IN THE SUPREME COURT OF FLORIDA

OWENS-CORNING FIBERGLAS CORPORATION,	§	
Petitioner,	§	
v.	§	Case No. 65,394
LEE LOYD COPELAND and VAUDEEN COPELAND,	§	
Respondents.	§	

RESPONSE TO PETITIONER'S BRIEF ON JURISDICTION FILED BY OWENS-CORNING FIBERGLAS CORPORATION

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TABLE OF CONTENTS

LIST OF CITATIONS

STATUTES CITED

INTRODUCTION

Petitioner, Owens-Corning Fiberglas Corporation (Owens-Corning), has moved this Supreme Court to adopt discretionary jurisdiction in this case based on an alleged conflict with existing law in the State of Florida. A review of the case law cited by the Petitioner, however, reveals that the holding of the Third District Court of Appeals in this case does not conflict with existing Florida law, and, in fact, is directly supported by the most recent interpretation of the "discovery rule" in occupational disease cases as articulated by this Supreme Court.

STATEMENT OF THE CASE AND FACTS

Plaintiffs/Respondents accept the Statement of the Case and Facts as presented by the opinion of the Third District Court of Appeals in this case. Plaintiffs would emphasize, in this regard, that it was the determination of the court that a question concerning the discovery of a latent disease is "generally a question of fact for the jury and is not, as a rule, appropriate for resolution on a summary judgment." Slip Opinion, p.2. Thus, the Court concluded, in this case where genuine issues of material fact existed on the record as to when the Plaintiffs claim accrued, summary judgment was inappropriate. Id. at 8.

ARGUMENT

I. THE HOLDING OF THE COURT BELOW DOES NOT CONFLICT WITH UNIVERSAL ENGINEERING CORP. V. PEREZ, _____ So.2d _____ (FLA. CASE NO. 62,157, MAY 17, 1984); CITY OF MIAMI V. BROOKS, 70 So.2d 306 (FLA. 1954); KELLEY V. SCHOOL BOARD OF SEMINOLE COUNTY, 435 So.2d 804 (FLA. 1983); OR ROBERTS V. CASEY, 413 So.2d 1226 (FLA. 5th DCA 1982), PET. DEN. 424 So.2d 763 (FLA. 1982).

In the decision of the Court below, it was determined that genuine issues of material fact remained open as to when the Plaintiff should have known he had a cause of action for injuries caused by exposure to asbestos. To wit, the court held:

> 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 casual 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 his long-term occupational exposure to asbestos dust. Prior thereto, from 1972-78, the plaintiff's condition had been diagnosed by two other doctors as being emphysema, which was unrelated to the plaintiff's on-the-job exposure to asbestos products.

Slip Opinion, p. 8.

In this way, the court recognized that although the Plaintiff regularly visited physicians, he was never informed until 1978 that he suffered from an asbestos disease. There is no proof in the record that his asbestos related disease was medically diagnosable before that time.

Petitioner would have this Court find that the decision of the Third District Court of Appeals directly conflicts with this Court's recent holding in Perez. The Perez decision, however, directly supports the finding of the appellate court in this case.

In Perez, this Court held that the statute of limitations begin to run in an occupational disease case when the

plaintiff knows or should have known that the disease at issue was "occupational in origin." Perez, 9 F.L.W. at 190. The record in this case is clear that there was no knowledge that Plaintiff's disease was occupational in origin until 1978, upon a diagnosis of asbestosis. In fact, as the Third District correctly reported, the Plaintiff's diligence in seeking medical advise as to the cause of his lung problems only led to the diagnosis that his medical complaints were not related to on-the-job exposure to asbestos dust. Nowhere in the record is there any indication that the Plaintiff suffered in fact from an asbestos disease prior to 1978. See, Brown v. Armstrong, ____ So.2d _____ (Fla. 3rd DCA 1984) pet. denied, May 30, 1984.

Owens-Corning Fiberglas Corporation claims that the decision of the Third District Court of Appeals in this cause is in direct conflict with this Court's holding in City of Miami v. Brooks, supra. A reading of Brooks, however, reveals no such conflict. In Brooks, this Court 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. In so holding, this Court relied upon Urie v. Thompson, 337 U.S. 163 (1949) and quoted the United States Supreme Court in stating:

> If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis prior to November 25, 1938, it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to

> diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

70 So.2d at 309, quoting 337 U.S. at 169 (emphasis added).

Thus this Court determined that knowledge of the Plaintiff is the touchstone of the discovery rule. The determination of the court below follows directly from the Court's decision in Brooks and the United States Supreme Court's holding in Urie.

The language relied upon by Owens-Corning Fiberglas Corporation in its brief regarding "the general rule" of statute of limitations is misleading. After stating the general rule in Brooks, this Court carefully refined its scope. Specifically, this Court explained that "[t]here is a distinction, however, between notice of the negligent act and notice of its consequences." 70 So.2d at 309. Expanding on Urie, this Court recognized "that in the absence of evidence showing that he should have known his condition at an earlier date the cause of action accrued only when diagnosis of disease was accomplished and not when the employee unwittingly contracted it." Id. Thus, in Florida, a cause of action for a latent disease arises upon diagnosis, absent positive evidence that the disease should have been discovered previously. So held this Court in Brooks, and so held the Third District Court of Appeals below.

