beach County Circuit Court is reflected in Appendix 1.

objectives that prompted this Court's application of *Kinney* to cases in the judicial pipeline when it was handed down.

Mr. Ballard's lawsuit was filed in 1993, but until the Court issued its *Kinney* decision on January 25, 1996, its dismissal on the basis of *forum non conveniens* was not possible under *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978), inasmuch as one of the named defendants was headquartered in Florida.[14] The Court's *Kinney* decision completely changed the principles governing *forum non conveniens* dismissals in Florida in order to correct the "disturbing results" of *Houston* that made Florida the forum of choice for innumerable cases having no connection with the state.[15] Mr. Ballard's suit is a perfect example of such abusive forum shopping.

A. The Court directed that its *Kinney* decision be applied to cases then pending in Florida's trial courts except in discovery-completed and trial-ready cases.

It has never been seriously contended by Mr. Ballard that his Florida lawsuit would pass muster under the four-factors analysis of *Kinney*. Indeed, he waived any such contention in the court below.[16] There is also no doubt that the Court intended

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[14] *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111, 1125 (Fla. 4th DCA), *review denied*, 699 So. 2d 1352 (Fla. 1997) (holding that, prior to *Kinney*, dismissal on *forum non* grounds was barred by *Houston* so long as any defendant had its principle place of business in Florida).

[15] *Kinney*, 674 So. 2d at 88.

[16] A copy of the relevant pages from Mr. Ballard's answer brief in the district court are attached as Appendix 4.

Kinney to be applied to cases pending in the trial and appellate courts as of the date on which *Kinney* was decided – January 25, 1996.

The Court's *Kinney* decision was carefully crafted not to be prospective only. The Court concluded its discussion of the merits of the case with an invitation for "new or renewed" motions for *forum non conveniens* dismissal in then-pending trial and appellate proceedings.[17] It specifically directed that the newly adopted principles of *forum non conveniens* "shall apply to all actions not yet final at the trial level," with one exception.[18] The trial courts were advised not to dismiss cases in which the application of *Kinney* principles would frustrate the doctrine of *forum non conveniens*, such as

> where the parties – relying on *Houston* – have substantially completed discovery or are now ready for a Florida trial . . . .[19]

The terms "***have*** substantially completed" and "***now*** ready for a Florida trial" (emphases added) reference the date of the Court's opinion – January 25, 1996 – and make abundantly clear that any inappropriately-filed case pending on that date was to be dismissed ***unless*** discovery had been completed or the case was ready for trial.

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17 *Id.* at 93-94.

18 *Id.* at 94.

19 *Id.*

B. Mr. Ballard's lawsuit was not ready for trial, and discovery had not been substantially completed, when Owens Corning filed its *forum non conveniens* motion.

The district court's primal error in this case was failing to acknowledge the directive in *Kinney* that a "ready for trial" test should be applied to pending cases as of the date on which *Kinney* was decided. The district court ignored that directive, and instead imposed a generic notion of "timeliness" by declaring that "Owens Corning waited over three years into litigation and shortly before trial to make the motion . . . ." 23 Fla. L. Weekly at D1077.[20] The district court somehow failed to recognize the futility of Owens Corning's filing a *forum non* motion given *Houston v. Caldwell* – a futility clearly recognized by the Court in *Kinney*.

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[20] There is no hard and fast timeliness rule for *forum non* motions in Florida, of course. Timeliness depends on whether discovery has advanced to the stage of developing the required factual foundation for making such a motion. *Cf. John Christen Corp. v. Maita*, 571 So. 2d 24, 25 n.1 (Fla. 2d DCA 1990) (in a case where venue change motion was not filed until after the case had been pending for 18 months and had once been set for trial by stipulation of the parties, the court held: "Although a long delay in making such a [venue change] request may be a circumstance which adversely affects the 'interest of justice,' we decline to rely upon the time delay as a factor in our decision in this case."). Universally, factual development is the key to testing an inconvenient forum. *E.g., Snam Progetti S.P.A. v. Lauro Lines*, 387 F. Supp. 322, 323 (S.D.N.Y. 1974) ("the factors of equity and convenience, such as the location of important witnesses and evidence, which control a *forum non conveniens* motion may not be apparent without time-consuming investigation and, frequently, discovery").

At the time Owens Corning filed its *forum non* motion, the Ballard lawsuit had been "dormant" (according to the trial court) for its entire three-year life. (2/27 Tr. 93). ***Nothing*** by way of pleading or discovery had transpired in the lawsuit between the date of the *Kinney* decision in late January and the filing of the motion on October 1.

