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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

10
11 NIAOMI AMITON, etc., et al.,)
12 Plaintiffs,)
13 -vs-)
14 MACKLIN COMPANY, INC., etc.,)
et al.,)
15 Defendants.)

NO. C 526841

ARGUMENT AND MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEMURRER TO
THE COMPLAINT AND MOTION
TO STRIKE BROUGHT BY DEFEN-
DENT EASTMAN CORPORATION.

DATE: August 12, 1985
TIME: 9:00 a.m.
DEPT: 82

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18 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

19 Plaintiffs submit herewith their Argument and Memorandum of
20 Points and Authorities in Opposition to the Demurrer to the Com-
21 plaint and Motion to Strike Brought by Defendant Eastman Corporation.

22 DATED: August 2, 1985.

23 LAW OFFICES OF JAMES H. DAVIS

24 By: Timothy D. Murphy
TIMOTHY D. MURPHY
25 Attorneys for Plaintiffs
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1 ARGUMENT AND MEMORANDUM OF POINTS AND AUTHORITIES

2 I

3 INTRODUCTION

4 The instant action is one both for wrongful death, brought
5 by the heirs of DONALD WILLIAM ACKERLEY, deceased, and a survival
6 action, brought by Barbara Ackerley, as special administratrix of
7 the estate of DONALD WILLIAM ACKERLEY.

8 Defendant EASTMAN CORPORATION seeks to remove by way of
9 Demurrer and Motion to Strike, allegations of the Complaint which
10 support punitive damages, and also seeks to strike that portion of
11 the prayer which seeks punitive damages based on the Fourth Cause of
12 Action, which is a survival action for strict liability and negli-
13 gence.

14 II

15 PUNITIVE DAMAGES MAY BE RECOVERED IN A SURVIVAL ACTION

16 Prob. Code Section 573 states:

17 "When a person having a cause of action dies
18 before judgment, the damages recoverable by
19 his executor or administrator are limited to
20 such loss or damage as the decedent sustained
21 or incurred prior to his death, including any
penalties or punitive or exemplary damages that
the decedent would have been entitled to recover
had he lived, and shall not include damages for
pain, suffering or disfigurement."

22 A statutory ground clearly exists under Section 573 for
23 decedent's estate to recover punitive damages which decedent could
24 have recovered if he had lived.

25 Courts in California have interpreted this statute liter-
26 ally, and have readily awarded punitive damages. A leading case on
27 point is Dunwoody v. Trapnell (1975) 47 Cal.App.3d 368, where the
28 Court held that a claim for punitive damages can be prosecuted by

1 a personal representative after the death of an injured party, even
2 if no action has been filed prior to death, as long as the injury
3 was suffered prior to death. See also Grimshaw v. Ford Motor Com-
4 pany (1981) 119 Cal.App.3d 757, 830; Ford Motor v. Superior Court,
5 etc., Alameda City (1981), 120 Cal.App.3d 748, 753.

6 The facts in Dunwoody, where the executor of the estate did
7 recover punitive damages, are similiar to those in the instant case.
8 In this case, the estate of decedent DONALD WILLIAM ACKERLEY, seeks
9 punitive damages pursuant to pleadings set forth in the Fourth Cause
10 of Action of the Complaint.

11 Defendant EASTMAN CORPORATION claims that Plaintiffs may
12 not recover punitive damages because Code of Civil Procedure Sec.
13 377 does not authorize punitive damages for wrongful death.

14 This argument is specious. Defendant fails to recognize
15 that Plaintiffs' Complaint contains a cause of action both for
16 wrongful death, brought by the heirs of the decedent, and a survival
17 action, brought by the estate of the decedent.

18 Courts in California clearly allow a wrongful death action
19 and a survival action to be brought in the same lawsuit. This was
20 the case in Ford Motor v. Superior Court, etc., Alameda City, supra
21 at 752, for example, which held that, "The heirs of a injured
22 person who dies . . . may sue of their own behalf under the wrong-
23 ful death act and on behalf of the decedent under the survival
24 statute." Furthermore, this court itself has previously permitted
25 in a case nearly identical to the one at bar, actions in wrongful
26 death and survival to be prosecuted in the same case. See,
27 Arellano v. Macklin Company, No. C 216 915 (L.A.S.C. Oct. 23, 1980)
28 (Order Overruling Demurrer and Denying Motion to Strike).

