O/A 1-7-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,394

OWENS-CORNING FIBERGLAS CORPORATION

Petitioner,

versus

LEE LOYD COPELAND AND VAUDEEN COPELAND

Respondents.

DISCRETIONARY PROCEEDINGS TO REVIEW
A DECISION OF THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT OF FLORIDA

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
ARGUMENT	
I. THE THIRD DISTRICT COURT OF APPEALS PROPERLY REVERSED SUMMARY JUDGMENT IN THIS CASE WHERE A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHEN THE PLAINTIFF SHOULD HAVE DISCOVERED THE FACTS GIVING RISE TO THIS CAUSE OF ACTION.	3
II. A CAUSE OF ACTION FOUNDED ON COLLECTIVE LIABILITY SHOULD BE ADOPTED IN FLORIDA. ...	12
CONCLUSION	12
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

CASES:	PAGE
Ash v. Stella, ____ So.2d ____ (Fla. 1984), 9 F.L.W. 434 (October 12, 1984)	5,6
Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973) cert. denied 419 U.S. 869 (1974)	8
Brown v. Armstrong World Industries, 441 So.2d 1098 (Fla.3d DCA 1983)	8
Christiani v. City of Sarasota, 65 So.2d 878 (Fla. 1953)	10
City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954)	7,10,11
Copeland v. Armstrong Cork Co., 447 So.2d 922 (Fla.3d DCA 1984)	1,2,3,7,9
Copeland v. The Celotex Corporation, 447 So.2d 908 (Fla.3d DCA 1984)	1,12
Havatampa Corporation v. McElvy, Jennewin, Stefany and Howard, 417 So.2d 703 (Fla.2d DCA 1982)	10
Holl v. Talcott, 191 So.2d 40, 43 (Fla. 1966)	3,5,9,10
Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975)	8,9
Kelley v. School Board of Seminole County, 435 So.2d 804 (Fla. 1983)	10
Nolan v. Johns-Manville Asbestos & Magnesia Materials Company, 85 Ill.2d 161, 421 N.E.2d 864 (1981)	8,9
Roberts v. Casey, 413 So.2d 1226 (Fla.5th DCA 1982) pet. denied 424 So.2d 763 (Fla. 1982)	10

Seaboard Air Line Railroad Company
v. Ford, 92 So.2d 160 (Fla. 1956) 3,6,7,10,11

Steiner v. Ciba-Geigy, 364 So.2d 47 (Fla.3d
DCA 1978) 10,11

Universal Engineering Corporation v.
Perez, 451 So.2d 463 (Fla. 1984) 3,6,7,10

STATUTES:

§95.031(2) FLA.STAT. (1981) 1,4,5

§95.11(3)(c) FLA.STAT. (1981) 1,4

SECONDARY AUTHORITIES:

I. Selikoff, Asbestos and Disease (1978) 8

STATEMENT OF THE CASE

On May 11, 1979, Lee Loyd Copeland and Vaudeen Copeland (referred to in the singular as "plaintiff" and "respondent" throughout this brief) filed their Original Complaint against various manufacturers of asbestos products. (R 1-7) Plaintiff alleged, inter alia, that he was exposed to and injured by the asbestos products manufactured by the defendants named in his Complaint. (R 1-7) After a hearing on May 18, 1981, the trial court granted summary judgment in favor of all defendant manufacturers based on the Florida four year statute of limitations, §§95.031(2) and 95.11(3)(c) FLA.STAT. (1981). (R 1999-2000) An appeal was timely filed, and on March 6, 1984 the Third District Court of Appeals of Florida reversed the summary judgment, finding that a genuine issue of material fact existed as to when the statute of limitations began to run in this case. Copeland v. Armstrong Cork Co., 447 So.2d 922 (Fla.3d DCA 1984). (Case No. 65,394 in this Court. Please refer to Appendix attached hereto). In turn, this Court accepted jurisdiction to review the finding on statute of limitations by Order of September 21, 1984.

