IN THE SUPREME COURT OF FLORIDA

CASE NO.: 66,383

THE CELOTEX CORPORATION,

Defendant, Petitioner,

vs.

LEONARD H. PICKETT, SR., and
LINDA N. PICKETT, his wife,

Plaintiffs, Respondents.

RESPONDENTS' ANSWER BRIEF ON JURISDICTION

WAYNE HOGAN, ESQUIRE
BROWN, TERRELL, HOGAN & ELLIS, P.A.
804 Blackstone Building
Jacksonville, Florida 32202
(904) 632-2424

Attorneys for Plaintiffs/Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

CLARIFICATION OF THE CASE

If petitioner were serious about its suggestion of conflict, it would have sought conflict certification from the First District. But, as we informed this Court when we opposed petitioner's motion for stay, petitioner could think of no legitimate conflict argument and sought no conflict certification.* Now petitioner, aware that the Court does not have the full record before it, makes conflict arguments that would have been the subject of knowing rejection by the First District.

CLARIFICATION OF THE FACTS

To get a second appeal Celotex tries to cast out its Philip Carey soul. But this belated attempt at exorcism is unfaithful to petitioner's confessions to the First District

> Of course, in the instant case, Celotex is a statutory successor to the Philip Carey Corporation and thus can be held liable for compensatory damages.

(Initial Brief at 15.) This admission, together with answers to interrogatories, and trial testimony and similar confessions at oral argument, resulted in the First District's correct conclusion that

> Celotex concedes that it is liable, pursuant to the merger, for the compensatory damages awarded to appellees. (A 3)

---

*After the Court denied the stay, Celotex paid the judgment and, at the direction of counsel for Celotex, satisfaction was recorded. O.R. Vol. 5912, p.352; O.R. Vol. 5912, p.354 (Duval County).

The First District accurately recorded how Philip Carey became Celotex. Nit-picking, petitioner chooses one "transaction" to discuss, but the record forces it to concede that both the "assets and liabilities were transferred" (Pet. Br. at 1, n.1, emphasis supplied). And petitioner's corporate secretary admitted that this was but an internal "spinoff of the Philip Carey assets" (T.3284).

Reckless corporate misconduct cannot be made to disappear so easily as the pea in a carnival shell game.

ARGUMENT

I.

A. The Pickett Decision Does Not Conflict With Bernard v. Kee Manufacturing Co., Inc., 409 So.2d 1047 (Fla. 1982)

It requires imagination to find conflict between the Pickett and Bernard decisions. In Bernard this Court only rejected a long-shot attempt at having Florida adopt the "product-line" line theory of corporate successor liability. The Bernard court reaffirmed the other traditional bases for such liability: assumption of obligation, merger, mere continuation and fraud. 409 So.2d at 1049. Nothing about Bernard suggests that a statutory successor should not be subject to punitive damages. This Court had long-before declared:

> Where a merger takes place, the subsisting corporation is answerable for the liabilities of the corporation which goes out of business. 15 A.L.R. 1138, note and cases cited. Where the corporation incurring liability ceases to have an independent

> existence de jure, the absorbing corporation is liable at law, as well as in equity, the ground for such liability being sometimes stated to be the continuance of the original corporation under a new guise, and sometimes to be an assumption of liabilities arising by implication. 11 L.R.A.,N.S., 1120, note. In case of merger of one corporation into another, the latter is liable for the debts, contracts and torts of the former.

Barnes v. Liebig, 146 Fla. 219, 1 So.2d 247, 253 (1941) (emphasis supplied). Moreover, in addition to merging, Celotex had, with open eyes, expressly agreed to assume the liabilities of Philip Carey in order to gain the benefit of its predecessor's ill-gotten assets. Cf., Anders v. Jacksonville Electric Authority, 443 So.2d 330, 331 (Fla. 1st DCA 1984), pet. for rev. den., 451 So.2d 847. It was Judge Barfield who put the painful question to opposing counsel at oral argument: "When you take the goodwill, don't you take the bad will along with it?"

It is entirely consistent with Bernard, Barnes and Anders to encourage prospective successors to have a healthy concern about their merger candidates' behavior vis-a-vis the consuming public. Since reckless wrongdoing by the predecessor can result in punitive damages against the successor, the owners and managers of acquisition candidates are deterred from reckless conduct. Otherwise, their companies will sell for less or not at all. If the potential for punitive damages were to disappear at merger, this would encourage reckless conduct. By ignoring safety, advertising heavily and intentionally flooding the market with cheaply made, defectively dangerous products, companies could create beautiful profit-and-loss statements and woo merger prospects. And acquiring companies would have no reason to care

about the soon-to-be-merged predecessor's reckless misconduct since insurance would cover the compensatory damages.