The present action properly pleads causes for wrongful death and survival in tandem and sets forth appropriate allegations supporting a punitive damage claim. For these reasons both defendant's Demurrer and Motion to Strike should be denied.

III

PLAINTIFF'S COMPLAINT ALLEGES FACTS SUFFICIENT

TO SUPPORT A CLAIM FOR PUNITIVE DAMAGES

The Fourth Cause of Action of the Plaintiff's Complaint prays for damages and punitive damages in strict liability. It incorporates various portions of other causes of action, notably, paragraphs 15 and 16 of the First Cause of Action, and paragraphs 21 through 23 of the Second Cause of Action.

Paragraph 15 of the First Cause of Action alleges Defendants represented to Plaintiff's decedent, among others, that Defendant's products were safe and could be used without harm.

Paragraph 16 contains allegations that Defendant s knew or should have known that failure to properly manufacture, package, design, test, inspect, analyze, merchandise, advertise, ship, transport, distribute, and sell for consideration their products, would be likely to cause severe harm, including death, to those, including Plaintiff's decedent, who came in contact with said products.

Paragraph 21 alleges that Defendants knew or should have known if their products were not properly manufactured, compounded, tested, inspected, fabricated, analyzed, merchandised, advertised, promoted, labeled, warned of and sold, that they were likely to cause injury to persons such as Plaintiff's decedent who were

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1 exposed to such products.

2 Paragraph 22 alleges that Defendants manufactured, sold,
3 etc., their products with the knowledge that these products were
4 defective, dangerous and unsafe.

5 Paragraph 23 concludes that "As a proximate result of the
6 defective, dangerous and unsafe condition" created by Defendants,
7 Plaintiff's decedent became ill and subsequently died.

8 In addition to the foregoing incorporated allegations,
9 Plaintiffs' Fourth Cause of Action contains the following charging
10 allegations:

11 "34. At all times herein mentioned, Defendants,
12 and each of them, were aware that the
13 above-mentioned products, if inhaled,
14 would produce illness, including carcinomas.
15 Defendants, and each of them, further were
16 aware that the above-mentioned products
17 would be used by the employees of R & G
18 Sloane Manufacturing Company, including
19 Plaintiff's decedent, in a manner directed
20 by the Defendants, and each of them. Not
21 withstanding such knowledge of the extre-
22 mely toxic and dangerous nature of said
23 products, Defendants continued to manu-
24 facture and sell R & G Sloane Manufacturing
25 Company said products without adequate and
26 necessary cautions, warnings, and safeguards.

27
28 ///

1 Defendants further failed to make proper
2 warnings with regard to said products and
3 to recall or ready to distribute products
4 to place warnings thereon."

5 "35. Plaintiff's decedent while employed by
6 R & G Sloane Manufacturing Company as a
7 machinist, was exposed to said chemicals
8 while relying upon the directions for safe
9 use prescribed by the Defendants and each
10 of them, and as a result of said exposure,
11 became ill with a condition known as
12 leiomyosarcoma, and subsequently died on
13 December 16, 1983. The Defendants, and
14 each of them, being conscious and aware of
15 the extreme dangers presented by the use of
16 said products, continued to manufacture,
17 failed to recall and failed to properly warn
18 of said products dangerous propensities.
19 Based on such willful and conscious dis-
20 regard for the health, safety and general
21 welfare of the employees of R & G Sloane
22 Manufacturing Company, and specifically of
23 the Plaintiff's decedent, Plaintiffs are
24 entitled to punitive and exemplary damages
25 according to proof from the Defendants and
26 each of them."

27 Thus, in addition to allegations charging the Defendants
28 with knowledge that their product, if not properly manufactured,

1 tested, and labeled, etc., could be unreasonably dangerous, the
2 complaint charges further that the Defendants knowingly continued
3 to distribute and sell the product, despite its dangers, and that
4 their actions proximately resulted in the death of Plaintiff's
5 decedent. It is further charged in paragraph 35 that this "willful
6 and conscious disregard for the health, safety and general welfare
7 of (Plaintiff's decedent)" entitles Plaintiffs to punitive damages
8 by way of punishment.

