IN THE SUPREME COURT OF FLORIDA

Case No. 66,383

THE CELOTEX CORPORATION, Petitioner, vs. LEONARD H. PICKETT, SR., and LINDA N. PICKETT, his wife, Respondents.	On Petition for Discretionary Review of the District Court of Appeal, First District, State of Florida

BRIEF OF AMICUS CURIAE THE ACADEMY OF FLORIDA TRIAL LAWYERS SUPPORTING THE POSITION OF RESPONDENTS

THE ACADEMY OF FLORIDA TRIAL LAWYERS
AMICUS CURIAE

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PREFACE

Amicus curiae, the Academy of Florida Trial Lawyers ("AFTL"), is a large, state-wide association of trial lawyers specializing in many areas, including negligence and products liability litigation. The AFTL believes that this case presents a very important issue to this Court: Whether a corporation which has acquired another corporation through merger can be held liable for punitive damages for the wrongful actions of the acquired corporation. This issue is one of great public importance with broad ramifications for many parties in Florida. Moreover, with the increasing number of corporate mergers and acquisitions nationwide, the issue is sure to recur frequently in the courts of Florida.

The AFTL urges the Court to affirm the decision of the First District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

Plaintiffs, Leonard H. Pickett, Sr. and Linda N. Pickett, his wife, brought this action sounding in negligence and strict liability against defendant, The Celotex Corporation, as statutory successor to Philip Carey Manufacturing Corporation, and other defendants, seeking damages for Leonard Pickett's exposure to asbestos in the 1960s. The jury awarded $500,000 in compensatory damages to Leonard Pickett and $15,000 to his wife. The jury also assessed punitive damages against Celotex of $100,000 for the reckless misconduct of its merged predecessor corporation, Philip Carey. The First District Court of Appeal affirmed, The Celotex Corporation v. Pickett, 459 So.2d 375, 376 (Fla.1st DCA 1984), holding, inter alia, that "Celotex as a successor corporation due to merger, may be held liable for all liabilities of its predecessor corporation [Philip Carey], including punitive damages."

As recited by the First District, the chain of ownership leading to Celotex's merger with Philip Carey is as follows: Philip Carey was begun in 1888 and subsequently merged with the Glen Alden Corporation in 1967. Thereafter, Philip Carey merged with another Glen Alden subsidiary, Briggs Manufacturing Company, and became known as Panacon Corporation. Celotex purchased Glen Alden's

controlling interest in Panacon in 1972 and later purchased the remaining shares of Panacon and merged it into Celotex. 459 So.2d at 376. Thus, through these series of transactions, the former Philip Carey Manufacturing Corporation has been merged into Celotex.

SUMMARY OF ARGUMENT

The acquiring, surviving corporation in a merger stands in the shoes of the acquired corporation in every respect. The universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all liabilities (as well as assets) of the predecessor corporation precisely as though it had incurred those liabilities itself. This assumption of liability includes liability for damages for the tortious conduct of the acquired corporation. Thus, a corporation which acquires another corporation through merger may be held liable for punitive damages based on the misconduct of the acquired corporation. The goals of punitive damages -- punishment of wrongful conduct and deterrence from future wrongful conduct -- are served by allowing punitive damages to be assessed against the surviving corporation for the misconduct of the acquired corporation.

ARGUMENT

The Acquiring, Surviving Corporation in a Merger Stands in the Shoes of the Acquired Corporation in Every Respect. Thus, a Corporation Which Acquires Another Corporation Through Merger May be Held Liable for Punitive Damages Based on the Wrongful Actions of the Acquired Corporation.

When, through a series of corporate transactions, Philip Carey (under the name Panacon) was acquired and merged into Celotex, Celotex became the "'present embodiment'" of Philip Carey. See Nicolet, Inc. v. Benton, 467 So.2d 1046, 1050 n.4 (Fla.1st DCA 1985). Indeed, Philip Carey still exists within Celotex; and Celotex, expressly and by operation of law, has assumed all liabilities of Philip Carey, including liability for punitive damages.

Section 607.231(3), Florida Statutes (1983), entitled "Effect of merger or consolidation," provides:

> "(a) The several corporations parties to the plan of merger or consolidation shall be a single corporation which, in the case of a merger, shall be the corporation designated in the plan of merger as the surviving corporation . . .
>
> "(b) The separate existence of all corporations parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease . . .

> "(e) Such surviving or new corporation shall thenceforth be responsible and liable for all the liabilities . . . of each of the corporations so merged or consolidated, and any claim existing or action or proceeding pending by or against any of such corporation may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place" (emphasis supplied).*

See Barnes v. Liebig, 1 So.2d 247, 253 (Fla.1941) ("[i]n case of merger of one corporation into another, the latter is liable for the debts, contracts and torts of the former"). See also Bernard v. Kee Manufacturing Company, Inc., 409 So.2d 1047 (Fla.1982) (recognizing that, even in the absence of a de jure merger, a surviving corporation may be held liable for compensatory damages of the predecessor corporation when the successor expressly or impliedly assumes the obligations of the predecessor and when the transaction is a de facto merger); Anders v. Jacksonville Electric Authority, 443 So.2d 330, 331 (Fla.1st DCA 1984).

