IN THE SUPREME COURT OF FLORIDA

65,394

CASE NO: _____

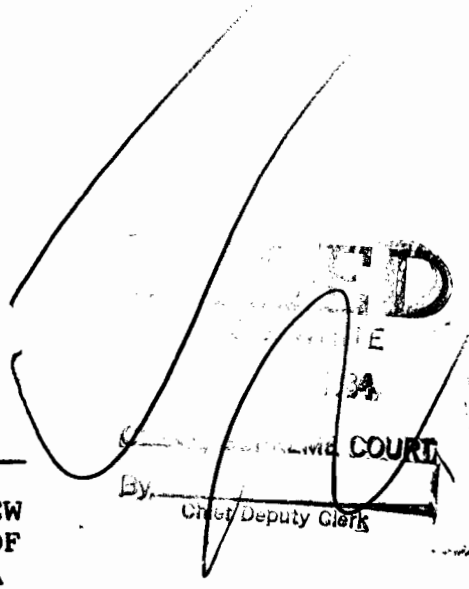
OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

v.

LEE LOYD COPELAND and VAUDEEN COPELAND,

Respondents.




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

# PETITIONER'S BRIEF ON JURISDICTION

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## INTRODUCTION

This brief is filed on behalf of the petitioner, Owens-Corning Fiberglas Corporation ("Owens-Corning"), one of several defendants/appellees below. The respondents are the plaintiffs/appellants below, Lee Loyd Copeland ("Copeland") and Vaudeen Copeland. A copy of the Third District opinion is appended ("A").

## STATEMENT OF THE CASE AND FACTS

From 1942 until his retirement in 1975, Copeland worked as a boilermaker in various shipyards and at numerous other jobs, during which time he was exposed to various asbestos products (A. 2). Copeland claims that his long term exposure to asbestos products caused his health to deteriorate over a period of years,

contracting the disease of asbestosis (A. 3). Copeland first became aware of the possible health hazards associated with asbestos dust in 1958 or 1959 (A. 3). It was not until the late 1960's, however, that he began to experience breathing problems and watery eyes when working around the white asbestos dust (A. 3). In April 1972, he experienced shortness of breath and coughing up blood (A. 3). He sought medical attention and was (mis)diagnosed as having pneumonia and emphysema (A. 3). One of the physicians encouraged him to change jobs to avoid the dusty conditions at the job site (A. 3). From 1972 until his retirement in April 1975, Copeland's physical condition further deteriorated. At the time of his retirement, he was unable to work due to shortness of breath and retired on his doctor's advice (A. 3-4). In 1978, he was referred to another physician who diagnosed his condition as asbestosis contracted as a result of his long term exposure to asbestos dust at work from 1942-1975 (A. 4).

On April 17, 1979, the Copelands filed this product liability law suit against the several defendant manufacturers (A. 4). Based upon Copeland's own testimony that he knew in the late 1960's that the inhalation of dust at his work place was causing his breathing problems, the trial court entered final summary judgment for the defendants on the ground that the action was time barred by the applicable statute of limitations (A. 4). The Third District reversed, finding that the subsequent

(mis)diagnosis of his condition created a question of fact on when the statute began to run (A. 8-9).

## JURISDICTIONAL ARGUMENT

### I.

THE DECISION BELOW IS IN EXPRESS AND DIRECT 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); AND ROBERTS V. CASEY, 413 So.2d 1226 (Fla. 5th DCA 1982), pet. den. 424 So.2d 763 (Fla. 1982).

By his own admission, Copeland knew in the late 1950's, that asbestos dust was a work related health hazard. In the late 1960's he began to experience breathing problems and watery eyes when working around asbestos dust which, again by his own admission, he attributed to the dust. He testified on deposition that he knew that the dust was what was causing his problems in the late 1960's. Under the clear dictates of the above referenced cases, the statute of limitations began to run at that time. Copeland had sustained identifiable injury, breathing problems, with the correlative appreciation for the source of that injury, the dust at work. Subsequent events can neither toll the running of the statute nor cause it to start anew. In requiring a diagnosable manifestation of a specific disease, asbestosis, the Third District decision reflects the conflict necessary to the jurisdiction of this Court.

The Third District decision conflicts with the following:

> Plaintiff's alleged injuries fall in the category of occupational injuries. '[T]he statute of limitations begins to run from the time that the employee knows or should have known that the disease was occupational in origin, even though diagnosis of the exact cause has not yet been made.'

Universal Engineering Corp. v. Perez, supra, 9 F.L.W. at 190. Here, the Third District has improperly concluded that the statute does not begin to run until "the disease of asbestosis" had "manifested itself to the plaintiff" (A. 8). It is not, however, the manifestation of a diagnosable disease, but merely the manifestation of injury which triggers the statute.

The decision is contrary to the following statement of law contained within City of Miami v. Brooks, supra:

> The general rule, of course, is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefore, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date. [70 So.2d at 308].

The decision below also conflicts with the following language from City of Miami v. Brooks:

> [T]he statute attached when there has been notice of an invasion of the legal right of the plaintiff or he has been put on notice of his right to a cause of

> action. ... [T]he statute must be held to attach when the plaintiff was first put on notice or had reason to believe that her right of action had accrued. [70 So.2d at 309].

In Kelley v. School Board of Seminole County, supra, this Court held:

> As a general rule, a statute of limitations begins to run when there has been notice of an invasion of legal rights or a person has been put on notice of his right to a cause of action. City of Miami v. Brooks, 70 So.2d 306 (Fla. 1954).

