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SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION,

Petitioner,

vs. CASE NO.: 66,383

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

Respondents.

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ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

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ANSWER BRIEF ON THE MERITS OF RESPONDENTS PICKETT

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# TABLE OF CONTENTS

# TABLE OF CITATIONS

| Other Authorities | Page |
|---|---|
| 19 Am.Jur.2d, Corporations, Section 1562, n.6 | 17 |
| 15 W. Fletcher, Cyclopedia of the Law of Private Corp. §§7122, 7123 | 22 |
| Del. Code Ann. Tit. 8, §259(a) | 28 |
| 8 Del. Gen. Corp. Law, Section 259 | 17 |
| 8 Fla.Jur.2d, Business Relations, Section 387, p.489 | 16 |
| Fla. Stat, §607.231(3) (1981) | 16 |
| Fla. Stat. §607.297 (1977) | 26 |
| Fla. Stat. §607.297 (1983) | 22 |
| Fla. Stat. §608.22(1) | 18 |
| Fla. Stat., 608.22 (1977) | 15 |
| Fla. Stat. §608.30 (1971) | 22 |
| Fla. Stand. Jury Instr. (Civil) 6.12 | 5 |
| Fletcher, Cyclopedia of Corporations, §1721 (Perm.Ed.) | 17 |
| Fox & Fox, Corporate Acquisitions and Mergers, §29,03[5] | 25 |
| Fox & Fox, Corporate Acquisitions & Mergers, §29.03[4], n.8.2 | 22 |
| Mich. Comp. Laws Annot., §450.1722 | 17 |

## STATEMENT OF THE CASE

While Celotex acknowledges it was sued as successor to Philip Carey/Panacon (R. 120-22), it omits that in moving for a directed verdict "on the entire case" (T. 3208-23), its trial counsel represented to the trial court that Celotex had denied the allegation in its answer (T. 3214, 3215, 3222), when, in fact, its answer had admitted the successorship allegations: "This Defendant admits the allegations as to Defendant, THE CELOTEX CORPORATION." (R. 211-15, para. 2). Moreover, Celotex omits that its trial counsel's inaccurate representations were made notwithstanding that Celotex itself had filed, in this very action, the affidavit of the ubiquitous Louis A. Pechstein, who as late as December 19, 1980, swore "I am an officer of the Celotex Corporation" and, speaking for Celotex, swore further:

> 2. ...In February of 1968 the Philip-Carey Manufacturing Company changed its name to Philip-Carey Corporation. In April, 1970, Philip-Carey Corporation was merged into Briggs Manufacturing Company, a Michigan corporation, and simultaneously Briggs Manufacturing Company changed its name to Panacon Corporation. <u>This merger was statutory and as a result Panacon succeeded to the assets and liabilities of Philip-Carey Corporation.</u>
>
> <u>3. On June 30, 1972, Panacon Corporation was merged into The Celotex Corporation. This merger was also statutory and as a result The Celotex Corporation succeeded to the assets and liabilities of Panacon Corporation.</u>

(R.14-17; A.1 and 2, emphasis supplied.) Not only did Celotex officer Pechstein so swear for Celotex in this very action, but he was placed under oath by Robert C. Bissell (R.14-17, S.R. 45), Celotex's own corporate house counsel (T.1409), who participated in this very trial (T.1409, during Dr. Mancuso's testimony; T.3293-94, 3308-14, during the testimony of Celotex's Assistant Secretary; T.3378, 3396, during the testimony of Celotex's Manager of Safety.)

Thus, as they must, Celotex's appellate counsel have repeatedly admitted Celotex's status as successor by statutory merger to the Philip Carey Manufacturing Company.

On another point, while Celotex correctly notes that the jury found its co-defendant, Pittsburgh Corning Corporation, not liable to the Picketts, Celotex overlooks the fact that the jury demonstrated a plain understanding that, when the jury believes a defendant should not have punitive damages assessed against it, the jury can express that belief by placing a zero (0) on the damages line in the verdict form: "9(b) What amount of punitive damages do you assess against Pittsburgh-Corning Corporation? Answer: Zero." (T. 4597; R. 587-88.) As Celotex correctly notes, the jury felt differently about Celotex and wrote "$100,000" rather than zero (0) on the corresponding line for Celotex.

## STATEMENT OF THE FACTS

### A. Background Facts

Although Celotex has abandoned any challenge to the compensatory damage verdict and judgment, it includes, even at this late date, an attempt to discredit Leonard Pickett. Since the purpose of the first part of Celotex's statement of the facts was to provide background, to be accurate it should have informed the Court that all witnesses who testified about the asbestos cements used during Mr. Pickett's years in the Gibbs Shipyards agreed that far-and-away the most popular and most used were those of Celotex's predecessor by statutory merger (T.2314, 2325, 2327, 2523-24, 2931, 2939-40).

Celotex also hints, meekly, that there is some question as to whether asbestos was a substantial, contributing cause of Mr. Pickett's severe asbestosis and dense pleural thickening. The First District knew this was not a question, Celotex Corporation v. Pickett, 459 So.2d 375 (Fla. 1st DCA 1984). Indeed, the proof was abundant (T.1100-01, Dr. James Merchant, pulmonologist; T.1232, 1241, Dr. Elliot McCaughey, pathologist; T.1476, 1478, 1485, Dr. Theodore Winegard, the surgeon; T. 1496, 1514-15, Dr. Ira Jackler, the treating pulmonologist; T.1727, 1748, Dr. Edwin Holstein, pulmonologist; T.2046, 2047, 2098, Dr. Albert Ehrlich, pathologist; T.3059, Dr. Gerritt Schepers, pathologist.) The record also shows that the surgery, in which Mr. Pickett's right upper lung was removed, resulted from his physicians' concern that, because he had been occupationally exposed to asbestos, the abnormal lesion might have been cancerous (T.1453, 1497, 1500-"My primary diagnosis, I think, before surgery, was a cancer.") Although the lung was not malignant, his high cancer and mesothelioma risks continue (T.1122-23, 1522, 1750, 3105-06) and, thus, periodic x-rays will continue (T.1522). Mr. Pickett's severe disability was proven (T.1113-14, 1531-32, "has probably...30 to 40 percent capacity remaining"; T.1748, 2098, 2428-29, 2521). At trial time he was capable of sedentary work only (T.1531-32). But for the disease and surgery, 35 year-old Pickett would have earned over $37,000.00 in 1981 alone (T.2891). His wage earning capacity was reduced from over $15.00 an hour to $6.00, and he had an after tax earnings loss of over $700,000.00 (T.2430, PX. 39, T.2644, T.2896-97). Whether in compensatory or punitive damages, the Picketts have hardly received "a windfall" in this litigation, as Celotex suggests. (Initial Brief, p. 13.)

