

Section 581.184, Florida Statutes (2002) mandates that the “Department shall remove and destroy all infected citrus trees and all citrus trees exposed to an infection.” It further defines citrus trees “exposed to infection” as those trees “located within 1900 feet of an infected tree.” The Meszaroses argue that the 1900 foot boundary established in section 581.184 is based upon scientific and statistical data showing that the probability of capturing all diseased trees is 95.5% and the probability of not capturing a diseased tree is 4.5%. Thus, despite the explicit 1900 foot boundary mandated in the statute, the Meszaroses argue that the true principle underlying the statute is a 4.5% acceptable level of risk, rather than what they consider to be an arbitrary 1900 foot boundary. Based on this assumption, the Meszaroses argue that their citrus trees fall within the 4.5% acceptable level of risk when factors such as distance, barriers, time of year and time since detection are considered.

[2] We conclude that the Meszaroses’ challenges to the IFO must fail. First, it is well-established that these IFOs are permissible. *Sapp; Denney v. Conner*, 462 So.2d 534 (Fla. 1st DCA 1985); *Nordmann v. Florida Dep’t of Agriculture and Consumer Services*, 473 So.2d 278 (Fla. 5th DCA 1985). The Meszaroses do not dispute the lawfulness of the IFO or the constitutionality of its enacting statute. Second, the Meszaroses’ criticisms of the methods employed by the Department in eradicating citrus canker are insufficient in light of the rule that courts should defer to an agency’s interpretation of its enacting statutes and rules in determining how to implement them. *See e.g., Hobbs v. Department of Transportation*, 831 So.2d 745 (Fla. 5th DCA 2002).

Accordingly, we affirm the IFO without prejudice to the Meszaroses to seek just compensation for the destruction of the

trees having value, and we order that the stay previously entered is now lifted.

AFFIRMED WITHOUT PREJUDICE.

PETERSON and ORFINGER, JJ.,  
concur.



Yves J. LAGUEUX, Appellant,

v.

UNION CARBIDE CORPORATION,  
Appellee.

No. 4D03-383.

District Court of Appeal of Florida,  
Fourth District.

Nov. 26, 2003.

Rehearing Denied Jan. 12, 2004.

**Background:** Negligence and strict liability Action was brought against manufacturer of asbestos products. The 17th Judicial Circuit Court, Broward County, O. Edgar Williams, J., entered judgment on jury verdict for victim, allocating 70% of the fault between non-parties. Victim appealed.

**Holding:** The District Court of Appeal, Gross, J., held that the manufacturer was not entitled to instructions and verdict form respecting liability of non-parties.

Reversed.

### 1. Products Liability ⇔62, 98

Manufacturer of asbestos products was not entitled to instructions and verdict form respecting liability of non-parties in negligence and strict liability action, where manufacturer failed to provide sufficient

evidence establishing the specifics of different products, how often the products were used on the job sites, and the toxicity of those products as they were used in order to permit jury to assess more accurately each of the asbestos products of both parties and non-parties on job site and likelihood of injury from each of the products. West's F.S.A. § 768.81.

## 2. Negligence $\Rightarrow$ 549(8), 1532, 1718

To include non-parties on a verdict form for the purpose of apportioning liability, a defendant must plead the negligence of a non-party as an affirmative defense and specifically identify the non-party; in addition, there must be evidence of the non-party's fault before the issue can go to the jury.

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GROSS, J.

This was a negligence and strict liability asbestos case. After a jury trial, appellant, Yves Lagueux, prevailed against defendant/appellee Union Carbide Corporation. However, the jury allocated 70% of the fault in the case between non-parties Johns-Manville, Inc., Phillip Carey, Inc., and Georgia-Pacific.

[1] We hold that Union Carbide did not produce specific evidence sufficient under *Fabre v. Marin*, 623 So.2d 1182 (Fla.

1993), *receded from in part by Wells v. Tallahassee Memorial Regional Medical Center, Inc.*, 659 So.2d 249 (Fla.1995), and *W.R. Grace & Co.-Conn. v. Dougherty*, 636 So.2d 746 (Fla. 2d DCA 1994) to justify the inclusion of the non-parties Johns-Manville and Phillip Carey in the jury instructions and on the verdict form.