9 The imposition of punitive damages in tort actions is
10 authorized by California Civil Code, Sec. 3294, where the Defendant
11 has been guilty of "oppression, fraud or malice . . ."

12 In the case of G. D. Searle and Company v. Superior Court
13 (1975) 49 Cal.App.3d 22, the court upheld a pleading seeking
14 punitive damages for injuries stemming from oral contraceptive
15 products manufactured by the Defendant. Although the Court of
16 Appeal ruled that the trial court erred in overruling a demurrer
17 brought by Searle, it had this to say as to the appropriate stan-
18 dard for pleading punitive damages in product liability cases:

19 "If suits of the present variety call for a
20 restatement of the traditional concept, one
21 is at hand. The phrase conscious disregard
22 is sometimes used to describe the highly
23 culpable state of mind which justifies an
24 exemplary award. The majority opinion in
25 Silberg v. California Life Ins. Co., supra,
26 11 Cal.3d at page 462, 113 Cal.Rptr. at page
27 718, 521 P.2d at page 1110, declares: "In
28 order to justify an award for exemplary

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1 damages, the defendant must be guilty of
2 oppression, fraud or malice. (Civ. Code,
3 Sec. 3294." He must act with the intent to
4 vex, injure, or annoy, or with a conscious
5 disregard of the plaintiff's rights."

6 In a personal injury action, the notion of
7 conscious disregard of the safety of others
8 logically may be substituted for that of
9 disregard of the rights of others. We sug-
10 gest conscious disregard of safety as an
11 appropriate description of the animus malus
12 which may justify an exemplary damage award
13 when nondeliberate injury is alleged."

14 The court went on to state that the complaint in Searle
15 did not charge the defendant with knowledge of the dangerous
16 potential of its products. By contrast in the instant case,
17 Plaintiffs have precisely made such an allegation in their com-
18 plaint.

19 Further, the court in Searle found fault with plaintiff
20 for not pleading that the defendant knew that its representations
21 as to the safety of its product were false, and for failing to
22 plead that the company marketed the product with the intent to
23 injure the consumers or act in conscious disregard of their safety.
24 (Searle, supra, at 32).

25 In Plaintiff's Complaint at paragraph 34 specifically
26 alleges that the Defendants, having knowledge of the dangerous
27 propensities of their product, continued to manufacture the product
28 without necessary cautions, warnings, or safeguards.

1 The complaint specifically alleges that defendants were
2 conscious and aware of the dangers presented by their product and
3 continued to market it in an unsafe manner in disregard thereof.
4 It further alleges that a proximate result of the "willful and
5 conscious disregard for the health, safety and general welfare" of
6 the employees such as plaintiff's decedent, was Mr. Ackerley's
7 suffered injury.

8 Since Plaintiffs have specifically alleged "willful and
9 conscious disregard" of decedent's safety at page 11, lines 1-6,
10 precisely within the guidelines of Searle, supra, they respectfully
11 submit that Defendant EASTMAN CORPORATION'S Demurrer and Motion
12 to Strike herein should be denied.

13 One of the more recent cases dealing with the sufficiency
14 of pleading and punitive damages situations is Taylor v. Superior
15 Court, (1979) 24 Cal.App.3d 890. In that case, the court stated
16 at page 895, that:

17 "We concur with the Searle observation that
18 a conscious disregard of the safety of others
19 may constitute malice in the meaning of
20 Sec. 3294 of the California Civil Code."

21 The defense relies upon decisional authorities for the
22 general proposition that factual allegations must be specifically
23 pled in order to support a claim for punitive damages, citing, at
24 page 7 of the Memorandum of Points and Authorities, the cases of
25 Blegen v. Superior Court (1981) 125 Cal.App.3d 959, 963, and
26 Cyrus v. Havson (1976) 65 Cal.App.3d 306.