B. Evidence Regarding Punitive Damages

Celotex admitted, and still admits, that it is the successor to Philip Carey/Panacon by statutory merger. Therefore, Celotex errs when it says the Picketts were awarded punitive damages "not for any wrong that Celotex had committed itself." Had Celotex not merged Philip Carey/Panacon into itself, but remained its sole stockholder, as it had become in 1972, Celotex would be correct. In fact, if Celotex had left well enough alone once it had become the sole stockholder of Philip Carey/Panacon, Philip Carey/Panacon would still have independent existence, and would be the defendant here, and would be the one liable for both the compensatory damages, for which Celotex admits liability, and the punitive damages, which Celotex strains to avoid. Instead, Celotex elected to become the present embodiment of Philip Carey/Panacon, leaving no means of enforcing the claim for compensatory and punitive damages except by suit against Celotex.

It is the conscious choice to merge statutorily that makes the difference. The suggestion that Celotex is not the wrongdoer is erroneous; it is the present embodiment of the wrongdoer, merely the wrongdoer with a different name.

Since it is impossible for Celotex to put distance between itself and Philip Carey/Panacon, which is embodied within it, Celotex tries to put distance between itself and the officials of the merged predecessor, such as Louis A. Pechstein. However, even if it were necessary (instead of discretionary, Fla. Stand. Jury Instr. (Civil) 6.12; T.4582) for the jury to consider the degree to which Celotex was a continuation of Philip Carey/Panacon, the jury was aware of the corporate history (T.3283-85, 3360), including the overlapping officer (T.3285), and a key one at that, Pechstein (T.3302), who was working for Celotex in 1973 (T.3302) and whom Celotex admits was its officer as late as 1980 (R.14-17; A.1 and 2).

Since Celotex had pled the successorship issue as an affirmative defense to the punitive damages claim (R.211-15, Nineteenth Affirmative Defense), it had the burden of proving a basis for avoiding the impact of being a successor by statutory merger. Accordingly, it presented the testimony of its assistant secretary, which we have just cited, and which at points was contradictory, but which told the jury that in the Celotex-Philip Carey/Panacon merger, "The directors came." (T.3285, line 16, T.4227; see also Celotex's argument at T. 4484).

The jury was aware through the cross-examination of Celotex's manager of safety, the man who signs Celotex's answers to interrogatories, that Celotex itself had followed a practice in the asbestos litigation of giving different answers in different lawsuits to the same interrogatories inquiring as to when its statutorily merged predecessor first learned of the hazards of asbestos (T.3381-97; see also the Picketts' argument at T.4391-92). This witness also acknowledged that the same Louis A. Pechstein, had issued directions, although not to him, to give short, evasive interrogatory answers (T.3379-80; see also T. 4392). This was the conduct of Pechstein, who was an officer of Philip Carey/Panacon, and whom Celotex made not only an officer, but, as confessed by trial counsel, also its lawyer when the merger occurred (T.4227).

Also in evidence was Celotex's following answer to this interrogatory:

[INTERROGATORY] "From 1930 until the present, did the asbestos products manufactured or distributed by you contain any warning, caution or caveat or other statement on the product or its packaging?"

* * * * *

[ANSWER] "The defendant does not have information or records which would enable it to determine the exact type of asbestos fiber using [sic used in] all of its predecessors' asbestos products....Raw asbestos fibers are believed to have been purchased from the following sources: Vermont Asbestos, GAF, Asbestos Corporation, Calaveros Asbestos, Johns-Manville, Quebec

> Asbestos Corporation, Johnson Asbestos, North American Asbestos and Carey Canadian Mines, Limited. In regard to the one product of this defendant's predecessor, M-W50, the one identified product of this defendant's predecessor, M-W50 was manufactured from 1940 to 1967 and contained 90 percent mineral wool and 10 percent asbestos."

(T.3350-51.)

By 1965, when Leonard Pickett first breathed the merged predecessor's asbestos and seven years before Celotex agreed, as a matter of law and expressly, to accept all the liabilities of Philip Carey/Panacon, there were 706 medical and scientific articles "describing death and disease from asbestos." (T.1882.) Asbestos had been considered a serious hazard to human beings since 1930 (T.1890). And, beginning in 1946, the year Leonard Pickett was born, the medical literature described asbestos diseases among insulation workers like Pickett (T.1888-90). Even before the principle article by Dr. Irving J. Selikoff in 1964 on asbestos and cancer in insulation workers, there were other articles in the American literature on that topic (T.1881, 1889-90). The jury knew, therefore, that before Celotex elected to statutorily merge with its wholly owned subsidiary, there was a vast storehouse of decades of knowledge available to Celotex concerning the risks of death, cancer and asbestosis posed by asbestos. Nevertheless, although Celotex still makes asbestos products (T.3364), the warning it uses even today does not admit that Celotex believes asbestos causes cancer and asbestosis. Instead, it merely says (with a wink and a nod) that "OSHA" believes it causes cancer and asbestosis. (T.3377).

Key actors from Philip Carey/Panacon remained active with Celotex: Karl Krieg, the corporate employee relations (workers compensation) director, who was still at the old Philip Carey/Panacon headquarters (T.1303) and the ever-present Louis. A. Pechstein, who had moved into the Celotex headquarters in Tampa (T.3362). They were intimately involved in the Philip Carey/Panacon operations during the late 1950's and early 1960s when Philip Carey/Panacon was experiencing heavy workers compensation claims for asbestosis (T.1325). (Testimony of Dr. Thomas Mancuso; T.1298-1438 and PX. 8-18 thereto). Our opponents, unsupported by their record citation, characterize these men as "minor employees". Initial Brief at 7. To the contrary, they were key officials, especially with respect to the issue of how Celotex's merged predecessor dealt with the asbestos hazard, as illustrated by the record, summarized below. For the Court's convenience, copies of the Mancuso-Pechstein exhibits are located in the appendix to this brief.

We note that, notwithstanding all the below-summarized information which was carried into the bosom of Celotex, at least by Krieg and lawyer and Celotex officer-to-be Pechstein, the jury learned that, when Celotex gave its first asbestos warning, the warning said nothing about asbestosis or cancer or death (T.3364). The record shows that upon retiring as Chief of the Division of Industrial Hygiene for the State of Ohio (T.1299), Dr. Thomas Mancuso was introduced in 1962 to officials of the Philip Carey Manufacturing Company by the corporation's outside consultant for workers compensation matters, John T. Cantlon (T.1301-02). Mancuso and Cantlon met with lawyer Pechstein, then assistant secretary of the company (T.1302). Through Pechstein, Dr. Mancuso met with other officials including the president and Mr. Krieg (T.1302-03). Dr. Mancuso was retained as "Consulting Medical Director" of the corporation (T.1312, 1328, PX. 11). The employment of someone concerned about occupational health matters was long overdue, however, the company's motivation was purely financial. Cantlon reported to Pechstein on September 8, 1962, after discussions with numerous company officials (including Pechstein himself):

> During our meeting on September 7, we discussed the occupational hazards of your operations, the liability that has developed into a serious problem in the last three years, and the effect upon your future operational and compensation costs.

(PX. 9.) Pechstein got the message and on September 14, 1962, issued a cover memorandum for Cantlon's report and pushed for the retention of Dr. Mancuso for two reasons: (1) to get the jump on the U.S. Public Health Service which was conducting an "investigation of asbestos users" and (2) in the hope that Dr. Mancuso would help the company defeat compensation claims and be able to "make the defense stand up." (PX. 8.)

