

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

UNION CARBIDE CORPORATION,

Defendant/Petitioner,

v.

YVES J. LAGUEUX,

Plaintiff/Respondent.

PETITIONER'S BRIEF ON JURISDICTION

Petition to Review a Decision of the District Court of Appeal,
Fourth District (Case No. 4D03-383)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF THE FACTS AND THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

CONCLUSION 8

CERTIFICATE OF SERVICE CS-1

CERTIFICATE OF TYPE SIZE AND STYLE CT-1

TABLE OF AUTHORITIES

CASES

Fabre v. Marin,
623 So. 2d 1182 (Fla. 1993) 1, 2, 3, 4

Nash v. Wells Fargo Guard Servs., Inc.,
678 So. 2d 1262 (Fla. 1996) 4, 7

Schindler Elevator Corp. v. Viera,
693 So. 2d 1106 (Fla. 3rd DCA 1997) 4, 5, 7

Wal-Mart Stores, Inc. v. Coker,
742 So. 2d 257 (Fla. 1st DCA 1997), decision approved,
714 So. 2d 423 (Fla. 1998) 5

INTRODUCTION

This appeal raises a question regarding the relief a district court should order when its ruling alters the potentially liable defendants and Fabre defendants on the verdict form, and consequently necessitates a re-calculation of apportionment among remaining parties. In this case, contrary to principles espoused by this Court and in conflict with a case from the Third District Court of Appeal, the Fourth District *itself* decided the amounts to apportion as between the defendant and a non-party. This decision was wrong and established a flawed precedent in the State of Florida. Union Carbide respectfully urges the Court to accept jurisdiction and reverse the ruling of the Fourth District.

STATEMENT OF THE FACTS AND THE CASE

On October 28, 2002, following the 15-day trial of plaintiff's product liability claims against asbestos supplier Union Carbide, the jury rendered its verdict in this case. The jury awarded plaintiff \$1,800,000 in damages and apportioned liability among Union Carbide and three non-parties who were permitted to appear on the verdict form in accordance with Fabre v. Marin, 623 So. 2d 1182 (Fla. 1993), as follows: (1) Union Carbide: 30%, (2) asbestos supplier Johns-Manville: 30%, (3) asbestos supplier Philip Carey: 30%, and (4) product manufacturer Georgia-Pacific: 10%. [R29-2370-71]. After the trial court denied both Union Carbide's and plaintiff's post-trial motions and entered a final judgment, both parties appealed. Plaintiff appealed the trial court's decision to permit non-parties Johns-Manville and Philip Carey to appear on the verdict form, and Union Carbide

cross-appealed the court's refusal to grant it a directed verdict or, at least, a new trial.

On November 26, 2003, the Fourth District Court of Appeal issued its ruling in this case, reversing the trial court's decision to place non-parties Johns-Manville and Philip Carey on the verdict form. The court found no errors with regard to Union Carbide's cross-appeal. As a consequence of its ruling regarding the Fabre defendants, the court remanded with instructions for the trial court to apportion the verdict itself and enter judgment for plaintiff Lagueux in an amount that assumed Union Carbide's share of the fault was equal to the total percentage previously attributed to Johns-Manville, Philip Carey, and Union Carbide, or 90% of the total verdict.

On January 12, 2004, the court denied Union Carbide's Motion for Clarification, Certification, and Rehearing, or, in the Alternative, Rehearing En Banc. Union Carbide filed its Notice to Invoke Discretionary Jurisdiction on February 11, 2004.

SUMMARY OF ARGUMENT

Florida law requires that decisions apportioning fault among defendants and Fabre defendants be made by a jury, and furthermore, that

when a district court issues a ruling altering the appearance of such entities on the verdict form, it should also order a new trial so a jury can reconsider the issue of apportionment. In contravention of these rules, the Fourth District in this case, following its reversal of the trial court's decision to place Johns-Manville and Philip Carey on the verdict form, refused to order a new trial and itself decided the apportionment issue. The Fourth District's decision violated principles espoused by this Court, created a direct conflict among two district courts of appeal, and moreover, caused Union Carbide to suffer severe prejudice. Based on the combined impact of these factors, Union Carbide respectfully asks this Court to accept jurisdiction and review the merits of this case.

ARGUMENT

The Fourth District’s decision reversing the trial court’s ruling permitting non-parties Johns-Manville and Philip Carey to appear on the verdict form, and the jury’s apportionment of a 60% share of the fault to those non-parties, created a new factual question: how fault should be apportioned among the defendant, Union Carbide, and the one remaining non-party, Georgia-Pacific. Since apportionment is an issue required to be decided by a jury, see Nash v. Wells Fargo Guard Servs., Inc., 678 So. 2d 1262, 1264 (Fla. 1996), the Fourth District court should have remanded for a new trial and resolution of that precise issue.