In Kelley, this Court approved the holding in Havatampa Corp. v. McElvy, Jennewin, Stefany & Howard, Architects/Planners, Inc., 417 So.2d 703 (Fla. 2d DCA 1982), rejecting a requirement for "knowledge of the specific nature of the defect" before the statute of limitations commences to run. Kelley, 435 So.2d at 806. The statute of limitations begins to run when there has been notice of an invasion of legal rights. A lack of knowledge of the specific cause will not toll the running of the statute of limitations.

Finally, the majority opinion is in express and direct conflict with Roberts v. Casey, 413 So.2d 1226 (Fla. 5th DCA 1982), pet. den. 424 So.2d 763 (Fla. 1982), where the Fifth District affirmed a final summary judgment granted upon the running of the statute of limitations. There, the plaintiff appellant described in her deposition a conversation in which she learned that "it was possible" that the illness sustained by her infant

daughter may have been contracted at the hospital where she was born. The Fifth District held that this awareness of the possibility of a causal connection was sufficient to commence the running of the statute against both the hospital and the physician. The Court held:

> The statute of limitations in a medical malpractice action begins to run when the plaintiff has been put on notice of an invasion of his legal rights. [Citations omitted]. This occurs when the plaintiff has notice of either the negligent act which causes the injury or the existence of an injury which is a consequence of the negligent act. [413 So.2d at 1229].

Owens-Corning and the other defendants were entitled to summary judgment upon Copeland's testimony of his own subjective association in the late 1960's of his breathing problem with his inhalation of asbestos dust on the job site. He was thus "on notice" of the potential invasion of his legal rights. Copeland's shortness of breath was actionable, if caused by the negligence of one or more of the defendants. A confirmed diagnosis of his disease is a matter of proof of proximate causation. It does not affect the right to bring suit ab initio. Moreover, the ascertained or ascertainable progress of his disease affects the measure of his damages, not the accrual of his cause of action.

II.

THE DECISION BELOW IS IN EXPRESS AND DIRECT 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); AND GILLESPIE V. FLORIDA MORTGAGE & INVESTMENT CO., 96 Fla. 35, 117 So. 708 (1928).

Copeland was on notice of the potential invasion of his legal rights in the late 1960's. He was arguably deterred in 1972 by an improper diagnosis of his condition. The District Court of Appeal in effect has found that this subsequent event either tolled the running of the statute or caused it to start anew with the later diagnosis of asbestosis.

In so holding, the decision below conflicts with the rule of law established in each of the above referenced cases that, "where the statute of limitations has commenced running, it runs over all subsequent disabilities." Wade v. Doyle, 17 Fla. at 527.

III.

THE DECISION BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH VECTA CONTRACT, INC. V. LYNCH, 444 So.2d 1093 (Fla. 4th DCA 1984).

Relying upon the companion case of Copeland v. Celotex Corporation (Case No. 81-997), rev. pending Case No. 65,124, the District Court held that, "the plaintiff was not obliged to establish that he was exposed to identifiable asbestos products of the defendants herein in order to establish a prima facie case

of product liability." That holding conflicts with the Fourth District decision in Vecta Contract v. Lynch, supra, where the applicable rule was stated as follows:

> In a products liability case, it is necessary to present evidence that the the defendant manufactured or produced the product that caused the injury. Morton v. Abbott Laboratories, 538 F.Supp. 593 (M.D. Fla. 1982)

IV.

JURISDICTION EXISTS WHEN A DISTRICT COURT OF APPEAL CITES AS CONTROLLING AUTHORITY A DECISION THAT IS PENDING REVIEW IN THE SUPREME COURT.

This case has accepted jurisdiction and is reviewing Copeland v. Celotex Corporation, supra, the companion decision upon which the decision below is based. There is a prima facie jurisdictional basis for further review when a District Court of Appeal cites as controlling authority a decision that is pending review in the Supreme Court. Jollie v. State, 405 So.2d 418 (Fla. 1981).

Absent relief in this Court, the appellees in this Copeland appeal may find themselves in the anomalous position of being bound by the "law of the case," when the law of Florida will ultimately be decided by this Court in its response to the certified question in the other Copeland appeal. This Court should determine the rights of all defendants in the Copeland litigation, regardless of their status as appellees to the separate appeals taken to the District Court of Appeal.

Owens-Corning has asserted nominal appellee status in the other Copeland appeal and has, in turn, petitioned this Court for review of the certified question. The Owens-Corning petition (Case No. 65,154) was appropriately consolidated with the Celotex petition (Case No. 65,124).

## CONCLUSION

Based upon the conflict shown to exist, this Court should accept jurisdiction to review the District Court's reversal of the summary final judgment and, upon the merits, quash the majority opinion and reinstate the trial court judgment.

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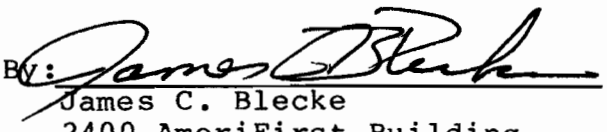

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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Brief on Jurisdiction was mailed to all counsel on the attached service list this 4th day of June, 1984.

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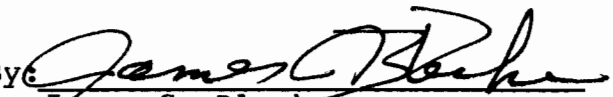
By: 
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