27 The Blegen case states that as long as actual allegations
28 are made, "absence of the labels 'willful', 'fraudulent',

1 'malicious' and 'oppressive' from the complaint, does not defeat
2 the claim from punitive damages." The court in Cyrus held that,
3 because the plaintiffs complaint made no general or specific alle-
4 gations of wrongful motive, intent, or purpose, the complaint did
5 not state a cause of action for punitive damages.

6 While defendant's contention that factual allegations
7 must be pled in order to support a claim for punitive damages may
8 be a valid general proposition, the implication that plaintiff's
9 complaint in the instant case does not contain sufficient factual
10 allegations is ocmpletely meritless.

11 It is clear that the complaint herein contains facts and
12 allegations amounting to malice, within the parameters of the
13 Blegen, Cyrus, Searle, and Taylor cases. In essence, the complaint
14 alleges that:

15 1. Defendants were in the business of manufacturing the
16 subject products;

17 2. Based on their expertise, persons such as Plaintiff's
18 decedent relied on their care, skill and judgment;

19 3. That the Defendants knew that their products, if not
20 properly compounded, manufactured, tested, sold, labeled, etc.,
21 would be extremely dangerous to persons such as Plaintiff's
22 decedent;

23 4. The Defendants in fact produced a chemical which was
24 negligently and defectively manufactured, sold, packaged, etc.,
25 and in fact failed to adequately warn or label the product as to
26 its dangers;

27 5. The Defendants, having knowledge that the products,
28 manufactured in such a defective manner and defectively labeled,

1 | could cause injury, consciously disregarded safety and welfare of
2 | the public, and continued to sell and market the product despite
3 | this awareness;

4 6. That this course of conduct amounts to malice and
5 justifies the imposition of punitive damages.

6 As stated in Nolin v. National Convenience Stores,
7 (1979) 95 Cal.App.3d, 279, at page 286:

8 "Malice is found in the intention to perform
9 an act which the actor knows or should know
10 will very probably cause harm." (emphasis
11 added).

12 Indeed, plaintiffs have pled that defendants knew the
13 product was dangerous but continued to market the same despite this
14 awareness. Plaintiffs have pled that this conduct amounts to
15 malice justifying the imposition of punitive damages. . For this
16 reason, it is submitted that sufficient facts and allegations are
17 contained in the complaint to support this allegation and justify
18 a finding of malice and the imposition of punitive damages. For
19 this reason it is submitted that the Demurrer and Motion to Strike
20 should be overruled.

IV

CONCLUSION

24 Based on the foregoing Arguments and Points and
25 Authorities, it is respectfully submitted that a claim for punitive
26 damages is properly included in Plaintiffs Complaint. For this

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1 reason both the Demurrer and Motion to Strike should be denied.

2 DATED: August 2, 1985.

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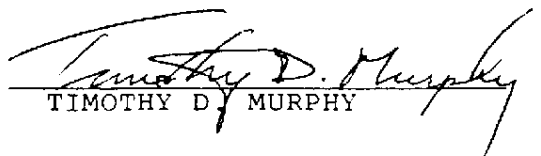
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LAW OFFICES OF JAMES H. DAVIS

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By:


TIMOTHY D. MURPHY

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URL 08321

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing

and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner ☐ a of

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. I have read the foregoing document and know its contents. The matters stated in it are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for

a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I have read the foregoing document and know its contents. I am informed and believe and on that ground allege that the matters stated in it are true.

Executed on 19 at California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Signature

ACKNOWLEDGMENT OF RECEIPT OF DOCUMENT (other than summons and complaint)

Received copy of document described as

on 19

Signature

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles

State of California.

I am over the age of 18 and not a party to the within action; my business address is: 2960 Wilshire Boulevard
Los Angeles, California

On August 5, 1985 I served the foregoing document described as ARGUMENT AND MEMORANDUM OF
POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER TO THE COMPLAINT AND MOTION
TO STRIKE BROUGHT BY DEFENDANT EASTMAN CORPORATION

on the interested parties

in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at: Los Angeles, California

addressed as follows:

(SEE ATTACHED PROOF OF SERVICE LIST)

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☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee. Executed on August 5, 1985 at Los Angeles, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Reliable 120P

May be used in California State or Federal Courts.

Judy Y. Garcia
Signature

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