In a companion case, Copeland v. The Celotex Corporation, (Case Nos. 65,124 and 65,154 in this Court. Please refer to Appendix attached hereto). The Third District Court of Appeals adopted a form of market share liability and certified the case to this Court. Copeland v. The Celotex Corporation, 447 So.2d 908 (Fla.3d DCA 1984). The holding on market share liability was referred to by reference in the Copeland v. Armstrong Cork

Co. decision and has been consolidated for argument with the present case.

STATEMENT OF THE FACTS

For the purposes of the Statement of the Facts in this appeal (No. 65,394), Respondent accepts the facts as set forth by the Third District Court of Appeals in Copeland v. Armstrong Cork Co., 447 So.2d 922, 924-26 (Fla.3d DCA).

I. THE THIRD DISTRICT COURT OF APPEALS PROPERLY REVERSED SUMMARY JUDGMENT IN THIS CASE WHERE A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHEN THE PLAINTIFF SHOULD HAVE DISCOVERED THE FACTS GIVING RISE TO THIS CAUSE OF ACTION.

In the court below, the Third District Court of Appeals held:

> [W]e have no trouble in concluding that genuine issues of material fact are presented on this record as to when the plaintiff's claim accrued herein for purposes of the statute of limitations, thereby making a summary judgment inappropriate on the basis that the action was time barred. Stated differently, we cannot say as a matter of law, as did the trial court, that the plaintiff's claim accrued more than four years prior to the filing of the subject lawsuit and was, therefore, barred by the applicable four-year statute of limitations. Plainly, a jury could reasonably conclude on this record that the claimed disease of asbestosis did not manifest itself to the plaintiff in a way which supplied some evidence of causal relationship to the defendants' asbestos products until 1978, when two doctors in Tampa diagnosed the plaintiff's condition as being asbestosis - a disease directly related to long-term occupational exposure to asbestos dust.

Copeland v. Armstrong Cork Co., 447 So.2d 922, 927 (Fla.3d DCA 1984). In so holding, the Third District applied the long standing law of this Court that a cause of action for latent, occupational disease accrues, for purposes of statute of limitations, when a plaintiff discovers, or should have discovered, that his injury is occupational in origin. Universal Engineering Corporation v. Perez, 451 So.2d 463 (Fla. 1984); Seaboard Air Line Railroad Company v. Ford, 92 So.2d 160 (Fla. 1956). Moreover, implicit in the Third District's holding is the proper understanding that summary judgment is wholly inappropriate save conclusive proof of the non-existence of a genuine issue of material fact. Holl v. Talcott, 191 So.2d 40, 43 (Fla. 1966).

Under Florida law, the statute of limitations in a product liability tort action begins to run when the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence. The plaintiff then has four years to file a lawsuit. §§95.11(3)(c), 95.031(2), FLA.STAT. (1981). In the instant case, there is no question that the plaintiff actually discovered the facts giving rise to his cause of action for asbestosis in 1978 upon diagnosis of his occupational disease. (R 1032). Thus, without doubt, his claim was timely filed in 1979 under the actual knowledge requirement of §95.031(2).

The Petitioner asserts, however, that Mr. Copeland should have known that he suffered from asbestosis four years prior to his filing suit. Petitioner's Main Brief on the Merits, pp.11-17.[1] This, it contends, because Mr. Copeland testified at deposition that he knew asbestos was harmful in the 1960's, and recognized that he had lung difficulties in the 1970's. Id. This testimony

[1]The Petitioner has argued itself into an inescapable corner. It maintains at once that Mr. Copeland has not suffered an asbestos-related injury. Petitioner's Brief, p.16. But, at the same time, it insists that the plaintiff should have known, as a matter of law, that he suffered from an asbestos-related disease four years prior to filing this lawsuit. Id. The Petitioner's argument only works to underscore the inherent factual nature of pinpointing a date upon which a cause of action for a latent disease such as asbestosis arises. As the record in this case reveals, there is no indication whatsoever that Mr. Copeland suffered from an asbestos-related injury prior to his 1978 diagnosis. Yet, even after such a diagnosis, the defendant manufacturers contend that the injury is not related to asbestos exposure. Only the jury, as finder of fact, can determine both the statute of limitations and the injury-in-fact question.

cannot establish, as a matter of law, that the time had run on Mr. Copeland's lawsuit. There is no proof of occupational injury until 1978; Florida law does not tolerate a leap to any other conclusion in summary judgment proceedings. Holl v. Talcott, supra.