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* Michigan, the state where Panacon was incorporated, and Delaware, the state of Celotex's incorporation and where the merger agreement was consummated, have similar provisions in their merger statutes. See Section 450.1722, Mich.Comp.Laws Annot.; 8 Del.Gen.Corp.Law, § 259. See also Sheppard v. A.C. and S. Co., Inc., 484 A.2d 521 (Del.Super.1984); Krull v. Celotex Corporation, No.83-C-9635, slip op. at 4 (N.D.Ill. May 31, 1985) (copy attached as Appendix to this brief). Indeed, the principle that the surviving corporation stands in the shoes of the acquired corporation in every respect, including liability for the torts of the acquired corporation, is hornbook law. See Fletcher, Cyclopedia of Corporation, § 1721 (Perm. Ed.).

In the merger agreement between Celotex and Panacon, Celotex expressly confirmed what occurred by operation of law:

> "'All debts, liabilities and duties of Panacon shall upon the effective date of the merger attach to Celotex and may be enforced against it to the same extent as if such debt, liabilities and duties had been incurred or contracted by Celotex.'" The Celotex Corp. v. Pickett, 459 So.2d at 376 (quoting section 11 of Celotex-Panacon merger agreement) (emphasis supplied).

Finally, Celotex, as it must, has acknowledged its liability for the compensatory damages awarded to plaintiffs. Id.

Thus, as a matter of law and by its own agreement, Celotex is responsible for all liabilities of Philip Carey, "as if such . . . liabilities . . . had been incurred by Celotex." Yet despite this, Celotex has maintained throughout the courts of this country that while it is liable for compensatory damages for the tortious actions of the acquired corporation, Philip Carey, it may not be held liable for punitive damages for Philip Carey's reckless misconduct. With one exception,* the courts have uniformly rejected Celotex's contention that as a matter of law Celotex may not be held liable for punitive damages for Philip Carey's wrongful actions. Krull v. Celotex

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* In re Related Asbestos Cases, 566 F.Supp.818 (N.D.Cal. 1983).

Corporation, No.83-C-9635, slip op. at 1 (N.D.Ill. May 31, 1985) (denying Celotex's motion for summary judgment on the punitive damages issue); Wall v. Owens-Corning Fiberglas Corporation, 602 F.Supp.252, 255 (N.D.Tex.1985) (same); Hanlon v. Johns-Manville Sales Corporation, 599 F.Supp.376, 377 (N.D.Iowa 1984) (same); Neal v. Carey Canadian Mines, Ltd., 548 F.Supp.357, 391 (E.D.Pa. 1982) (upholding jury's award of punitive damages against Celotex for conduct of Philip Carey); Sheppard v. A.C. and S. Co., Inc., 484 A.2d 521, 526 (Del.Super.1984) (denying Celotex's motion for summary judgment on the punitive damages issue); Martin v. Johns-Manville Corporation, 469 A.2d 655, 666-67 (Pa.Super.1983) (jury should be permitted to decide whether Celotex should be liable for punitive damages for the actions of its predecessor).

As recognized by these courts, the fundamental flaw in Celotex's argument against punitive damages liability for the actions of Philip Carey is that it fails to recognize that in choosing to merge with Philip Carey, Celotex became the continuing corporate embodiment of Philip Carey with all the attendant responsibilities and liabilities. This point is perhaps best stated by the federal district court in Krull v. Celotex Corporation, No.83-C-9635, slip op. at 2-4 (N.D.Ill. May 31, 1985) (copy attached as Appendix to this brief):

> "Celotex . . . argues [plaintiff's] claim for punitive damages is 'solely predicated upon the alleged misconduct of Phillip Carey Corporation.' Celotex urges the unfairness of saddling it with such punitive damages because it
>
> > 'never participated in or ratified any of the allegedly wrongful acts committed by either the Philip Carey Corporation or the Panacon Corporation.'
>
> Celotex's emphasis on its own conduct is misplaced. That error reflects the fundamental flaw in Celotex's analysis: its failure to distinguish between the liability of a successor corporation by merger from the very different situation that has generated most 'successor corporation' litigation in the products liability field . . .
>
> "[T]he Celotex-Panacon transaction was a merger, not merely a purchase of assets. And the universal rule applicable to mergers or consolidations is that, by operation of law, the successor corporation assumes all debts and liabilities of the predecessor corporation precisely as if it had incurred those liabilities itself . . .
>
> "That rule is inherent in the concept of a merger, under which the surviving corporation stands in the shoes of the disappearing corporation in every respect. And that concept is uniformly codified in every merger statute, including the Delaware General Corporation Law under which the Celotex-Panacon merger was accomplished" (emphasis partly in original and partly supplied).