The quiescent status of this case was not unusual for a pending "asbestosis" lawsuit. Given the volume and variety of asbestos suits facing Owens Corning, an asbestosis claim would not have been actively litigated until a trial date approached. These suits require little in the way of health information from the plaintiff, since that particular disease is neither inherited nor genetic, and any possible damage award is expected to be relatively modest because that condition is neither malignant nor terminal. (2/27 Tr. 60-61, 93-94). Mr. Ballard's claim of exposure at only three job sites would have involved less substantial discovery than would be the case where many job sites are identified, as a smaller number of records would be needed to present a *Fabre* defense[21] for apportionment of liability to employers and other manufacturers whose asbestos products had been used at those sites during the time frame of Mr. Ballard's employments. (2/27 Tr. 93-94).

After Owens Corning's *forum non* motion was filed on October 1, however, and before it was heard by the circuit court, the character of Mr. Ballard's lawsuit changed completely. His

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

claim of non-malignant asbestosis was converted into a claim of malignant mesothelioma, the diagnosis of which he had been aware for over nine months but which he had not disclosed to Owens Corning. Additionally, his claim of exposure was expanded to nine job sites in six previously undisclosed states, where products containing asbestos had been utilized by 17 manufacturers other than Owens Corning. (2/27 Tr. 6-8).

A claim of cancerous mesothelioma necessitates an extensive medical history of a plaintiff (S.M. Ex. B; 2/27 Tr. 80-81, 94), and portends a very substantial damage recovery. (2/27 Tr. 104). The compulsion to perfect an apportionment defense increases dramatically. Indeed, so distinct is a claim of mesothelioma from a claim of asbestosis that Florida has set aside its rule against splitting a cause of action for persons who had brought suit on a claim for asbestosis but later learned that they also have a claim for mesothelioma. *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517, 519-27 (Fla. 3d DCA 1985), *review denied*, 492 So. 2d 1331 (Fla. 1986).

Yet Mr. Ballard had withheld his mesothelioma diagnosis from Owens Corning since December 1995, and concealed both from Owens Corning and from the circuit court until after the motion to dismiss had been denied his plan to bring a parallel cause of action in Louisiana against defendants other than those he was pursuing in Florida.[22] Thus, Owens Corning's discovery for Mr.

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[22] Louisiana would have allowed Mr. Ballard to initiate his mesothelioma claim as a distinct and viable cause of action despite the running of the statute of limitations on his (continued . . .)

Ballard's brand new lawsuit, based on a cause of action for mesothelioma, had not even begun, let alone had it been substantially completed, and Owens Corning was most certainly ***not*** ready for trial.[23]

The complete transformation of Mr. Ballard's lawsuit was brought to the trial court's attention at the October 31 hearing, and the undeveloped status of the case was again made manifest to the circuit court when Owens Corning moved to amend its pleading in order to perfect its right to apportionment. (R. 315-18, 319-29). The circuit court ignored Owens Corning's interests, however, based on a mistaken (and unsubstantiated) recollection that Owens Corning had "agreed" to try Mr. Ballard's suit in January 1997,[24] and a notion that Mr. Ballard's conversion of his lawsuit from an asbestosis suit to a mesothelioma suit was merely a "continuance" issue. (2/27 Tr. 58, 62, 65). Owens Corning strongly opposed Mr. Ballard's motion to expedite because of the

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(. . . continued)
cause of action for asbestosis. *Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315 (5th Cir. 1986) (applying Louisiana law).

[23] Mr. Ballard, of course, may have been well along in his trial preparation as of October 1, 1996, since he, but not Owens Corning, was privy to the developments in his case that had been concealed from Owens Corning. Because the plaintiff may feel "ready" for a Florida trial does not suggest that the ***case*** was ready for trial.

[24] Owens Corning had agreed in August of 1996 only that Mr. Ballard's lawsuit was "at issue," based on the state of the pleadings at that time. (2/27 Tr. 62-68). More importantly, any "agreement" was predicated on Owens Corning's having been told by Mr. Ballard that he was suffering from asbestosis, not mesothelioma.

mesothelioma diagnosis and the dramatically expanded exposure sheets. The circuit court granted the motion to expedite, however, solely because Mr. Ballard was suffering from a fatal disease. (2/27 Tr. 85).

The key question in implementing *Kinney* fully is what the Court meant when it said that *forum non conveniens* dismissals should not be granted for those cases pending on January 25, 1996, in which the parties had substantially completed discovery or the case was ready for trial. That question was answered in *Sun & Sea Estates, supra*, a personal injury, jet-ski accident lawsuit that had been filed in early 1994 and in which discovery was more advanced than in this case.