In the space of a year Dr. Mancuso met in person with corporate officials, including Mr. Meisner, the vice-president for research and engineering, Mr. Fasold, the corporate secretary, Pechstein and Krieg, more than 20 times (T.1313, 1329, 1334, 1337.) But he proved not to be a "yes-man"; instead, Dr. Mancuso repeatedly reminded (T.1313-15) Philip Carey/Panacon, through

Krieg and Pechstein and other officials that not only factory workers but insulation workers (end users, such as Leonard Pickett was to become two-years later) were at risk for cancer and asbestosis (T.1328-29) and that there was no known safe level of exposure to asbestos for cancer (T.1401-03). The officials were already aware of the asbestosis problem; they had had asbestosis compensation cases for years (PX. 9) and even had death certificates, some of which Krieg gave to Dr. Mancuso (T. 1400, 1408).

Dr. Mancuso made very specific recommendations for steps to be taken to protect the health of factory workers and product users. His efforts culminated in his September 23, 1963, proposal for "THE PHILIP CAREY MANUFACTURING COMPANY OCCUPATIONAL HEALTH PROGRAM" (PX. 13). Pertinent to whether Pechstein and Krieg were major or minor players, its introduction read:

> OCCUPATIONAL HEALTH PROGRAM
>
> FOLLOWING ARE THE OBSERVATIONS OF THE COMPANY'S MEDICAL CONSULTANT, THOMAS F. MANCUSO, M.D.M.P.H., TO PREFACE A CONFERENCE WITH MANAGEMENT SCHEDULED FOR SEPTEMBER 23, 1963. IT IS UNDERSTOOD THAT THE CONTENTS OF THIS REPORT ARE STRICTLY CONFIDENTIAL AND ARE NOT TO BE USED FOR ANY PURPOSE OTHER THAN CONSIDERATION BY THE OFFICIALS OF THE COMPANY. THIS INFORMATION SHOULD REMAIN WITHIN THE KNOWLEDGE OF THE PERSONS PARTICIPATING IN THE CONFERENCE AND SHOULD NOT OTHERWISE BE DISSEMINATED.
>
> * * * *
>
> These are the questions posed at the latest conference with Mr. Louis Knippa, Lockland Plant Manager, Mr. L. A. Pechstein, Assistant Secretary, Mr. Karl F. Krieg, Employee Relations Manager, Mr. R. J. Preston, Safety Supervisor, and Mr. John T. Cantlon, Consulting Actuary, which may serve as a basis for points of reference and clarification.

Attending the September 23 meeting with Dr. Mancuso were assistant secretary Pechstein, vice-president Meisner, plant manager Knippa and workers compensation consultant Cantlon (T. 1334). Our opponents' suggestion notwithstanding, the record confirms that Dr. Mancuso's 1963 proposal did recommend instructions and warnings for safe use of the asbestos products by end users, such as Leonard Pickett became two years later:

> "10. Develop safe practice ventilation guides with illustrative drawings, as well as medical guide lines, for distribution with sales, for consumer protection and relations, to avoid added compensation liability to consumers."

(PX. 13; T.1391-92.) And, it must have amused, if not angered, the jury to hear Celotex's trial counsel cutely suggest (T.1389-91) that the report did not mention "asbestosis", a condition which was well known to Celotex's merged predecessor - as noted above, they had their own proof, the death certificates and workers compensation claims. What the Mancuso report did say was:

> 2. Conduct medical studies which have a direct bearing on sales of the company products and legal liability through a medical director, medical consultant, university contract, or other arrangement. This relates to the questions which are inevitable and will be raised by all users and consumers and in general, by the public, because of the accumulation of recent scientific reports showing the positive association between asbestos and cancer of the lung, pleura and pertioneum. In addition to cancer positive association also exists with Cor pulmonale (right heart failure due to the fibrosis of the lungs) pulmonary emphysema (which follows fibrosis), chronic bronchitis, bronchiectasis and pneumonitis. As a consequence, there is a formidable array of medical problems now being recognized as directly related to asbestos exposure.

(PX. 13, A-38) Dr. Mancuso explained to the officials:

> Internally, within the company, the question has been raised as to why medical problems, particularly relating to cancer and asbestos, were not recognized before. Actually, they were recognized, but the asbestos industry chose to ignore and deny their existence. Evidence of this was as recent as the Industry Hygiene Foundation Study, sponsored by the Asbestos Industry, at a cost of $40,000.00, which provided a basis for the companies to argue against this recognition of asbestos and lung cancer. The report, when properly analyzed, had many weaknesses, upon which the conclusion was drawn, and these weaknesses have been recognized in scientific circles.
>
> Refutation of this report has already appeared in press and will appear in a number of publications. Consequently, the asbestos industry cannot rely on this report for legal defense. (PX. 13, A-39.)

For his efforts, Dr. Mancuso was terminated by letter from Pechstein dated December 2, 1963 (PX. 18, T.1340). Leonard Pickett began breathing Celotex's merged predecessor's asbestos in late 1965.

As for the punitive damages verdict, it was well supported by the evidence, as demonstrated above. Contrary to Celotex's suggestion, the jury had every opportunity to consider whether Celotex had presented sufficient mitigating evidence to avoid punitive damages. The jury was given Standard Jury Instruction 6.12 which informed them that the awarding of punitive damages was a matter left purely in the jury's discretion:

> If you find for the Picketts and find also that either or both defendants acted with malice, moral turpitude, wantonness, willfulness or reckless disregard to the rights of others, you may <u>in your discretion</u> assess punitive damages against such defendant as punishment and as a deterrent to others. If you find that punitive damages should be assessed against either defendant, you may consider the financial resources of that defendant

in fixing the amount of such damages.

(T. 4582, emphasis supplied). Both Celotex and the Picketts asked the trial court to give this standard jury instruction. No special instructions on punitive damages were requested by Celotex (R.548-73). As for Celotex's contention that its confusing special verdict form (R. 58-61) should have been used, the form injected, too late, (after final arguments had been made) a statute of limitations issue which Celotex had waived by failing to present evidence. Accordingly, its verdict form was not used (T.4569-72). This decision was affirmed on appeal, 459 So.2d at 378, and Celotex has not challenged that ruling.

The lawyers reinforced the discretionary nature of the punitive damages issue. Counsel for Celotex, who throughout the trial was trying the impossible, to put distance between Celotex and its statutorily merged predecessor, told the jury that "it would be unjust and would be unfair to render any punishment or punitive damages against my client." (T.4486.) And counsel for Celotex's co-defendant explained that the verdict form would "have questions about punitive damages. Are you going to punish the defendants? You do not have to give those and I suggest you not." (T.4513.) As noted in the statement of the case, the jury placed a zero on the punitive damages line for the co-defendant. Plainly they could have done the same for Celotex, but, exercising their discretion, they declared that for punishment and example Celotex should pay $100,000, which is less than 1/10th of one percent of its $118 million dollar net worth (T.3159).

## SUMMARY OF THE ARGUMENT

Corporations are 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 are many variations which a knowledgeable corporate practitioner may use. In the products liability area some courts have begun to circumscribe the conventional corporate law effects of some of those acquisition methods, looking through the transactions to impose "successor" liability (the product line notion is such a device). 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.