Rather, Florida law requries that a plaintiff exercise due diligence in discovering the facts giving rise to a cause of action. §95.031(2). The fact of the plaintiff's diligence in this case cannot be understated. Mr. Copeland sought medical attention on several occasions prior to 1978. His lung problems, however, were repeatedly misdiagnosed as emphysema and pneumonia unrelated to his occupational exposure to asbestos. (R 892, 1030). Moreover, the plaintiff clearly testified that he did not know that asbestos was causing his lung problems at the time of his work related exposure to the substance. (R 1032). A more diligent pursuit for the truth can hardly be imagined. Nevertheless, Mr. Copeland remained without notice of the occupational origin of his disease until his 1978 diagnosis.

This Court has recently articulated its great hesitancy to infer constructive knowledge to a lay plaintiff where a complex a medical diagnosis is at issue. In the medical malpractice context, this Court refused to uphold the grant of a summary judgment on statute of limitations where there was no conclusive finding as to when the plaintiff should have known of her actionable misdiagnosis. Ash v. Stella, ____ So.2d ____ (Fla. 1984), 9 F.L.W. 434 (October 12, 1984).

> The etiology of malignancy is not well enough understood, even by medical researchers, that the courts should impute sophisticated medical analysis to a lay person struggling to cope with the fact of malignancy. Further evidence may reveal that, without knowledge of the specific nature of the tumor, no medical expert could have conclusively stated that the cancer did, in fact, exist at the time of Dr. Ash's alleged misdiagnosis. Absent a finding of fact that before March 30, 1977, medical records showed that the newly discovered tumor had been the cause of Mrs. Stella's earlier problems, constructive knowledge of the incident giving rise to the claim cannot be charged to the Stellas.

Id. 9 F.L.W. at 435 (emphasis in original)

In the context of occupational disease, a similar rule has been long standing. In fact, in Seaboard Air Line Railroad Company v. Ford, 92 So.2d 160 (Fla. 1956) this Court first recognized that an exception to the general rule of limitations exists where an occupational disease is at issue.

> The rule of Urie and similar cases dealing with limitations of actions for occupational disease was developed as an exception to the general rule because of the fact that such diseases may exist unrecognized for a long time and under a judicial determination that the legislature could not have "intended such consequences to attach to blameless ignorance." Urie v. Thompson, supra, 337 U.S. 163, 69 S.Ct. 1018, 1025.

Id. at 164.

In the Seaboard case, the plaintiff had developed occupational contact dermatitis. This Court held that the statute began to run from the date the plaintiff discovered or should have discovered that his injury was occupational in origin. Id. at 165. The occupational etiology of the disease was considered a question of fact, to be determined by the jury. Id.

The rule of Seaboard was recently reconfirmed by this Court in Universal Engineering Corporation v. Perez, 451 So.2d 463

(Fla. 1984). In Perez the plaintiffs contracted manganese poisoning from occupational exposure to fumes given off during welding. The date of discovery of the occupational nature of the plaintiffs' disease process could not be determined from the trial court record, thus this Court remanded the case for a factual determination under the applicable rule of Seaboard.

In both Perez and Seaboard, this Court relied on the seminal case of City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954). Brooks held that the statute of limitations for a latent injury resulting from x-ray treatments began to run upon a medical diagnosis that the injury complained of was in fact caused by the treatments, and not upon the administration of the treatments themselves. It was reasoned that the plaintiff's knowledge is the touchstone of the statute of limitations in a latent injury case.