See also Neal, 548 F.Supp. at 391 (Celotex is "essentially identical" to Philip Carey). See generally Atlanta Newspapers, Inc. v. Doyal, 84 Ga.App.122, 65 S.E.2d 432,

437 (Ga.App.1951):

> "[T]he consolidation of two or more corporations is like the uniting of two or more rivers, neither stream is annihilated, but all continue in existence. . . . So it is with a consolidated corporation. A new corporation is formed, but not in the sense which works a destruction of the rights of action existing against the old one." (Emphasis in original.)

With this established, it is easily seen that the goals of punitive damages -- punishment and deterrence -- are satisfied by allowing punitive damages to be assessed against the surviving corporation in a merger for the malicious, wanton or reckless actions of the acquired corporation. Precisely because the acquiring corporation (here, Celotex) is the continued corporate embodiment of the acquired corporation (here, Philip Carey), the punishment objective of punitive damages is fulfilled because the entity being punished is the wrongdoer (Philip Carey), as continued and embodied by Celotex. That the corporate personnel, i.e., officers and directors of the surviving corporation, may be substantially different from the personnel of the acquired corporation is of no importance because the award of punitive damages seeks to punish the wrongdoing corporate entity which continues to exist through the successor corporation. See Johns-Manville Sales Corporation v. Janssens, 463 So.2d

242, 252 (Fla.1st DCA 1984)*.

The assessment of punitive damages against the acquiring corporation also serves a deterrence function: to the extent that the acquiring successor corporation continues the same business or product which was the subject of the wrongful conduct, punitive damages deter the acquiring corporation from committing future wrongful acts similar to those committed by the acquired corporation. See Sheppard v. A.C. and S. Co., Inc., 484 A.2d at 526 ("continuation by a successor of a product line with knowledge of its danger . . . could be a reprehensible act properly discouraged through the imposition of punitive damages").

Moreover, as recognized by the First District below, "punitive damages operate not only to punish the actual wrongdoer, but also, by way of example, to deter others from committing similar wrongs" 459 So.2d at 377. See

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* Thus, the issue of vicarious liability for punitive damages, addressed by this Court in Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla.1981), is not involved in determining an acquiring, successor corporation's liability for punitive damages for the acts of its merged predecessor because the liability imposed on a successor corporation is not vicarious but, rather, direct liability for the actions of the acquired corporation for which, through the merger, the acquiring corporation has become responsible. See generally Winn-Dixie Stores, Inc. v. Robinson, 10 FLW 338, 339 (Fla.June 27, 1985) ("Mercury Motors is not applicable . . . where the suit was tried on the theory of direct liability . . . for punitive damages").

Fisher v. City of Miami, 172 So.2d 455, 457 (Fla.1965). The assessment of punitive damages against the acquiring successor corporation certainly serves as a deterrent to other corporations from engaging in the same wrongful conduct of the acquired corporation.

A corporation which acquires another corporation through merger cannot claim surprise or undue hardship if it is held liable for punitive damages based on the misconduct of the acquired corporation. First, as already detailed, the merger laws of every state specifically provide that the acquiring corporation will stand in the shoes of the acquired corporation for all purposes. Indeed, in this case, Celotex specifically confirmed this obligation when in the merger agreement it assumed all liabilities of the predecessor corporation "as if such . . . liabilities . . . had been incurred . . . by Celotex." Moreover, as cogently stated by the court in Krull:

> "Corporations are largely the molders of their own destinies in acquisition transactions: They may buy assets without assuming liabilities, they may buy stock and preserve the acquired company as a subsidiary (insulating the parent from subsidiary liabilities), they may engage in upstream or downstream mergers, they may consolidate -- there is no need to ring all the changes with which a knowledgeable corporate practitioner is familiar. . . . But if an acquiring corporation -- for its own business (and perhaps tax) purposes --

> chooses a formal de jure merger, with its familiar consequences of the total assumption of predecessor liabilities, the corporation will not be heard to extract itself from its wholly voluntary and deliberately undertaken actions." No. 83-C-9635, slip op. at 7 (N.D.Ill. May 31, 1985) (emphasis supplied).

Indeed, a ruling by this Court that a corporation acquiring another by merger does not become responsible for the punitive damages liability of the acquired corporation would allow corporations to play "shell games" with their liability, "accept the good without the bad" and "jettison inchoate liabilities into a never-never land of transcorporate limbo." Wall v. Owens-Corning Fiberglas Corp., 602 F.Supp. at 255 (denying Celotex's motion for summary judgment on the punitive damages issue).

CONCLUSION

The First District's affirmance of the jury's award of punitive damages against the surviving corporation of a merger for the reckless misconduct of the acquired corporation accords with Florida law and with the overwhelming number of decisions which have considered this precise issue. Amicus curiae, the Academy of Florida Trial Lawyers, therefore, asks the Court to affirm the decision of the First District Court of Appeal.

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