Punitive damages stand as a bulwark against the merger attractiveness of get-rich-quick, the public-be-damned corporate wrongdoers. Since the merged successor is the predecessor "in a new guise", Barnes, 1 So.2d at 253, liability for punitive damages is not vicarious; therefore insurance would not cover the punitive damages. Compare, U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061 (Fla. 1983) (insurance covers vicarious punitive damages). Again, this encourages acquiring companies to stop, look and listen before merging.

B. The Pickett Decision Does Not Conflict With Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981)

Two days after this Court denied Celotex's motion for stay, the Court clarified the holding in Mercury Motors. In deciding Bankers Multiple Line Ins. Co. v. Farish, ___ So.2d ___, 10 FLW 66, 67 (Fla. Jan. 24, 1985), the Court declared:

> That decision [Mercury Motors] was not intended to apply to situations where the agent primarily causing the imposition of punitive damages was the managing agent or primary owner of the corporation.

See, Farish v. Bankers Multiple Line Ins. Co., 425 So.2d 12, 19, 20 (Fla. 4th DCA 1982), affirmed in part, reversed in part on other grounds, 10 FLW 66. Therefore a showing of "some fault" of the corporation is not necessary for punitive damages in such circumstances. A copy of Bankers Multiple Line Ins. Co. is attached for the convenience of the Court.

Since Celotex, as admitted statutory successor, is the very embodiment of Philip Carey its suggestion of conflict with Mercury Motors is without merit. Just as in Bankers Multiple Line, the punitive damages liability is direct, not vicarious. Liability is being equated with fault. Celotex is inseparable from Philip Carey which the jury found to have acted with reckless indifference to the rights of asbestos workers. Therefore, petitioner's suggestion that "the perpetrators of the alleged wrongs have received their moneys and are not being punished in any way by the award," is simply not true. Philip Carey, the corporation, was the perpetrator. It exists today in the guise of Celotex. Bernard; Barnes. It is being punished. Compare Bankers Multiple Line, in which the primary wrongdoer, one John D. MacArthur, had died, yet this Court directed that the punitive damages case to be retried against his corporation. 10 FLW at 67-68.

C. The Pickett Decision Does Not Conflict With White Construction Co. Inc. v. Dupont, 455 So.2d 1026 (Fla. 1984)

1. Petitioner waived any challenge to the sufficiency of the punitive damages evidence by failing even to mention the question until after the First District's decision. We successfully opposed petitioner's attempt to inject the issue belatedly through a groundless motion for rehearing en banc. We pointed out that the issue was entirely absent from it's initial brief, entirely absent from its reply brief, entirely absent from its oral argument, entirely absent from its notices of supplemental

authority - and, thus, entirely absent from its Rule 9.330 motion for rehearing. Indeed, the citation of White Construction, on page 5 of the jurisdictional brief, is the very first time Celotex has even cited White Construction in these proceedings. The Court should reject the attempt to inject this waived issue.

2. Because petitioner did not challenge the sufficiency of the punitive damages evidence, the First District did not rule on its sufficiency. Therefore, nothing in the Pickett decision could conceivably conflict with White Construction. Moreover, petitioner, apparently believing the Court will not read the First District's Pickett opinion, unwisely chooses to distort it by saying:

> 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'."

(Pet. Br. at 5) Petitioner knows this referred only to the compensatory damage verdicts (A 2). As to punitive damages, the court reported that

> The jury also found that Philip Carey acted so as to warrant punitive damages which were assessed in the amount of $100,000 against Celotex.

(A-2) Thus, the jury necessarily found "malice, moral turpitude, wantonness, wilfulness or reckless indifference to the rights of others," since standard jury instruction 6.12 on punitive damages was given (T. 4582). Compare, Bankers Multiple Line, 10 FLW at 67.

3. In Carraway v. Revell, 116 So.2d 16, 19 (Fla. 1959), the cornerstone for this Court's decision in White Construction, the Court declared:

> Different degrees of negligence are far easier to demonstrate than to define.[7] The same conduct, in different settings, could and does result in different degrees of liability.[8]

116 So.2d at 19 (text of footnotes omitted). And, just last month the Court reiterated the importance of "the nature, extent and enormity of the wrong and all of the circumstances in relation to the tort." Bankers Multiple Line, 10 FLW at 67. It is not surprising that Celotex did not challenge the sufficiency of the punitive damages evidence. Even now its brief fails to give any inkling of why it thinks the evidence was insufficient. Instead, it tellingly resorts to mischaracterizing the First District's opinion as allowing punitive damages for simple negligence, when, in fact, the court merely, and accurately, recorded a jury finding of "malice, moral turpitude, wilfulness or reckless indifference to the rights of others." (A 2)

II. The Court Should Deny The Petition For Discretionary Review

A. The First District's decision is true to this Court's decisions on merger and corporate successorship. Because the proven reckless wrongdoer exists in the guise of its statutory successor, the punitive damages achieve the goals of punishment and deterrence - particularly deterrence, by encouraging potential acquiring corporations to refrain from buying, or to offer substantially less for, or to buy only the assets and not the goodwill of, corporations which have engaged in reckless misconduct. All corporate counsel worth their salt will understand, and advise their clients, that no corporation can

eliminate potential punitive damages simply by merging with another. Acquiring corporations must be careful not to merge with reckless wrongdoers and, consequently, those who would be acquired must avoid reckless wrongdoing.

