SUPREME COURT OF FLORIDA

THE CELOTEX CORPORATION,

Petitioner,

vs. CASE NO. 66,383

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

Respondents.

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

INITIAL BRIEF ON THE MERITS OF APPELLANT THE CELOTEX CORPORATION

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PRELIMINARY STATEMENT

In this brief, the petitioner, The Celotex Corporation, a defendant below, is referred to as "Celotex."

The principal respondent, the plaintiff below, Leonard H. Pickett, Sr., and his wife who made a derivative claim, are referred to collectively as "Plaintiff."

References to the record are designated by the prefix "R," with exception of references to the supplemental record which are designated by the prefix "SR", and references to the trial transcript which are designated by the prefix "T."

STATEMENT OF THE CASE

Plaintiff commenced this action by filing suit in 1981 against Celotex and a number of other defendants, seeking damages for negligence, civil conspiracy, 1/ and strict liability (R. 1-8). Pursuant to a joint stipulation, Plaintiff was permitted to amend his complaint to state that he was suing Celotex as a successor-in-interest to Philip Carey Manufacturing Company (R. 72-73).

Numerous defendants settled and the case proceeded to jury trial against Celotex and Pittsburgh Corning Corporation in 1983 (T. 1). The jury returned a verdict finding no liability on behalf of Pittsburgh Corning Corporation, but found that the Philip Carey Corporation (as a predecessor of Celotex) was negligent and marketed asbestos-containing insulation products with a defect which caused injury to Plaintiff. The jury found that Mr. Pickett's compensatory damages were $500,000 and that his wife's compensatory damages were $15,000. The jury also found that Philip Carey Manufacturing Company acted so as to warrant punitive damages which were assessed in the amount of $100,000 against Celotex (T. 4594-4596). A final judgment was entered pursuant to the jury verdict (R. 612-613), Celotex's post trial motions were denied (R. 618) and the District Court of Appeal, First

1/ Celotex obtained a partial summary judgment on the civil conspiracy count (R. 288).

District, affirmed in an opinion reported as Celotex Corporation v. Pickett, 459 So. 2d 375 (Fla. 1st DCA 1984) (A1-4). This Court accepted jurisdiction by its order of May 24, 1985.

STATEMENT OF THE FACTS

A. Background Facts

Plaintiff worked in the Gibb's Shipyard in Jacksonville, Florida from 1965 through 1968 as an insulator on ships and in the carpenter's shop and machine department (T. 2495-97, 2763-64). Plaintiff testified at trial that while working at Gibb's 95% of the cement he used was Philip Carey asbestos cement, although he admitted during cross-examination that in previous deposition testimony he had stated that he could only remember using Kaylo and Johns Manville boxes of cement (T. 2523, 2768-2772). There was extensive testimony as to the nature of Plaintiff's lung problems and the operation he ultimately underwent in 1981, including whether or not they were related to his asbestos exposure.

The jury returned a verdict finding that Philip Carey had been negligent and had placed a defective product on the market which had caused injury to Plaintiff (R. 587).

B. Evidence regarding Punitive Damages.

1. The verdict form.

As noted in the Statement of the Case, Plaintiff was awarded $100,000 punitive damages against Celotex - not for any wrong that Celotex had committed itself - but solely as a successor to the Philip Carey Manufacturing Company. The jury verdict form on punitive damages was submitted by Plaintiff and used by the trial court over Celotex's objection (T. 4572-73). It provided no opportunity for the

jury to consider if Celotex were a mere continuation of Philip Carey, but amounted to a directed verdict in favor of Plaintiffs on that issue so that if the jury found Philip Carey liable for punitive damages, it had to find Celotex liable:

> 8(a) Do you find that The Philip Carey Manufacturing Company, as predecessor of The Celotex Corporation, acted with malice, moral turpitude, wantonness, wilfulness or reckless indifference to the rights of others with reference to its asbestos-containing products?
>
> YES __X__ NO _____
>
> If your answer to question 8(a) is NO, do not answer question 8(b).
>
> If your answer to question 8(a) is YES, please answer question 8(b).
>
> 8(b) What amount of punitive damages do you assess against The Celotex Corporation?
>
> $ 100,000

(R. 588)

Celotex had moved for a partial summary judgment on the issue of punitive damages which was denied by the trial court (R. 299). Celotex moved for a directed verdict on the issue of punitive damages at the conclusion of the Plaintiff's case and at the conclusion of all of the evidence (T. 3224-3228, 3239, 4212-4218). These motions were unsuccessful, as was Celotex's objection to the punitive damages instruction (T. 4233, 4325).