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.

The Celotex-Panacon transaction was a merger, not merely a purchase of assets. And the Florida, and universal, rule 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.

Celotex has properly been held liable for punitive damages.

## ARGUMENT

PUNITIVE DAMAGES WERE PROPERLY ASSESSED AGAINST CELOTEX, THE SURVIVING CORPORATION IN A STATUTORY MERGER

### A. Celotex Is Philip Carey/Panacon

In 1972 when Celotex elected to merge with Philip Carey/Panacon, the Florida statute governing the "status of corporations" in a "consolidation or merger" declared:

> (1) Upon the effective date of the consolidation or merger, the separate existence of the constituent corporations or of all such constituent corporations except the one into which the other constituent corporations have been merged, as the case may be, shall cease, and the constituent corporations shall become a single corporation in accordance with the agreement, possessing all the rights, privileges, powers, franchises, whether or not by their terms assignable, and immunities, as well of a public as a private nature, and properties, real, personal and mixed belonging to all the constituent corporations, however acquired. All rights of creditors and all liens upon the property of either of the constituent corporations shall be preserved unimpaired, limited in lien to the property affected by such liens at the time of the consolidation or merger, and all debts, contracts, liabilities, obligations and duties of the respective constituent corporation shall thenceforth attach to the consolidated or merged corporation, and may be enforced against it to the extent as if they had been incurred or controlled by it.

§608.22 Fla. Stat. (1971). By 1981 when this action was filed, the statutory merger statute had been renumbered, but it still declared:

> (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 thence forth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated....

§607.231(3), Fla. Stat. (1981) (emphasis added). See also, 8 Fla.Jur.2d, Business Relations, Section 387, p.489. The surviving corporation having consumed the predecessor, the predecessor continues to exist within its successor. In essence, Celotex stepped into the shoes of Philip Carey/Panacon and is its continuing embodiment with respect to all wrongs committed by Philip Carey/Panacon. Thus, in the decision under review the First District was right when it held:

> [U]nder Florida law, specifically section 607.231(3), Florida Statutes...Celotex as a successor corporation due to merger, may be held liable for all liabilities of its predecessor corporation, including punitive damages.

Celotex Corp. v. Pickett, 459 So.2d 375, 376 (Fla. 1st DCA 1984). See Nicolet, Inc. v. Benton, 467 So.2d 1046, 1050, n.4 (Fla. 1st DCA 1985), in which a separate, unanimous First District panel held that in a merger the surviving corporation "must be considered the 'present embodiment' of the merged predecessor."

Indeed, the First District was merely enforcing the rule laid down long ago by this Court in Barnes v. Liebig, 146 Fla. 219, 1 So.2d 247, 253:

> A merger exists where one of the constituent companies remains in being, absorbing or merging into itself all the other constituent companies. 7 Fletcher Cyclopedia of Corporation, 8304, §4662. 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, <u>the absorbing corporation is liable at law, as well as in equity</u>, the ground for such liability being sometimes stated to be the continuance of <u>the original corporation under a new guise</u>, and sometimes to be an assumption of liabilities arising by implication. 11 L.R.A., N.S., 1120, note. <u>In case of merger of one corporation into another, the latter is liable for the debts, contracts and torts of the former</u>. 7 Fletcher, Cyclopedia of Corporations, 8388, Sec. 4750.

(Emphasis added.) This Florida statutory and case law is unchanged, as Celotex admits:

> Celotex does not dispute that as a statutory successor to the Philip Carey Manufacturing Company it can be held liable for compensatory damages. (Initial Brief, p.15)

It is not surprising that Celotex acknowledges this universal law, since not only our corporate and tort law so hold, but also that of Michigan (where Philip Carey/Panacon was incorporated) and Delaware (Celotex's state of incorporation). §450.1722, <u>Mich. Comp. Laws Annot.</u>; 8 <u>Del. Gen. Corp. Law</u>, Section 259. 19 <u>Am.Jur.2d</u>, Corporations, Section 1562, n.6 ("The ordinary form of a statutory liability provision includes tort liabilities.")

This rule of merged-successor tort liability declared in <u>Barnes v. Liebig</u>, citing the leading corporate law treatise, is reiterated in the current edition of the treatise, Fletcher, <u>Cyclopedia of Corporation</u>, §1721 (Perm.Ed..), which in turn, cites Barnes v. Liebig and many other decisions and states:

> In the case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the...torts of the former....

B. The Liability Of The Surviving Corporation In A Statutory Merger Is Not Vicarious

Celotex's reliance on Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981), is completely misplaced. Celotex admits its status as the surviving corporation in a statutory merger. As the foregoing statutes, cases and texts all demonstrate, Celotex is the "present embodiment" of Philip Carey/Panacon (Nicolet, Inc.); "the original corporation in a new guise" (Barnes v. Liebig); "the separate existence of the constituent corporations" has ceased and they have become "a single corporation." (§608.22(1), Fla. Stat.) Celotex, therefore, has no existence separate from Philip Carey/Panacon. By voluntary choice, Celotex has become Philip Carey/Panacon and the latter has become the former. They are one and the same, although in former days they were separate.

When competitor newspapers, the Atlanta Constitution and the Atlanta Journal, merged statutorily, the Court approved the punitive damages claim against the surviving corporation. Atlanta Newspapers v. Doyal, 84 Ga.App.122, 65 S.E.2d 432 (Ga.App. 1951). The court made this pertinent declaration:

> A new corporation is formed, but not in the sense which works a destruction of the rights of action existing against the old one.

* * * * * *

> It [the Atlanta Journal Company] had not become defunct in the manner of a corporation whose charter had expired, but had become, in toto a vital but inseparable part of Atlanta Newspapers, Inc.

Id. at 436-437. Quoting an earlier decision, the court continued:

> "the consolidation of two or more corporations is like the uniting of two or more rivers, neither stream is annihilated, but all continue in existence. A new river is formed, but it is a river composed of the old rivers, which still exist, though in a different form. 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." (Italics ours.) Accordingly, the corporate defendant continued to exist, although in a different form, and although its existence as such corporation ceased.

Id. As another court has put it,

> Consolidation does not create an entirely new entity but merely directs the blood of the old corporation into the veins of the new, the old living in the new. [Citation.]

Moe v. Transamerica Title Ins. Co., 98 Cal. Rptr. 547, 556-57 (Cal.1st DCA 1971)(emphasis added).

Therefore, the liability in this case is not vicarious at all.* It is direct liability for the reckless misconduct of Philip Carey/Panacon which continues to exist within, and under the name of Celotex.

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*"Vicarious liability. Indirect legal responsibility; for example, the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent." Black's Law Dictionary, Special Deluxe Fifth Edition (emphasis supplied).

When liability for punitive damages is based upon the direct corporate misconduct of the wrongdoer this Court, clarifying the law, has said:

> Most recently in Bankers Multiple Line Insurance Co. v. Farish, 464 So.2d 530 (Fla. 1985), we expressly held that 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. We also hold that Mercury Motors is not applicable in the present case where the suit was tried on the theory of the direct liability of Winn-Dixie should be held directly liable for punitive damages. Cf. Dorsey v. Honda Motor Co., 670 F.2d 21 (5th Cir.), cert. denied, 459 U.S. 880 (1982).