In Schindler Elevator Corp. v. Viera, 693 So. 2d 1106, 1109 (Fla. 3rd DCA 1997), the Third District Court of Appeal specifically determined that appellate decisions affecting the presence of non-parties on the verdict form for purposes of apportionment of liability require orders remanding for a new trial. In Viera, after the court reversed the trial court’s decision with regard to the presence of a non-party on the verdict form, it remanded for a new trial so the jury could consider how to apportion fault among the parties. See id. at 1107 (“[W]here a jury has been prevented from properly considering apportionment because a Fabre nonparty was erroneously omitted from the verdict form, the solution is a new trial limited to the apportionment issue. . . .”). The logic of this rule is clear: where an appellate court decides to exclude or permit a party or non-party on the verdict form for purposes of apportionment of liability, the apportionment calculation necessarily changes, and if apportionment decisions are to be made by a jury, the court has no choice but to order a new trial on apportionment.¹

¹ The rule applied in Viera pertains except where a court reverses a decision with respect to the presence of a non-party on the verdict form and leaves only the defendant as a party who may be held responsible for plaintiff’s damages. In such a case, since there is no other party against whom a jury may apportion fault, a court may remand with instructions to

Here, instead of remanding the case for a new trial so a jury could determine the appropriate amounts to apportion between Union Carbide and the one remaining non-party, Georgia-Pacific, the Fourth District simply **declared** that Union Carbide should be held responsible for Johns-Manville's and Philip Carey's 60% combined share, in addition to its own 30% share. The court gave no explanation for its remand instruction, and indeed, there is no basis for it in fact. There is no way to know why the Lagueux jury decided to apportion fault the way it did, and no reason to believe that it would only have apportioned 10% of the fault to Georgia-Pacific had Georgia-Pacific been the only non-party involved. The jury could just as easily have believed that Union Carbide should only be held responsible for 30%, and that without Johns-Manville and Philip Carey, the remaining 70% should be applied exclusively to Georgia-Pacific. Indeed, the jury was instructed, both by the judge and the verdict form, that the court would "take into account [its] allocation of liability among all entities" whom the jury found had contributed to plaintiff's damages. [R10-2022; R23-2357]. Or the jury could have decided to apportion Johns-Manville's and Philip Carey's 60% share equally or proportionally between Union Carbide and Georgia-Pacific. Because it is impossible to know the jury's true objectives, a rule requiring a new trial is the only one that comports with principles of law and fairness. Such a rule should have been applied in this case.

Plaintiff is likely to argue that Union Carbide waived its argument for a new trial by failing to object to the jury's allocation of only 10% of the fault to Georgia-Pacific. No law, however, requires such an objection. Union Carbide made this clear to the trial court when the issue was raised in response to plaintiff's directed verdict motion regarding the presence of Johns-Manville and Philip Carey on the verdict form. The trial court, while denying the motion, noted its curiosity about what would happen if it decided, instead, to grant the motion. [R30-2459-65]. Union Carbide's attorney insisted that the court should be required to grant a new trial because "[w]ho knows what [the jury] would have allocated had there been

enter judgment against the defendant in the full amount of the verdict. See, e.g., Wal-Mart Stores, Inc. v. Coker, 742 So. 2d 257, 259 (Fla. 1st DCA 1997), decision approved, 714 So. 2d 423 (Fla. 1998). This is obviously not the case here as the court's decision left both Union Carbide and Georgia-Pacific as parties or non-parties to whom liability could be apportioned.

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only two parties to the case.” [Id. at 2460].²The Fourth District’s decision to remand with instructions on how plaintiff’s damages should be apportioned as opposed to ordering a new trial so a jury could decide that issue was erroneous and in direct conflict with Nash, Viera, plain logic, and principles of fairness. This Court should review and reverse the decision to prevent confusion among future litigants and lower courts and to avoid the recurrence of unjust results in cases yet to come.

² In the Fourth District, both plaintiffs and Union Carbide focused their briefs on the merits of the trial court’s decision to include Johns-Manville and Philip Carey on the verdict form and did not debate the issue of what relief would be appropriate were the court to reverse. Nevertheless, Union Carbide did request the specific relief of a new trial.

CONCLUSION

For the foregoing reasons, Petitioner Union Carbide respectfully requests that this Court accept jurisdiction and hear this case on its merits.

Respectfully submitted this 23rd day of February, 2004,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing
Petitioner's Brief on Jurisdiction was mailed this 23rd day of February, 2004
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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Florida Rule of Appellate Procedure 9.210(a),
Union Carbide hereby certifies that the type size and style of its Petitioner's
Brief on Jurisdiction is Times New Roman 14 point.

John Pelzer