> [T]he statute attaches when there was been an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of action.... It is the testimony of one of the expert witnesses that injury from treatment of this kind may develop anywhere within one to ten years after treatment, so that the statute must be held to attach when the plaintiff was first put upon notice or had reason to believe that her right of action had accrued.

Id., 70 So.2d at 309.

In this case, as in Perez, Seaboard and Brooks, we are presented with a tort resulting in truly latent medical injury. Because of its latency period, diagnosis of asbestosis is extremely difficult, even by expertly trained medical specialists. And, as the Third District Court recognized, there is no "magic moment" when the disease manifests. Copeland, 447 So.2d at 926.

The disease process of asbestosis is latent, progressive and irreversible.

> [Asbestosis] is difficult to diagnose in its early stages because here is a long latent period between initial exposure and apparent effect. This latent period may vary according to individual idiosyncrasy, duration and intensity of exposure, and the type of asbestos used....This latent period is explained by the fact that asbestos fibers, once inhaled, remain in place in the lung, causing tissue reaction that is slowly progressive and apparently irreversible.

Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973) cert. denied 419 U.S. 869 (1974).

See also, Brown v. Armstrong World Industries, 441 So.2d 1098 (Fla.3d DCA 1983); Nolan v. Johns-Manville Asbestos & Magnesia Materials Company, 85 Ill.2d 161, 421 N.E.2d 864 (1981); Karjala v. Johns-Manville Products Corporation, 523 F.2d 155 (8th Cir. 1975); See generally, I. Selikoff, Asbestos and Disease (1978). Because of the varient latency period necessarily involved in the development of asbestosis, a conclusive finding as to when a plaintiff should have discovered the occupational origin of his disease cannot be determined in the context of summary judgment proceedings. It is inherently a fact for the jury to determine. It is for this reason that the Supreme Court of Illinois rejected summary judgment as an appropriate mechanism for determining when a plaintiff should have discovered infliction of an asbestos-related disease:

> In the instant case, Nolan knew he had lung problems in 1957, and he knew he had pulmonary fibrosis in 1965. It was not until May 15, 1973, that he was told by a doctor that he had asbestosis and that his condition was caused by exposure to asbestos materials at work. The evidence is conflicting as to whether or when Nolan would have had sufficient infor-

> mation to reach such a conclusion earlier.[2] The resolution of this question is not in the province of this court. It is a question of fact, and in this case, a seriously disputed one. Accordingly, summary judgment, which requires that no genuine issues of material fact exist..., is not an appropriate remedy here.

Nolan v. Johns-Manville Asbestos & Magnesia Material Company, 85 Ill.2d 161, 421 N.E.2d 864, 869 (Ill. 1981).

Similarly, in Karjala v. Johns-Manville, supra, it was determined that in an asbestos disease case "the time at which [the plaintiff's] impairment maniested itself was, of course, for the jury to determine." 523 F.2d at 161.

At the very most, as recognized by the appellate court below, the record in this case presents conflicting inferences as to when Mr. Copeland should have discovered the occupational origin of his disease. Copeland, 447 So.2d at 927-28. Conflicting inferences, of course, cannot form the basis of a successful summary judgment motion in Florida. Holl v. Talcott, supra. In fact, evidence produced by the movant for summary judgment "must be such as to overcome all reasonable inferences which may be drawn in favor of the [party opposing summary judgment]." Id. at 43. "This conclusive showing is justified because the summary judgment procedure is necessarily in derogation of the constitutionally protected right to trial." Id. at 48. No such conclusive evidence has been adduced in this case.

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[2]Some evidence was adduced in the trial court that Mr. Nolan was told he had pulmonary fibrosis secondary to asbestosis in around 1957. 392 N.E.2d at 1356-57. There was aalso evidence that Nolan knew of the dangers of asbestos in 1968. Id. at 1355. Nevertheless, summary judgment was deemed inappropriate.