The Petitioner's contention that the holding below conflicts with this Court's ruling in Kelley is entirely misplaced. Kelley did not involve the issue of the discovery

rule in an occupational disease case. In fact, Kelley does not address the discovery rule at all.

> 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 grave contrast, at issue in the court below was the application of the discovery rule as encompassed by 95.031(2) Florida Statute (1979) to a cause of action for personal injury based on negligence and products liability. It was recognized that the asbestos disease suffered by the Plaintiff is a latent disease. The question therefore was whether the Plaintiff "should have known" the cause of his injury prior to his actual discovery of it. It was determined that a genuine issue of material fact existed on this point. Despite the Plaintiff's displayed diligence, his disease process remained undiscovered until 1978. The holding of Kelley not only does not directly conflict with the lower courts determination of this matter, it is entirely irrelevent to the Third District's analysis.

Similarly, the Roberts case is not on point. In Roberts it was held that the statute of limitations for medical malpractice began to run when the parents of an injured child were told that the child's injury was contracted at the Defendant hospital and that they should consult an attorney. There, the child's injury was readily diagnosable upon its development and the parents were informed of such. Thus, the statute commenced to

run. Again, the question of when the Plaintiff "should have known" of the injury was not addressed by the court's opinion. The case did not involve the discovery of a latent injury.

II. THE HOLDING OF THE COURT BELOW DOES NOT CONFLICT WITH BENNETT V. HERRING, 1 FLA. 387 (1847); WADE V. DOYLE, 17 FLA. 522 (1880); DOYLE V. WADE, 23 FLA. 90, 1 So. 516 (1887); OR GILLESPIE V. FLORIDA MORTGAGE & INVESTMENT CO., 96 FLA. 35, 117 So. 708 (1928).

Petitioner suggests that the Third District Court of Appeals either tolled the statute of limitations in this case, or started it anew upon the Plaintiff's diagnosis of asbestosis. This suggestion is absurd in light of the clear language of the decision below. At issue below was whether a genuine issue of material fact existed in the record as to when this Plaintiff knew or should have known of his asbestos related disease. The Court found that a genuine issue of fact did exist, precluding summary judgment. The statute was tolled and not and did not begin to run anew upon actual discovery of the disease process. The cases cited by the Petitioner on this point are irrelevent to the issue on review.

III. THE HOLDING OF THE COURT BELOW DOES NOT CONFLICT WITH VECTA CONTRACT, INC. V. LYNCH, 444 So.2d 1093 (FLA. 4th DCA 1984).

Vecta Contract holds that in a product liability case, it is necessary for the plaintiff to present evidence that the defendant manufactured the product complained of. In Copeland v. Celotex, ____ So.2d ____ (Fla. 3rd DCA 1984) (decided March 6, 1984), rev. pending Case No. 65,124, the Third District Court

of Appeals adopted a concept of market share liability and certified the question of its appropriateness in Florida to this Supreme Court. The question of "product identification" is, therefore, not an issue in the present appeal. To the extent that it is relevant to the present case, it is already properly before this court for review as a certified question of public importance.

IV. THERE IS NO PRIMA FACIE GROUND FOR JURISDICTION IN THIS CASE.

As recognized by the Petitioner, Copeland v. Celotex Corporation, is presently before this Court as a certified question concerning market share liability. While Copeland v. Celotex Corporation was cited in the present case it was not the only authority cited on this issue of product identification. It cannot be over emphasized that the decision of the court below concerning product identification rested equally on the Third District's holding in Copeland v. Celotex and Vilardebo v. Keene Corporation, 431 So.2d 620 (Fla. 3rd DCA 1983). To wit, the appellate court held:

> Moreover, it is plain that [the] burden must be satisfied by the defendant manufacturer so as to exclude any genuine issue of material fact thereto before said defendant is entitled to a summary judgment in its favor on the products identification issue. See Vilardebo v. Keene Corp., 431 So.2d 610 (Fla. 3rd DCA 1983).

Slip Opinion, p.7.

Thus, even if this Supreme Court were to alter the holding of Copeland v. Celotex, the decision in this case would remain unchanged due to the previous law established in the Vilardebo case.

The Third District Court of Appeals ruled that the instant case was not time-barred as a matter of law. Therefore, this case, along with all other timely filed occupational disease cases currently pending in Florida should proceed to trial under the law of Florida as it now exists. Jollie v. State, 405 So.2d 418 (Fla. 1981) does not instruct to the contrary.

CONCLUSION

Because there is no direct or express conflict between the decision of the Third District Court of Appeals and any case law cited to this Court; and further because much of the case law cited to this court is wholly irrelevant to the issue of the applicability of the discovery rule in a latent disease injury case, the Petitioner's request for discretionary jurisdiction should be denied in full.

Respectfully submitted,

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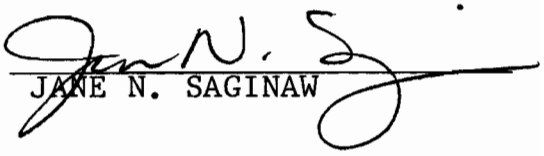
BY: 
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CERTIFICATE OF SERVICE

I hereby certify that and exact copy of the foregoing Response To Petitioner's Brief On Jurisdiction Filed By Owens-Corning Fiberglas Corporation has been mailed or hand delivered to all counsel of record for the defense on this the 13 day of June, 1984.

JANE N. SAGINAW