Winn-Dixie Stores, Inc. v. Robinson, ___So.2d___, 10 FLW 338, 339 (Fla. June 27, 1985). Since Celotex, as statutory successor by merger, is Philip Carey/Panacon "under a new guise" (Barnes v. Liebig, 1 So.2d at 253) the jury properly held that Celotex "should be held directly liable for punitive damages." 10 FLW at 339.

Winn-Dixie Stores is more analogous to the Celotex-Philip Carey/Panacon situation than Bankers Multiple Line Ins. Co. v. Farish, 464 So.2d 530 (Fla. 1985) which foretold the coming of Winn-Dixie Stores. Nevertheless, Bankers Multiple Line itself supports punitive damages here. If, without an additional finding of "some fault", a company can be held directly liable for punitive damages for the reckless wrongdoing of its managing agent or owner, a statutory successor by merger can definitely be held liable for punitive damages since it is the present embodiment of the reckless wrongdoer. Again, the liability is direct.

C. Knowing The Disadvantages Of Becoming The Surviving Corporation In A Statutory Merger And Having Other Alternatives, Celotex Nevertheless Elected To Merge Philip Carey/Panacon Into Itself

In a most unusual twist, Celotex ignores a long-established body of corporation case law and, to sidestep the result dictated by corporate law, makes a misplaced appeal for "equity", but its arguments are unpersuasive. No result will be more equitable than that which holds Celotex to the express terms of its merger agreement with Philip Carey/Panacon and to the consequences of the operation of law which existed and were understood by Celotex at the time of the merger. Nevertheless, Celotex complains that it paid millions of dollars to purchase Philip Carey/Panacon's "assets with the then unknown enormous latent liabilities." Initial Brief, p. 14.

Although the affidavit of Celotex officer Pechstein fills the bill nicely (A-1 and 2), Celotex refers courts to In Re Related Asbestos Cases, 566 F. Supp. 818, 820 (N.D.Cal. 1983) for greater detail about the transactions at issue. However, the most comprehensive review of the matter appears in the report of the Federal Trade Commission's attempt to require Celotex and its sole shareholder Jim Walter Corporation, to divest themselves of Philip Carey/Panacon. Matter of Jim Walter Corp., 90 F.T.C.671 (1977). Celotex, using Jim Walter Corporation's money, purchased approximately 89% of the outstanding shares of Panacon stock from Glen Alden on April 17, 1972. 90 F.T.C. at 687 (1977). At this point, Celotex became the controlling shareholder of Philip Carey/Panacon, and, as a shareholder only, was fully insulated from liability for punitive, and compensatory, damage claims against Philip Carey/Panacon. Holding Celotex as a wholly-owned subsidiary, Jim Walter Corporation was also immune from any such claims. However, not contented with 89% ownership and the control it brought, Celotex and its parent decided to wholly acquire Philip Carey/Panacon. Several different methods were available for the acquisition, each method having distinct advantages and disadvantages. In a statement filed with the Securities and Exchange Commission on May 8, 1972, Jim Walter Corporation stated that "...Walter and Celotex have not decided whether such anticipated action should be accomplished by a liquidation, sale of assets, statutory merger, or otherwise." Quoted, id. at 689 (emphasis supplied). Being no babes-in-the-corporate-woods, Celotex and its parent were aware of the available alternatives.

If Celotex had chosen to liquidate Philip Carey/Panacon, it would have assumed no greater liabilities than it already had as a stockholder; in fact, those potential liabilities would have been limited by the "winding down" provisions of Fla. Stat. §608.30 (1971), now codified at Fla. Stat. §607.297 (1983). If Celotex had purchased the assets of Philip Carey/Panacon, it would not have succeeded to its liabilities unless 1) it had expressly or impliedly agreed to assume the liabilities, 2) the transaction amounted to a de facto merger, 3) it constituted a mere continuation of Philip Carey/Panacon, or 4) the transaction was deemed a fraudulent attempt to avoid Philip Carey/Panacon's liabilities. Bernard v. Kee Mfg. Co., Inc., 409 So.2d 1047 (Fla. 1982); 15 W. Fletcher, Cyclopedia of the Law of Private

Corporations, §§7122, 7123 (rev. perm. ed. 1973 and cum. supp. 1983) and Fox and Fox, Corporate Acquisitions & Mergers, §29.03[4], n.8.2.

In contrast with liquidation or purchase of assets, the corporation which subsumes another corporation through merger assumes all of the liabilities of the predecessor whether known, unknown, contingent, or undisclosed, and regardless of whether they are based on debts, contracts, or torts. See, for example, the following explanations in Fox and Fox's basic text, Corporate Acquisitions & Mergers:

> **§23.02[3]--Disadvantages of Statutory Mergers**
>
> The following disadvantages of the statutory merger might dictate the selection of another form.
>
> **[a]--Assumption of Unknown Liabilities.** The acquiring corporation assumes the risk that the merged corporation has unknown or undisclosed liabilities. These become liabilities of the acquiring corporation upon the consummation of the merger by operation of law.
>
> * * * *
>
> **§29.03[2]--The Form of the Transaction**
>
> In an acquisition of stock, the acquiring company does not become responsible for the payment of the liabilities of the acquired company. The mere change in the latter's stock ownership does not affect its outstanding obligations.
>
> In an asset acquisition, the acquiring corporation can acquire only those assets it wants to acquire and assume only those liabilities it wants to assume. In the typical asset transaction--at least to the extent cash is paid directly to the selling corporation--there is little danger that the acquiring company will be liable for the unknown, contingent, or undisclosed liabilities of the corporation whose assets it has acquired.

> In statutory mergers and consolidations an entirely different rule obtains. In those transactions the surviving corporation becomes liable for all the obligations of the constituent corporations, whether they are known, unknown, or contingent, at the closing of the transaction.

(Footnotes omitted; emphasis supplied.) We have included in the appendix several pages from §2.02 of the 1968 version of this basic text, to demonstrate the simplicity with which any corporate lawyer, let alone those of Celotex and Jim Walter Corporation, could have learned what to look out for before merging with an asbestos corporation in 1972 (A-52).

Of course, there are many other advantages and disadvantages associated with each method of acquisition. When Celotex and Jim Walter Corporation declared to the Securities and Exchange Commission that they were considering these alternatives, they undoubtedly thought about tax implications, minority shareholders, labor contracts, health, disability and pension plans, and other practical considerations, including profitability and the impact of the anti-trust laws. With full knowledge that it was assuming unknown liabilities, Celotex chose to proceed via statutory merger, and this took place on June 30, 1972. Jim Walter Corporation, supra at 688. And, as the First District emphasized in the decision under review:

> [S]ection 11 of the merger agreement between Panacon and Celotex provides in part that "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.