B. On page 6 of its brief petitioner admits there is no merit to its assertion of conflict jurisdiction by improperly inviting this Court to ignore the Constitution and hear this case on purported public importance grounds. Petitioner knows Article V requires a district court certification. Art. V, s.3(b)(4), Fla. Const. Yet, petitioner asked the Pickett panel to certify the question of whether there should be no punishment for massive wrongdoing only if the Janssens panel so certified. Knowing that this contention closely resembles the rejected "reasoning that envisions a person can be punished only for his malicious and reckless actions when they maim another but not for these same despicable actions when they kill the victim," the Janssens panel decided not to certify. In Martin v. United Security Services, Inc., 314 So.2d 765, 771-72 (Fla. 1975), this Court reaffirmed Justice Thornal's declaration that "...[S]uch a rule of law cannot be allowed to exist." 314 So.2d at 771, quoting Atlas Properties, Inc. v. Didich, 336 So.2d 684, 688 (Fla. 1969).

Now, on February 6, 1985, petitioner sends up, as purported supplemental authority, the Fifth Circuit's decision in Jackson v. Johns-Manville Sales Corp., ___ F.2d ___ (5th Cir. 1985), merely certifying to the Mississippi Supreme Court the question of whether massive wrongdoing should create immunity from punitive damages in Mississippi. What does this have to do with

this Court's conflict jurisdiction? Nothing. Petitioner is obviously asking the Court to ignore Article V and to "reach down" and "pluck up" this case, even though there is not, and should not have been, a public importance certification. Although proposed in 1979, such "reach down" jurisdiction was deleted from the 1980 amendments to Article V, and does not exist. England, Constitutional Jurisdiction Of The Supreme Court Of Florida: 1980 Reform, 32 U. Fla. L. Rev. 147, 155-56, 194-95 (1980).

Moreover, Florida law, and public policy (Martin; Atlas Properties), support punitive damages for massive reckless wrongdoing. Arab Termite And Pest Control v. Jenkins, 409 So.2d 1039, 1042-43 (Fla. 1982), declares:

> Punitive damages apply to wrongdoing not covered by the criminal law, where the private injuries inflicted partake of public wrongs. They are to be measured by the enormity of the offense, entirely aside from the measure of compensation for the injured plaintiff. Ingram v. Pettit, 340 So.2d 922 (Fla. 1976); Campbell v. Government Employee Insurance Co., 306 So.2d 525 (Fla. 1974) [at 531, dicta favorably noting punitive damages in the Thalidomide cases]....

(Emphasis supplied.) And, most recently, Bankers Multiple Line, 10 FLW at 67 ("the nature, extent, and enormity of the wrong"). And the immunity contention has been roundly rejected by the courts of this nation. See cases cited in Johns-Manville Sales Corp. v. Janssens, ___ So.2d ___, 9 FLW 2048, 2051-52 (Fla. 1st DCA 1984) and Pickett, itself (A 5-7). Indeed, if Jackson had been a Florida case, the Fifth Circuit would not have certified, given this Court's prior decisions and the Janssens and Pickett decisions. See Worsham v. A. H. Robins Co., 734 F.2d 676, 691

(11th Cir. 1984), a Florida diversity case, affirming punitive damages in the Dalkon Shield IUD litigation.

Faced with strong Florida precedent, petitioner only half-heartedly asked for a public importance certification, and is out-of-bounds to ask the Court to engage in "the subterfuge of finding conflict to address a truly [un]important legal issue when no real conflict exists." Overton, District Courts of Appeal: Court of Final Jurisdiction With Two New Responsibilities, 35 U. Fla. L. Rev. 80, 88-89 (1983); see also, Overton, A Prescription For The Appellate Caseload Explosion, 12 Fla. St. L. Rev. 205, 226-30 (1984). The Court rejects improper attempts to amend the judicial article. Evans v. Firestone, 457 So.2d 1351 (Fla. 1984).

CONCLUSION

There is no conflict between the Pickett decision and this Court's decisions. The punitive damages judgment affirmed in Pickett punishes the wrongdoer and will deter others from similar wrongdoing. There being no conflict, there is no jurisdiction.

Respectfully submitted,

BROWN, TERRELL, HOGAN & ELLIS, P.A.

Wayne Hogan
804 Blackstone Building
Jacksonville, Florida 32202
904/632-2424

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 8th day of February, 1985 to Raymond T. Elligett Jr., Esquire, P.O. Box 3324, Tampa, Florida 33601 and Julian Clarkson, Esquire, P.O. Drawer 810, Tallahassee, Florida 32302.

Attorney