By asserting that Mr. Copeland should have known, as a matter of law, that he suffered from an asbestos-related disease four years prior to filing this suit, the Petitioner herein is asking this Court to infer upon the plaintiff medical facts that his own treating physicians were unable to ascertain. The requested finding is not only fundamentally unfair to the plaintiff, who diligently sought medical advice for his perceived problems, but is contrary to the substantive and procedural law of this state. Perez, Seaboard, Brooks, Holl. No case law cited by the Petitioner portends to the contrary.

In Kelley v. School Board of Seminole County, 435 So.2d 804 (Fla. 1983) and Havatampa Corporation v. McElvy, Jennewin, Stefany and Howard, 417 So.2d 703 (Fla.2d DCA 1982), the discovery rule aspect of the applicable statute of limitations was decidedly not at issue. As this Court stated in Kelley: "This case does not, therefore, present the question as to whether a cause of action actually existed or whether the school board had, or should have, discovered the existence of a problem." Kelley, 435 So.2d at 806 n.3.

In the same vein, neither Roberts v. Casey, 413 So.2d 1226 (Fla.5th DCA 1982) pet. denied 424 So.2d 763 (Fla. 1982), Steiner v. Ciba-Geigy, 364 So.2d 47 (Fla.3d DCA 1978) nor Christiani v. City of Sarasota, 65 So.2d 878 (Fla. 1953), cited by the Petitioners, concerned the issue of when a plaintiff "should have discovered" the onset of a latent disease. Significantly, the Christiani case was specifically distinguished by this Court in

Seaboard Air Line Railroad Co. v. Ford, supra, and City of Miami v. Brooks, supra, when this Court addressed the specific issue of the application of the statute of limitations in the latent injury context. Moreover, the Steiner case, so heavily relied on by the Petitioner, suggests that summary judgment would be error in this case.

The Steiner court recognized that the statute of limitations begins to run in a medical malpractice case only when the "moment of trauma" and "moment of realization" have both occurred. Steiner, 346 So.2d at 53. It used the case of a patient with surgical equipment negligently left in his body as an example.

> The post-surgical pain or discomfort and possible physical injury resulting from the negligence in such cases would produce the trauma, but ordinarly at the time inadequate facts would exist to give rise to the realization. A subsequent x-ray, for example, revealing the negligence would then signal the 'moment of realization,' which in turn...would more clearly illuminate and define the already existent trauma. In such instances... a question of fact concerning the running of the statute of limitations would ordinarly be presented.

Id. (emphasis added).

The case at hand is closely analogous to the "surgical equipment" example provided by the court in Steiner. The only way in which Mr. Copeland's discomfort could be "illuminated and defined" was through the knowledge that his lung problems were caused by occupational exposure to asbestos products. This "time of realization" is a fact question for the jury to resolve.

II. A CAUSE OF ACTION FOUNDED ON COLLECTIVE LIABILITY SHOULD BE ADOPTED IN FLORIDA.

In response to Issues II and III of the Petitioner's Main Brief on the Merits and in response to the Celotex Corporation's Initial Brief on the Merits submitted in this case, Respondents refer this Court to Respondents' Answer Brief filed in the companion case The Celotex Corporation v. Lee Lloyd Copeland, Case Nos. 65,124 and 65,154. A copy of that brief is included in the Appendix hereto and incorporated by reference into the body of this brief to the extent deemed necessary by this Court.

CONCLUSION

WHEREFORE, based on the argument and authority cited herein, Respondent respectfuly requests that the holding of the Third District Court of Appeals be affirmed on the issue of statute of limitations in this case. Regarding the market share liabiliy issue, Respondent respectfully refers this Court to his brief filed in The Celotex Corporation v. Lee Loyd Copeland, Case Nos. 65,124 and 65,154.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing Brief on the Merits of Respondents has been mailed to all counsel of record herein for the Petitioners on this the 26th day of October, 1984.

JANE N. SAGINAW