Celotex Corp. v. Pickett, 459 So.2d at 376. This, of course, was confirmed by the affidavit of Mr. Pechstein who swore as a

Celotex officer that by the merger "Celotex succeeded to the assets and liabilities of Panacon". (T.14-17, A-1 and 2.)

This deliberate course of action by Celotex and Jim Walter Corporation vaulted Celotex from the fourth or fifth largest manufacturer of asphalt roofing products in the United States in 1972 (before the merger) to second largest manufacturer by August 31, 1972. Id. at 682. Having purposely availed itself of the benefits of the merger route, Celotex should not now be heard to complain of the foreseeable resulting liabilities. We have noted in the statement of facts the hundreds of medical articles available before 1972 explaining the hazards of asbestos (T.1882). Moreover, Celotex brought into its fold Messrs. Krieg and Pechstein who knew all about the workers compensation claims for death and disease caused by asbestos and who were privy to the unheeded warnings, recommendations, criticisms and predictions Dr. Mancuso had repeatedly made 10 years before (supra, pp.8-11). Apparently aware of these hazards, Jim Walter Corporation, as the driving force behind this acquisition, did protect itself by not engaging in a three-way merger and kept its position as sole shareholder of its growing subsidiary, Celotex. It chose to put Celotex "on the hook" instead.

Though Celotex became liable for Panacon's liabilities by operation of law, it nonetheless could have protected itself through a variety of structures which could have been integrated within the acquisition agreements. E.g., Celotex could have required an indemnification agreement from the shareholders of Philip Carey/Panacon for any unknown or undisclosed liabilities. See, generally, Fox & Fox, Corporate Acquisitions and Mergers at §29.03[5]. It is not apparent whether Celotex did structure its agreements so as to control its exposure, but it did expressly acknowledge that "all liabilities...of Panacon...may be enforced against [Celotex] to the same extent as if such...liabilities...had been incurred by Celotex." This acknowledgment was made without limitations, qualifications, or conditions. Principles of equity demand that Celotex be estopped from denying its unqualified assumption of Panacon's liabilities. Cook v. Katiba, 190 So.2d 309 (Fla. 1966); Trustees of Internal Improvement Fund v. Lobean, 127 So.2d 98 (Fla. 1961).

This analysis of Celotex's acquisition alternatives has been made under Florida law, but Celotex complains that as a Delaware corporation its liability should be determined by the law of that jurisdiction. This position cannot stand in view of Florida case law in Advance Machine Company v. Berry, 378 So.2d 26 (Fla. 3rd DCA 1979), cert. den., 389 So.2d 1107 (1980). In that case a Missouri corporation which had done business in Florida was voluntarily dissolved. The question was whether a tort claim filed after the dissolution should be governed by the Missouri law, which provided a two year limitation on such actions, or Fla. Stat. §607.297 (1977), which provided for a three year "winding up" period. The Third District held that

> [t]he action of the defendant corporation, in voluntarily dissolving itself in its home State, could not reduce the period below the three-year "winding up" period provided for by Florida Statutes. To do so would permit a foreign corporation, which had done business in this State, to escape the effects of its tortious conduct after the expiration of only two years when the Florida law provided that

> liability should exist for at least three years. If the foregin corporation desired to take the benefits of doing business in Florida, then it should be subject to the same limitations as applicable to a domestic corporation upon dissolution.

Id. at 27 (footnote omitted). Accord, Padoano v. Wotitzky, 355 So.2d 871 (Fla. 2d DCA 1978).

The reasoning of these two cases applies here. Although Celotex is a Delaware corporation, its principal place of business is Tampa, Florida. A natural person who resides in Florida is subject to Florida's substantive law; why should a corporate person which resides in Florida be able to escape the reach of Florida law? The conduct of which the Picketts complain is not simple negligence. Celotex has engaged in flagrantly reckless behavior and Florida law favors an action for punitive damages because this is "the most satisfactory way to correct evil-doing in areas not covered by the criminal law." Campbell v. Government Employees Ins. Co., 306 So.2d 525, 531 (Fla. 1974). The policy of public protection demands that anyone engaging in such egregious conduct in Florida be held liable under those laws designed to protect the citizens of Florida.

However, assuming arguendo that the merger of Philip Carey/Panacon into Celotex should be viewed from the perspective of Delaware law, Celotex is nonetheless subject to punitive damages. If Celotex had simply held Philip Carey/Panacon as a wholly owned subsidiary, Delaware would have recognized Celotex as a legal entity distinct from the subsidiary. Braasch v. Goldschmidt, 199 A.2d 760, 763 (Del. Ch. 1964). Although a purchase of assets may have led to a result indistinguishable from that achieved by the merger, Delaware recognizes that the two statutory methods of acquisition are "acts of independent legal significance." Hariton v. Arco Electronics, Inc., 188 A.2d 123 (Del. 1963). The de facto merger doctrine available in Florida is applied in Delaware only when there has been a failure to comply with the provisions of the sale of assets statute. Orzeck v. Englehart, 195 A.2d 375 (Del. 1963). Thus in Delaware a purchase of assets may be structured to achieve a de facto merger without assumption of liabilities provided that statutory requirements are met.

Given these liberal options available, it is not surprising that Delaware does impose broad liability in the case of merger.

> When any merger...shall have become effective under this chapter...the separate existence... of all such constituent corporations except the one into which the other...constituent corporations have been merged...shall cease and the constituent corporations shall...be merged into one of such corporations...being subject to all the restrictions, disabilities and duties of each of such corporations so merged...and all debts, liabilities and duties of the respective constituent corporations, shall thenceforth attach to said surviving...corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

Del. Code Ann. Tit. 8, §259(a).

Thus, under Delaware law, as well as Florida law, Celotex is subject to all of the liabilities of Philip Carey/Panacon. As for Michigan law, it is even more oriented toward assigning liability to successor corporations. See Turner v. Bitunimous Casualty Co., 397 Mich. 406, 244 N.W.2d 873 (1976), discussed by this Court in Bernard v. Kee Manufacturing Co., Inc., 409 So.2d

1047 (Fla. 1982). Celotex's liability is based on the operation of law which recognizes that the corporation which is merged into the "surviving" corporation does not cease to exist, but rather continues and is embodied within the "surviving" corporation. (See discussion, supra.)

### D. This Court's Rejection Of The "Product-Line" Exception To The Rule Of Non-Liability For Assets Only Purchasers Is Completely Unrelated To The Universal Rule Imposing Liabilities On The Surviving Corporation In A Statutory Merger

We have demonstrated that, beyond debate, Florida statutory and decisional law, in line with the universal rule, imposes on the surviving corporation in a statutory merger all the liabilities of the corporation which is merged into it (see discussion supra pp. 15-21). This Court's decision in Bernard v. Kee Manufacturing Company, Inc., 409 So.2d 1047 (Fla. 1982), was not meant to, and did not, have any effect on this principle.