In *Sun & Sea Estates*, as here, a complaint had been filed, the defendant had answered, the plaintiff had filed a notice of "ready for trial," and preliminary interrogatories and a request for production had been served. In that case, though, ***four*** depositions had been taken, including depositions of the plaintiffs. (In contrast, ***no*** deposition had been taken in this case.) Yet based on a "dearth of discovery taken," the district court there reversed a determination of the trial court that, under the *Kinney* test for pending cases, discovery had been substantially completed. The district court held:

> Beyond the depositions of the plaintiffs, not a single deposition has been taken of any witness with knowledge of the issue of liability. No depositions have been taken on the issue of damages. . . . Based on the entirety of this record, it is our impression that the trial judge . . . construed [the *Kinney* exception to dismissals] as a directive to deny dismissal . . . .

707 So. 2d at 865.

Mr. Ballard's "mesothelioma" lawsuit was even less advanced in discovery and more remote from *the defendant's* readiness for trial on October 1, 1996, than was the suit considered in *Sun & Sea Estates*.[25] Initial pleadings had been filed and preliminary interrogatories had been served, but ***no medical or damages discovery*** had been undertaken relative to a claim of mesothelioma, and ***no apportionment discovery*** had been taken regarding Mr. Ballard's periods of employment at his expanded number of alleged job sites where he was exposed to products manufactured by 17 other asbestos-product manufacturers.[26] Yet *Sun & Sea Estates* held that the circuit court abused its

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[25] Apportionment and medical expert discovery for cases in Florida was particularly problematic at the time this case was tried because Florida, unlike most jurisdictions, did not have an identity of interest rule pursuant to which Owens Corning could have used depositions from other cases to substantiate the involvement of other manufacturers. In Florida, Owens Corning was required to start all of its defenses from scratch. (2/27 Tr. 90-91).

[26] According to his counsel, Mr. Ballard had *"worked for seventy employers . . . on dozens upon dozens upon dozens of job sites."* (2/27 Tr. 42) (emphasis added). Mr. Ballard's mesothelioma lawsuit was so new when Owens Corning's *forum non conveniens* motion was denied, however, that Owens Corning had not even had the opportunity to frame and allege an apportionment defense in conformity with *Nash v. Wells Fargo Guard Services*, 678 So. 2d 1262 (Fla. 1996). Its attempt to do so under Florida's liberal rules of the amendment of pleadings was barred by a classic "Catch 22" – the circuit court's ruling that Owens Corning could not amend to prepare for the newly-framed trial because less liberality is allowed in amending when the time for trial is imminent. (2/27 Tr. 32-33).

discretion in maintaining an unwarranted Florida forum for a case even in that more "ready for trial" posture.

Worse, because Mr. Ballard had concealed his preparation of an asbestos lawsuit in Louisiana alleging the same injuries, the circuit court was not in a position to assess the dual forum contradiction of Mr. Ballard's maintaining his lawsuit in Florida.[27] Owens Corning believed then, and it believes now, that a dismissal of Mr. Ballard's lawsuit would have been an "easy call" for any Florida court faced with a plaintiff as unconnected to Florida as Mr. Ballard who was making parallel claims in another jurisdiction, especially right after this Court had held in *Kinney* that pending cases such as Mr. Ballard's should be weeded out. (*See* 2/27 Tr. 9).

No "bright line" rule can be formulated for applying the discovery-completed and trial-ready tests of *Kinney* to all cases, but the *Sun & Sea Estates* decision offers a shimmering line that is definitive enough to meet this Court's objectives of ensuring that *Kinney* would be applied scrupulously to then-pending cases. In that case, the Third District held that discovery should be deemed to be substantially complete, or a case should be deemed

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[27] The court expressed this point to Mr. Ballard's counsel stating:

> you-all, for whatever reasons, didn't tell me about that other lawsuit. . . . But it seems like to me it's something that, if you knew, should have been on the table, so that at least at that moment in time I could have evaluated it . . . .

(2/27 Tr. 34).

ready for trial, when three elements of preparation have been completed:

> 1. the parties have identified the nature of the injury or illness on which the plaintiff's claims will be tried;
>
> 2. the parties have identified the extent of damages on which the plaintiff's claims will be tried; and
>
> 3. the parties have identified essential witnesses, additional parties that may be added to the lawsuit, and persons to whom liability can be assigned for an apportionment of fault.

By any standard, Mr. Ballard's *mesothelioma* lawsuit was not ready for trial, and discovery had not been substantially completed, at the time Owens Corning presented its *forum non conveniens* motion to the circuit court. It was no less here than in *Sun & Sea Estates* an abuse of the trial court's discretion to deny Owens Corning's motion, and the district court's approval of that abuse both conflicts with that decision and significantly subverts the Court's effort to dispatch those cases, like Mr. Ballard's, that inappropriately choke Florida's courts to the detriment of waiting Floridians.

C. The fact that a jury trial was conducted does not vitiate the trial court's erroneous denial of Owens Corning's *forum non conveniens* motion.

