

IN THE SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION, :
 :
 Defendant/Petitioner, :

vs.

CASE NO. 66,383

LEONARD H. PICKETT, SR., and :
LINDA N. PICKETT, his wife, :
 :
 Plaintiffs/Respondents. :
_____:

FILED

SID J. WHITE

JAN 18 1985 ✓

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

JURISDICTIONAL BRIEF OF PETITIONER
THE CELOTEX CORPORATION

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	ii
STATEMENT OF THE CASE AND FACTS.....	1
JURISDICTIONAL ISSUES.....	2
ARGUMENT	
I. THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL CONFLICTS WITH THE DECISIONS OF:	
A. <u>Bernard v. Kee Manufacturing Co., Inc.</u> , 409 So. 2d 1047 (Fla. 1982).....	3
B. <u>Mercury Motors Express, Inc. v. Smith</u> , 393 So. 2d 545 (Fla. 1981).....	4
C. <u>White Construction Co., Inc. v. DuPont</u> , 455 So. 2d 1026 (Fla. 1984).....	5
II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO ACCEPT JURISDICTION OF THIS CASE.....	5
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	8
APPENDIX.....	9
INDEX TO APPENDIX.....	A-i

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<u>Bernard v. Kee Manufacturing Co., Inc. v. Smith</u> , 409 So. 2d 1047 (Fla. 1982).....	3
<u>Ford Motor Company v. Kikis</u> , 401 So. 2d 1341 (Fla. 1981).....	3
<u>In re Related Asbestos Cases</u> , 566 F. Supp. 818 (N.D. Calif. 1983).....	3
<u>Gibson v. Avis Rent-A-Car Systems, Inc.</u> , 386 So. 2d 520 (Fla. 1980).....	1
<u>Insurance Company of North America v. Pasakarnis</u> , 451 So. 2d 447 (Fla. 1984).....	4
<u>Jackson v. Johns-Manville Sales Corporation</u> , 727 F.2d 506 (5th Cir. 1984) <u>rhg. en banc pending</u>	6
<u>Mercury Motors Express, Inc. v. Smith</u> , 393 So. 2d 545 (Fla. 1981).....	4
<u>St. Regis Paper Co. v. Watson</u> , 428 So. 2d 243 (Fla. 1983).....	4
<u>White Construction Co., Inc. v. DuPont</u> , 455 So. 2d 1026 (Fla 1984).....	5

STATEMENT OF THE CASE AND FACTS

The Celotex Corporation ("Celotex") appealed a judgment based on a jury verdict assessing compensatory and punitive damages in favor of Plaintiff and against Celotex based on Plaintiff's exposure to asbestos products manufactured by the Philip Carey Manufacturing Company ("Philip Carey") (A 2). As the First District noted, Celotex acquired Panacon Corporation, a successor corporation to Philip Carey, in 1972, four years after Plaintiff's last alleged exposure (A 2-3). 1/ As the First District also noted, citing In re Related Asbestos Cases, supra, none of the shareholders of Panacon became shareholders of Celotex (A 3). Celotex made an arms-length cash purchase of Panacon from Glen Alden Corporation. In re Related Asbestos Cases, supra, at 820.

The First District affirmed the award of punitive damages against Celotex based purely on the actions of Philip Carey, without any showing by Plaintiff that Celotex was in any way culpable (A 5). 2/ Celotex's motions for rehearing were denied and its petition followed (A 8).

1/ The First District opinion incorrectly indicates that Philip Carey came to be merged into Celotex purely through a series of corporate mergers. In fact, in the late 1960's what was originally Philip Carey Corporation was merged into the Glen Alden Corporation and then assets and liabilities were transferred to a new company which was subsequently renamed Philip Carey. In re Related Asbestos Cases, 566 F. Supp. 818, 820 (N.D. Calif. 1983).

2/ Indeed, the jury was not permitted to consider Celotex's culpability since the verdict form automatically assessed punitive damages against Celotex if Philip Carey was found liable.

JURISDICTIONAL ISSUES

- I. WHETHER THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL CONFLICTS WITH THE DECISIONS OF:
 - A. Bernard v. Kee Manufacturing Co., Inc., 409 So. 2d 1047 (Fla. 1982)
 - B. Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545 (Fla. 1981)
 - C. White Construction Co., Inc. v. DuPont, 455 So. 2d 1026 (Fla. 1984)
- II. WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETION TO ACCEPT JURISDICTION OF THIS CASE.

ARGUMENT

I. WHETHER THE DECISION OF THE FIRST
 DISTRICT COURT OF APPEAL CONFLICTS WITH
 THE DECISIONS OF:

A. Bernard v. Kee Manufacturing Co., Inc.,
 409 So. 2d 1047 (Fla. 1982)

The First District misapplied this Court's opinion in Bernard v. Kee Manufacturing, supra, when it used this Court's opinion on compensatory damages to justify its affirmance of punitive damages against Celotex. This Court has jurisdiction based on conflict when a district court of appeal misapplies the law by relying on a decision which involves a situation materially at variance with the one under review. Gibson v. Avis Rent-A-Car System, Inc., 386 So. 2d 520 (Fla. 1980); see also, Ford Motor Company v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981) (conflict review may be based on district court's discussion of legal principles and it need not explicitly identify conflicting decisions).