In Bernard, as Celotex admits, this Court only rejected an attempt at having Florida adopt the "product-line" line theory of corporate successor liability in assets only transactions. 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 the surviving corporation in a statutory merger, such as Celotex, should not be subject to punitive damages. Moreover, in addition to merging, Celotex unlike the assets purchaser in Bernard had, with open eyes, expressly agreed to assume all the liabilities of Philip Carey/Panacon in order to become the second largest manufacturer in its industry. Cf., Anders v. Jacksonville Electric

Authority, 443 So.2d 330, 331 (Fla. 1st DCA 1984), pet. for rev. den., 451 So.2d 847. The Second District had noted in the opinion which this Court affirmed in Bernard: "There was no statutory consolidation or merger." Bernard v. Kee Manufacturing Company, Inc., 394 So.2d 552, 555 (Fla. 2d DCA 1981).

When Celotex quotes from the Bernard decision (Initial Brief, p.15), it displays its misunderstanding, or its ignoring, of the impact of its status as the surviving corporation in a statutory merger. Since Celotex is the continuing embodiment of Philip Carey/Panacon, it (unlike the purchasers of Mr. Kee's assets) did create the risk to Leonard Pickett, did invite usage of the asbestos and was in a position to eliminate the risk. Why else does it agree that it is liable for the compensatory damages? Its attempt to draw a distinction for punitive damages collides head-on with both its statutory and express assumption of the liabilities of Philip Carey/Panacon. The assets purchaser in Bernard assumed no such liabilities.

### E. Holding Celotex Liable For Punitive Damages Is Not Analogous To Insuring Philip Carey/Panacon For Its Own Reckless Conduct

Continuing to ignore, when convenient, its status as the surviving corporation in a statutory merger, Celotex argues that its liability for punitive damages would be analogous to insuring its predecessor against punitive damages. For this argument to have any merit Celotex would have to be a separate entity from its merged predecessor. However, it admits, as it must, that it is the statutory successor. This Court has declared that it is, therefore, Philip Carey/Panacon "under a new guise." Barnes v.

Liebig, 1 So.2d at 253. Thus, punitive damages have found the wrongdoer's pocketbook. The insurance analogy is false.

F. The Assessment Of Punitive Damages Against Celotex As The Surviving Corporation In A Statutory Merger Achieves The Dual Purpose Of Punitive Damages.

Despite liability for punitive damages premised on express assumption of liability and liability by operation of law, Celotex argues that it should not be subject to punitive damages because those responsible for the reckless conduct of Philip Carey/Panacon are neither owners nor officers of Celotex. This argument totally ignores the purpose of incorporation. Corporations are formed so that the liabilities incurred will attach to the legal person of the corporation and not to the natural persons who own or operate the corporations. This corporate veil may not be pierced absent a showing of some fraud or intent to mislead creditors through use of the corporate name. Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984).

Since the liability attaches to the corporation, it is irrelevant, from a legal standpoint, whether the ownership or management of the corporation has changed. Punitive damages assessed against a corporation are intended to punish the corporation, and any punishment of the individual wrongdoers achieved by such assessment is incidental to this primary purpose. It is for the jury to decide, as a matter of the exercise of its discretion, whether the defendant has presented sufficient mitigating evidence (changed management and practices, etc.) to result in the jury's writing \$ 0 on the damages line as it did for Celotex's co-defendant. As the court noted in Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242, 248 (Fla. 1st DCA 1984), pet. for rev. denied, ___So.2d___, mitigating and aggravating circumstances are for the jury to consider as they exercise their discretion. The Janssens court explained:

> A claim for punitive damages survives the death of the tort feasor. Johnson v. Rinesmith, 238 So.2d 659 (Fla. 2d DCA 1970). And, as previously indicated, punitive damages operate not only to punish the actual wrongdoer but, by way of example, to deter others from committing similar wrongs. The tort feasor sued in this case is Johns-Manville, a corporate entity, not its directors, shareholders, and employees. As a general rule, a corporate entity continues to be liable for its past tortious acts, regardless of any change in its ownership, its directors, or the personnel through whom it acts. We see no reason for carving out an exception to this rule in punitive damages cases.

Id. at 252.

Moreover, it is entirely consistent with the decisions of this Court to encourage prospective statutory merger 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 or personal guarantees will be demanded. 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 such reckless 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.

### G. Corporations Are The Molders Of Their Own Destinies In Corporate Acquisition Transactions: The Well-Reasoned Authority And The Weight Of Authority From Other Jurisdictions Persuades That Celotex Should Be Held Liable For Punitive Damages

Joined most recently (May 31, 1985) by United States District Judge Milton I. Shadur, an array of jurists have handed down authority directly rejecting Celotex's argument on punitive damages, (collected in a compilation of authorities being provided for the Court's convenience). Celotex marshalls but one contrary decision, and it was erroneous.

Decisions rejecting Celotex's arguments include:

(1) the decision under review, Celotex Corp. v. Pickett, 459 So.2d 375 (Fla. 1st DCA 1984);*

(2) Krull v. Celotex Corporation, No. 83-C-9635, slip op. at

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*The Florida Circuit Court decision cited by Celotex has lost any force of authority by virtue of the Pickett decision.

3-4 (N.D. Ill. May 31, 1985) (liability based on merger);

(3) Wall v. Owens-Corning Fiberglas Corporation, 602 F.Supp. 252, 255 (N.D. Tex. 1985) (liability based on merger and express assumption of liabilities);

(4) Hanlon v. Johns-Manville Corporation, 599 F.Supp. 376, 377 (N.D. Iowa 1984) (same);

(5) Neal v. Carey Canadian Mines, Ltd., 548 F.Supp. 357, 391 (E.D. Pa. 1982) (confirming jury verdict, liability based on essential identity between Philip Carey/Panacon and Celotex);

(6) Martin v. Johns-Manville Corporation, 469 A.2d 655 (Pa. Super. 1983) (sufficient identity between Philip Carey/Panacon and Celotex to overrule trial court's refusal to submit issue of punitive damages to the jury.)

Celotex's lone authority, which fades with each new decision on the issue is In Re Related Asbestos Cases, 566 F.Supp. 818 (N.D.Cal. 1983). Initially we note that the plaintiffs' there promised, but failed to produce, the available extensive evidence of Pechstein and Krieg's direct involvement in the reckless management decisions to fail to put into effect a program to control and warn about the asbestos hazard. Missing from the opinion in Related Asbestos Cases is any mention of an affidavit or deposition of Dr. Mancuso. Apparently, the plaintiffs failed to present that proof. Missing is any reference to the Mancuso documents which are in this record. Just on the factual differences alone Related Asbestos Cases loses its relevance.

Moreover, in that case, the district judge was bound to apply California law in granting Celotex's motion for partial summary judgment on the issue of liability for punitive damages. This decision is inapplicable here for several legal reasons:

1) The district judge notes at the outset that contrary to Florida law [Mercury Motors Express, Inc. v. Smith] in California

> ...punitive damage liability is not imposed on the basis of vicarious fault; California courts have recognized that punitive damages will have no deterrent effect if awarded against a party not responsible for the wrong.

566 F. Supp. at 821. We know, of course, that this Court does permit punitive damages against even a vicariously liable party, on a showing of "some fault" (and over against its insurer) even when punishment and deterrence are not served. U.S. Concrete Pipe Co. v. Bould, 437 So.2d 1061, 1067, n.1 (Fla. 1983). Plainly, then, California law with respect to punitive damages (at least as interpreted by the district judge), is at odds with this Court's view of Florida law.