Addressing apportionment of liability, section 768.81 provides that "the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability." § 768.81(3), Fla. Stat. (2002). In *Fabre*, the supreme court construed section 768.81 and wrote: "Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants." 623 So.2d at 1185.

[2] To include non-parties on a verdict form for the purpose of apportioning liability, a defendant must plead the negligence of a non-party as an affirmative defense and specifically identify the non-party. See *Nash v. Wells Fargo Guard Servs., Inc.*, 678 So.2d 1262, 1264 (Fla.1996). In addition, there must be evidence of the non-party's fault before the issue can go to the jury. *Id.* (citing *Dougherty*, 636 So.2d at 748). As the second district has explained,

[i]f [the defendant] want[s] the benefit of jury instructions and a verdict form which include[s] other entities that manufactured asbestos products used on the job sites where [the plaintiff] worked, then [the defendant] need[s] to produce evidence establishing the *specifics of different products, how often the products were used on the job sites, and the toxicity of those products as they were used.*

This evidence would permit the jury to assess more accurately each of the asbestos products of both parties and non-parties on a job site and the likelihood of injury from each of the products. Without that evidence, [the defendant has] not satisfied the foundation necessary for a jury to receive jury instructions and a verdict form to decide the case pursuant to section 768.81, Florida Statutes (1991) and *Fabre*.

*Dougherty*, 636 So.2d at 748 (emphasis added); see also *Nash*, 678 So.2d at 1264; *Snoozy v. U.S. Gypsum Co.*, 695 So.2d 767, 769 (Fla. 3d DCA 1997).

Based on a thorough reading of the record, we find that Union Carbide failed to provide the necessary and specific evidence described in *Dougherty*. The scant evidence offered by Union Carbide was not enough to “permit the jury to assess more accurately each of the asbestos products of both parties and non-parties on a job site and the likelihood of injury from each of the products.” 636 So.2d at 748. Without guessing, the jury would have been unable to ascertain Johns–Manville and Phillip Carey’s percentage of fault; although the jury was informed that Georgia–Pacific used asbestos from these two companies around the same time that it used Union Carbide’s product, no evidence pointed to a specific time frame and percentage of usage in comparison to Union Carbide.

This case is similar to *Snoozy*. There, the decedent’s estate filed suit against U.S. Gypsum for the decedent’s asbestos-related death. 695 So.2d at 768. One of U.S. Gypsum’s affirmative defenses was that other non-parties were responsible. *Id.* At trial, the jury returned a verdict attributing 25% fault to U.S. Gypsum and 75% to “others.” *Id.* After trial, the circuit court granted the estate’s motion for directed verdict, finding that U.S. Gypsum failed to “sufficiently establish the necessary foun-

ation for the jury to determine the issue of fault of non-parties.” *Id.* The third district affirmed, holding that U.S. Gypsum did not introduce the essential evidence required by *Dougherty*. It stated:

In the instant case, the jury apportioned 25% of the liability to [U.S. Gypsum] and 75% of the liability to “others.” The record, however, demonstrates that [U.S. Gypsum] failed to introduce evidence as to the “specifics of different products, how often the products were used on the job sites, and the toxicity of those products as they were used.” [*Dougherty* ], 636 So.2d at 748. Therefore, since [U.S. Gypsum] failed to satisfy “the foundation necessary for a jury to receive jury instructions and a verdict form to decide the case pursuant to section 768.81,” the trial court correctly granted the plaintiff’s motion for directed verdict as to the nonparty “others.”

*Id.* at 769; see also *Owens–Ill., Inc. v. Baione*, 642 So.2d 3, 4 (Fla. 2d DCA 1994) (affirming the trial court’s determination that the defendant provided insufficient evidence under *Dougherty* ).

For these reasons we reverse the judgment and remand with instructions to enter judgment for Lagueux in the amount of \$1,620,000. This amount takes into account a 10% set-off for the fault attributable to Georgia–Pacific, which Lagueux does not challenge on appeal.

On the cross-appeal, we find no reversible errors.

REVERSED.

STEVENSON and TAYLOR, JJ.,  
concur.