In Bernard, this Court recognized that the Florida merger statute made a corporate successor liable in compensatory damages for the acts of its predecessor. Aside from the fact that the merger into Celotex did not take place under Florida law and that there was not truly a series of mergers, the First District misapplied Bernard in subjecting Celotex to punitive damages, which Bernard simply did not address.

B. Mercury Motors Express, Inc. v. Smith,
393 So. 2d 545 (Fla. 1981)

This Court has repeatedly recognized that a plaintiff has no right to punitive damages, but that punitive damages are awarded to punish the defendant and deter others from committing similar acts in the future. E.g., St. Regis Paper Co. v. Watson, 428 So. 2d 243, 247 (Fla. 1983); Mercury Motors Express, supra. In Mercury Motors, this Court ruled that an employer could not be held vicariously liable for punitive damages under the doctrine of respondeat superior unless there was some fault on the employer's part. 393 So. 2d at 549 (A 18). This rationale should apply in the instant case, and Celotex should not be held liable for punitive damages for the actions of a previously unrelated corporation it purchased when it is undisputed that there was no fault on the part of Celotex which led to Plaintiff's injury.

This Court has recently noted that the most equitable result in tort law is the equation of liability with fault. Insurance Company of North America v. Pasakarnis, 451 So. 2d 447 (Fla. 1984). The First District opinion fails to equate liability with fault and has imposed punitive damages on Celotex without a showing of any fault on its behalf. The imposition of punitive damages without fault is particularly offensive here, where Celotex bought Philip Carey (Panacon)

in an arm's length transaction and the perpetrators of the alleged wrongs have received their moneys and are not being punished in any way by the award.

C. White Construction Co., Inc. v. DuPont,
455 So. 2d 1026 (Fla. 1984)

As the First District noted, punitive damages were awarded based on Philip Carey's negligence "in placing 'asbestos-containing products on the market with a defect'." (A 2; one of Plaintiff's witnesses testified he warned Philip Carey of potential health hazards). The award of punitive damages based on the alleged distribution of a defective product and the failure to warn of potential health problems is insufficient to justify an award of punitive damages under this Court's recent decision in White Construction Co., Inc. v. DuPont, supra. Consequently, the First District's affirmance of the award of punitive damages conflicts with White Construction.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION
TO ACCEPT JURISDICTION OF THIS CASE.

This case presents crucial issues in Florida corporate and tort law, asbestos litigation, and the vitality of corporations doing business in Florida. As indicated above, the First District opinion imposes unprecedented punitive damage liability on a corporate successor without a showing of any culpability. Obviously, punitive damages will not have the desired effects of punishment or deterrence. The wrongdoer is not being punished and the punitive award cannot

deter Celotex (or any similarly-situated corporation) - since it never engaged in the conduct in the first place. It is simply a windfall to Plaintiff.

Perhaps equally important is the propriety of punitive damages in asbestos cases, particularly against a defendant who had no part in the complained of conduct. As of early 1984, over 20,000 personal injury asbestos lawsuits had been filed, approximately half of which sought punitive damages. E.g., Jackson v. Johns-Manville Sales Corporation, 727 F.2d 506, 524 (5th Cir. 1984), rhg. en banc pending. Asbestos litigation has already led to the filing of bankruptcy petitions by several asbestos defendants. If Plaintiff's punitive damage award of \$100,000 is allowed to stand, and asbestos defendants were repeatedly subjected to such awards, their economic vitality would be called into question so that eventually many plaintiffs, whose diseases had not yet even manifested, might receive no compensatory damages because of prior punitive damage windfalls to Plaintiff and other early litigants.

This case does not present an isolated issue. 3/ Celotex would direct the Court's attention to another pending petition for discretionary review, Johns-Manville Sales Corporation v. Janssens, S.Ct. Case No. 66,256. Janssens

3/ Celotex is also before this Court on another asbestos issue, that of market share liability. Celotex v. Copeland, S.Ct. Case 65,124, oral argument Jan. 7, 1985.

presents the same question of the propriety of punitive damages in light of White Construction, that is presented above in point I.C. Moreover, Celotex's petition presents additional facets of the asbestos punitive damage issue - their propriety against a successor corporation which was in no way at fault. Therefore, if this Court accepts jurisdiction in Janssens it should also accept Celotex's petition to further refine the issue, and if this Court declines jurisdiction in Janssens it should nevertheless accept this petition to decide the crucial issues presented in Celotex's first two points. Celotex's petition presents vital issues warranting a definitive answer from this Court.

CONCLUSION

Based on the foregoing arguments and authorities, the Petitioner Celotex respectfully requests this Court to take jurisdiction of this matter in light of the conflict of the First District's opinion with the decisions of this Court.

Respectfully submitted,

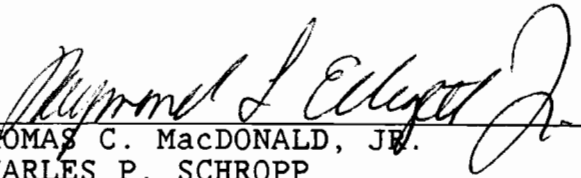


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Wayne Hogan, Esquire, 804 Blackstone Building, Jacksonville, Florida 32202, this 17th day of January, 1985.


Attorney

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