2) California law does not allow punitive damages to be awarded after the death of an individual defendant. Moe v. Transamerica Title Ins. Co., 21 Cal.App.3d 289, 98 Cal.Rptr. 547, 556 (Cal.1st DCA 1971) citing Evans v. Gibson, 220 Cal. 476, 31 P.2d 389 (1934). To the contrary, however, Florida law does allow punitive damages even when the wrongdoer is dead. Atlas Properties, Inc. v. Didich, 226 So.2d 684, 688 (Fla. 1969); Johnson v. Rinesmith, 238 So.2d 659 (Fla. 2d DCA 1969), cited in Janssens supra, 463 So.2d at 252. Certainly then, when Philip Carey/Panacon is not dead, but is currently embodied within Celotex, Florida law permits punitive damages against it.

3) The district judge made no mention of the legal significance of Celotex's being the statutorily merged successor to Philip Carey/Panacon. This apparently results from the judge's having failed to note the significance of the key underlying factor in Moe v. Transamerica Title Ins. Co., 21 Cal.App.3d 289, 98 Cal.Rptr. 547 (Cal. 1st DCA 1971): the existence of statutory merger. Since there was a statutory merger, there was no legal basis whatsoever for Transamerica to have attempted to "show it was a corporation separate and distinct from City Title." 98 Cal.Rptr. 556. As the court plainly expressed it:

> Consolidation does not create an entirely new entity but "merely directs the blood of the old corporation into the veins of the new, the old living in the new."

98 Cal.Rptr. 556-57 (emphasis added). Thus, contrary to his diversity case obligation to apply California law, the district judge failed to enforce the California law of corporate statutory merger. Related Asbestos Cases, then, stands as a decision which is wrong under California law, which it purported to be analyzing, and is even more contrary to Florida law.

In the Krull v. Celotex Corporation decision, the court rejected Celotex's arguments with a clear and persuading analysis (it deserves emphasis):

> **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 (inculating 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. In the products liability area some imaginative courts have begun to circumscribe the conventional cor-**

porate law effects of some of those acquisition methods, looking through the transactions to impose "successor" liability (the "de facto merger" notion is such a device). 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.

Slip op. at 7. The court had already noted (slip op. at 2-3):

> 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. Hanlon v. Johns-Manville Sales Corp., 599 F.Supp. 376, 378 (N.D. Iowa 1984)(applying Iowa law); Moe v. Transamerica Title Insurance Co., 21 Cal.App.3d 289, 304-05, 98 Cal.Rptr. 547, 556-57 (1971)....

Also, although Celotex criticizes the Neal and Hanlon decisions, including the latter's reliance on the Texas decision in Western Resources Life Insurance Co. v. Gerhardt, 553 S.W.2d 783, 786 (Tex. App.--Austin 1977, writ ref'd n.r.e.), Celotex overlooks that Hanlon and Neal were just recently approved in the Wall decision in Texas which refused to permit Celotex to "jettison inchoate liabilities into a never-never land of transcorporate limbo." 602 F.Supp. at 255.

Finally, we note Celotex's curious footnote in which it seeks to distinguish Dorsey v. Honda Motor Company, Ltd., 670

F.2d 21, cert. denied, 459 U.S. 880 (1982), which this Court just favorably cited in support of its on-point holding in Winn-Dixie Stores, Inc. v. Robinson, ___So.2d___, 10 FLW 338 (Fla. June 27, 1985). Celotex says this about Dorsey:

> The court noted that in the pre-trial stipulation the parent agreed that in legal effect the acts of its subsidiary and the subsidiaries' employees were its own acts. The court held that the parent could not retreat from this stipulation and urge independent fault was necessary.

Initial brief, p.27. How is that any different from Celotex's statutory and express assumption of all the liabilities of Philip Carey/Panacon? Celotex cannot retreat from its status as the present embodiment of Philip Carey/Panacon.

### H. Jurors Understand The Power They Wield In Deciding Damages

Jurors tend to demonstrate a clear understanding as to their broad powers in awarding damages. They clearly understand their ability to award "zero damages" when the evidence and circumstances so dictate (and sometimes when the evidence and circumstances do not so dictate). In Blue v. Williams, 200 So.2d 626 (Fla. 3d DCA 1967) and Raffel v. Magarian, 165 So.2d 249 (Fla. 3d DCA 1964) the juries found in favor of the plaintiffs on the issue of liability, however they in turn found "zero damages" for the plaintiffs. In Propst v. Neily, 467 So.2d 398 (Fla. 4th DCA 1985) and Hagens v. Hilston, 388 So.2d 1379 (Fla. 2d DCA 1980) the juries returned verdicts of "zero damages".

Even in the face of undisputed and unrebutted evidence, juries have quite frequently rendered "zero damages" verdicts. Albritton v. State Farm Mutual Auto Insurance Co., 382 So.2d 1267 (Fla. 2d DCA 1980); Shaw v. Peterson, 376 So.2d 433 (Fla. 1st DCA 1979); Webber v. Jordan, 366 So.2d 51 (Fla. 2d DCA 1978); Coppola v. Ballard, 314 So.2d 6 (Fla. 4th DCA 1975); Kinne v. Burgin, 311 So.2d 695 (Fla. 3d DCA 1975); Fejer v. Whitehall Laboratories, Inc., 182 So.2d 438 (Fla. 3d DCA 1966); Noll v. Byorick, 108 So.2d 67 (Fla. 3d DCA 1959). While these cases were improper, and were reversed, they clearly demonstrate that jurors have an innate understanding that they can protect a defendant from paying damages by returning an award of "zero" compensatory damages.

Celotex asserts on page five of its brief that verdict question no. 8 "amounted to a directed verdict in favor of plaintiffs on that issue [punitive damages] so that if the jury found Philip Carey liable for punitive damages it had to find Celotex liable". This assertion is ill-founded.

Standard Jury Instruction 6.12 was given. It clearly told the jury that awarding of punitive damages was completely within its sole discretion (T.4582).

Had the jury returned a verdict of "zero damages", and they could have, the Pickett's would have no basis for complaint. St. Regis Paper Co. v. Watson, 428 So.2d 243 (Fla. 1983). The Court recognized that the area of punitive damages is within the sole discretion of the jury, subject to reversal only upon a finding that the jury was improperly influenced or that some fraud contaminated the verdict.

The above-cited cases clearly demonstrate that jurors understand their power to award zero compensatory damages (some affirmed, some reversed). The jury in the Pickett case awarded $100,000 punitive damages against Celotex; but could have awarded "zero" punitive damages. Obviously they felt the evidence showed the need for punitive damages against Celotex.

## CONCLUSION

The punitive damages verdict is supported by the record and accords with Florida statutory and case law and public policy. The judgment should be affirmed.

Respectfully submitted,

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I HEREBY CERTIFY that a copy of the foregoing was furnished by U.S. mail this 8th day of July, 1985 to Raymond T. Elligett, Jr., Esquire, P.O. Box 3324, Tampa, Florida 33601, Attorney for Petitioner.

Wayne Hogan