The trial court rejected the special verdict interrogatory forms of the defendants in their entirety and

used the Plaintiff's form (T. 4572-73). The Plaintiff's form provided automatically that if Philip Carey's conduct were such as to subject it to punitive damages, then Celotex was liable for those damages. By contrast, Celotex's special interrogatory form would have permitted the jury to determine if "The Celotex Corporation is a continuation of the Philip Carey Manufacturing Company to the extent that you believe punitive damages are warranted as a punishment to The Celotex Corporation and as a deterrent to others?" (Verdict interrogatory 15, SR. 60).

2. Corporate history.

Charles F. Wilson, the assistant secretary of Celotex, described the inception of the Philip Carey Manufacturing Company in 1888, and its subsequent statutory merger with the Glen Alden Corporation in 1967 (T. 3282-3283). Glen Alden transferred the assets and liabilities of the original (old) Philip Carey Manufacturing Company to a new Philip Carey Manufacturing Company. The new Philip Carey subsequently merged with another Glen Alden subsidiary, Briggs Manufacturing Company, and the merged company was renamed the Panacon Corporation. Celotex Corporation purchased Glen Alden's controlling interest in Panacon Corporation in 1972 (T. 3283-3284). The substance of Mr. Wilson's testimony is reiterated in somewhat greater detail in In re Related Asbestos Cases, 566 F. Supp. 818, 820 (N.D. Calif. 1983) (A 13). Celotex purchased the remaining public shares of

Panacon and merged Panacon into the Celotex Corporation. Id. at 820.

Mr. Wilson testified that upon Celotex's acquisition of Panacon, that the officers and directors changed drastically (T. 3286). An affidavit of the current secretary of Celotex submitted to support Celotex's motion for partial summary judgment on punitive damages confirmed that no shareholder of Panacon became a shareholder of Celotex, nor did any of the directors of Panacon serve as directors of Celotex or become directors of Celotex after the merger of Panacon into Celotex (SR. 45). Related Asbestos Cases, supra, at 823, reiterates that Celotex was an ongoing concern before it purchased Panacon stock, that Celotex continued to operate with its former board of directors and officers, and that none of the predecessor shareholders of Panacon became shareholders of Celotex.

The only link Plaintiff attempted to show between Philip Carey and Celotex was that two minor employees, Lewis Pechstein, an assistant secretary to the Philip Carey Manufacturing Company, and Karl Krieg, an employee relations director, had continued on as employees of Celotex after the acquisition. (T. 1302-3, 3362). Although making no attempt to show that Mr. Pechstein was in a position of authority to make corporate decisions for old Philip Carey, Plaintiff elicited Dr. Mancuso's testimony that Pechstein had received copies of certain correspondence from Dr. Mancuso in the

early 1960's referencing potential health problems of asbestos, primarily in the nature of workman's compensation claims for factory workers employed by old Philip Carey (T. 1302, 1308, 1313-1317, 1326, 1327, 1333, 1334). Of course, Plaintiff was not a Philip Carey plant employee, but an insulator outside of the plants. On cross-examination, Dr. Mancuso admitted that an article he had written was based on a study in a manufacturing plant which manufactured asbestos brake linings and that he had never written an article discussing the dangers to insulators working outside of a plant (T. 1378). Dr. Mancuso also admitted that his final report to Philip Carey regarding an occupational and health program did not specifically mention asbestosis, nor did he specifically recommend that any warning label be placed on such products (T. 1389-92). Dr. Mancuso also did not recommend a warning label on asbestos products while he was chairman of the labeling committee for the American Conference of Governmental Industrial Hygienists in 1957 (T. 1394-1395).

Celotex began to give asbestos warnings in 1972, immediately after it purchased Panacon. (T. 3351) At the time of trial Celotex still made some asbestos products; however, the asbestos had been removed from the type of product which Plaintiff used years before the trial (T. 3363).

As indicated by the jury verdict form, the only basis on which Plaintiff sought punitive damages against Celotex was

as a successor to Philip Carey. As noted above, Plaintiff's exposure to asbestos products took place in the time period 1965 to 1968 and there was no claim or even suggestion that he was exposed to any product manufactured by the Celotex Corporation - rather he sought and obtained punitive damages solely for alleged exposure to Philip Carey products.