Mr. Ballard argued below that his jury verdict and judgment should stand even if the trial court had ruled erroneously on Owens Corning's *forum non* motion, because the resources of Florida's courts have already been expended in holding a jury

trial. This argument sought to capitalize on the Court's statement in *Kinney* that a dismissal under the new rules for *forum non conveniens* should not apply if dismissal would undermine the interests that the doctrine seeks to preserve, including a waste of resources.[28] The Court cannot accept this attempt to transform reversible error in the trial court into estoppel at the appellate court.

The thrust of Mr. Ballard's position on the use of judicial resources is that a trial court's legal error in failing to dismiss on the grounds of *forum non conveniens* becomes totally unreviewable on plenary appeal, because judicial resources have been used in a trial which went forward after the dismissal error was made.[29] Were the Court to adopt Mr. Ballard's position, it would emasculate the world of law which requires an appellate court to provide meaningful appellate review of trial court rulings which are challenged as an abuse of discretion,[30] and it

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[28] *Kinney*, 674 So. 2d at 94.

[29] Ballard cannot argue that an interlocutory appeal should have been taken to address the denial of Owens Corning's motion. Any such argument would defy established law. There is no requirement in the law that a party must take an interlocutory appeal or lose the right to challenge the subject ruling on plenary review at the end of the proceeding. *See* Rule 9.130(g), Fla. R. App. P. ("This rule [for non-final appeals] shall not preclude initial review of a non-final order on appeal from the final order in the cause."); Committee Notes to Rule 9.130, Fla. R. App. P. ("Under these rules there are no mandatory interlocutory appeals.").

[30] *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).

would contradict the very specific mandate of the Court for appellate review of *forum non conveniens* rulings which it made as a part of the *Kinney* decision.

In conjunction with its opinion in *Kinney,* the Court adopted emergency Rule 1.061 and adopted accompanying textual guidance. Rule 1.061(a)(4) states that the decision to grant or deny the motion for dismissal rests in the sound discretion of the trial court, "subject to review for abuse of discretion." The Court's commentary repeats that orders granting or denying dismissal for forum non conveniens "are subject to appellate review under an abuse of discretion standard." Mr. Ballard's suggestion — that the conduct of a trial following the erroneous denial of a motion to dismiss was the type of resource waste contemplated by the Court in the text of its *Kinney* decision — would render meaningless the right of review expressly preserved by that same decision in Rule 1.061.

Mr. Ballard stated below that he knew of no Florida case which addressed the effect of a post-denial trial on the reviewability of a motion that had been denied. There are cases aplenty, however. Trial court orders denying motions to dismiss based on *forum non conveniens* are routinely reviewed on appeal following trial and the entry of final judgment. *E.g., Cruickshank v. Cruickshank*, 420 So. 2d 914 (Fla. 1st DCA 1982); *Atlantic Coast Line R.R. v. Cameron*, 190 So. 2d 34 (Fla. 1st DCA 1966). The reason is obvious: Florida law does not prohibit appellate review of an erroneous denial of a *forum non* motion

simply because the defendant was forced to go to trial. Indeed, any such notion has effectively been rejected by the Court.

> The exposure to liability for additional attorneys' fees and costs in reliance upon an erroneous ruling is simply a risk of litigation, the consequences of which are not unlike those which befall other plaintiffs whose judgments are reversed on appeal.

See Public Health Trust of Dade County v. Diaz, 529 So. 2d 682, 684 (Fla. 1988).

CONCLUSION

Mr. Ballard's lawsuit should have been dismissed by the trial court under *Kinney*, and it should be dismissed now and consigned for pursuit elsewhere as *Kinney* requires. It is important to the backlogged courts throughout Florida that the Court stand behind its "ready for trial" prescription in *Kinney*. The Third District correctly applied that prescription in *Sun & Sea Estates*.

It is equally important if this lawsuit is not to be dismissed outright that the Court direct a rigorous implementation of the Legislature's strictures on punitive damages that exceed three times compensatory damages. This case provides the opportunity for the Court to prescribe the standard for doing so. The only possible application of the Legislature's mandate is a direction that, on the basis of the record as a whole, the circuit court remit that portion of Mr. Ballard's punitive damage award which exceeds three times the compensatory award.

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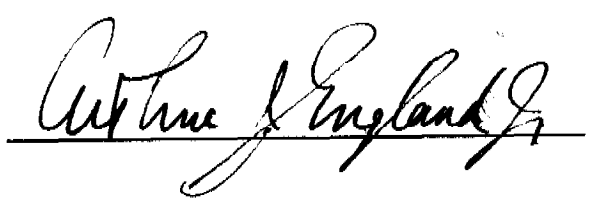

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