ISSUE PRESENTED

WHETHER PUNITIVE DAMAGES SHOULD BE AWARDED AGAINST CELOTEX AS A STATUTORY SUCCESSOR CORPORATION FOR A PREDECESSOR'S ACTIONS.

SUMMARY OF ARGUMENT

Celotex examines this Court's discussion of the purposes of punitive damages, and demonstrates that they are inapplicable to Celotex which was in no way responsible for Plaintiff's injuries. The First District's opinion violates the requirement of "some fault" forseeably contributing to the injury and misapplies this Court's precedent which rejected a "product-line" theory.

Second, when one carefully examines decisions from other states addressing the issue of successor liability for punitive damages, it is apparent that some earlier cases simply did not make the holdings for which they are subsequently cited and others are patently distinguishable. The cases which have analyzed this issue have concluded that Celotex should not be liable for punitive damages absent a showing that it continued on the wrongful conduct - a showing Plaintiff totally failed to make and which the jury was not permitted to consider in any event.

ARGUMENT

PUNITIVE DAMAGES SHOULD NOT BE AWARDED AGAINST CELOTEX AS A STATUTORY SUCCESSOR CORPORATION FOR A PREDECESSOR'S ACTIONS.

A. The punitive damage award against Celotex contravenes the purpose of such damages in Florida.

This Court has recently reiterated its statement that in tort law the most equitable result is the equation of liability with fault. Insurance Company of North American v. Pasakarnis, 451 So. 2d. 447, 452 (Fla. 1984), citing Hoffman v. Jones, 280 So.2d 431, 438 (Fla. 1973):

> A primary function of a court is to see that legal conflicts are equitably resolved. In the field of tort law, the most equitable result that can ever be reached by a court is the equation of liability with fault.

Plaintiff patently cannot show that Celotex was guilty of any fault that contributed to his injury when his exposure occurred prior to Celotex's acquisition of Panacon.

This Court has repeatedly recognized that a plaintiff has no right to punitive damages, but that punitive damages are awarded to punish the defendant and to deter others from committing similar acts in the future. E.g. St. Regis Paper Company v. Watson, 428 So. 2d 243, 247 (Fla. 1983); Mercury Motors Express, Inc. v. Smith, 393 So. 2d 545, 547, 549 (Fla. 1981)(A21-25). Since Celotex undisputedly committed no tortious act itself the desired effects of punishment and deterrence are not served. The wrongdoer is not being

punished and the punitive award cannot deter Celotex (or any similarly situated corporation) since it never engaged in the conduct in the first place. As noted, the products Plaintiff used are no longer produced or sold by Celotex with asbestos in them. This punitive damage award is thus simply a windfall to Plaintiff.

Mercury Motors held that an employer could not be held vicariously liable for punitive damages under the doctrine of respondeat superior, unless the plaintiff proves "some fault on the part of the employer which forseeably contributed to the plaintiff's injury." 393 So. 2d at 549. This rationale should apply in the instant case and Celotex should not be held liable in punitive damages for the actions of a corporation it purchased when it is undisputed that there was no fault on the part of Celotex which led to Plaintiff's injury.

In his jurisdictional brief Plaintiff argued that Mercury Motors' requirement of "some fault" should not apply to this stiuation, in light of Bankers Multiple Line Insurance Co. v. Farrish, 464 So. 2d 530 (Fla. 1985). Nothing could be further from the truth. Bankers implicitly reaffirms that "some fault" is still required to hold a company liable for punitive damages, where the tortious act was not committed by a managing agent or primary owner. By no stretch of the imagination can Philip Carey or Panacon be analogized to a managing agent or owner of Celotex, an independent, unrelated

corporation which purchased Panacon at arms-length from its parent company. Quite simply, prior to the 1972 purchase, Celotex had no connection with, much less control over, the selection of the Philip Carey/Panacon management and there is no way in which either acted on the other's behalf as managing agent or in any other capacity.

Plaintiff, as he must since the issue was not presented to the jury, argues that a corporate successor must always be liable for punitive damages assessed against the predecessor. He argues that Celotex should be held liable since it benefited by acquiring assets of Philip Carey through merger. If this were the law, every statutory successor would be liable for punitive damages since every successor "benefits" from the acquired assets. Plaintiff's argument overlooks the fact that Celotex paid millions of its dollars to purchase those assets with the then unknown enormous latent liabilities. It also overlooks this Court's rejection of such benefits as a basis for imposing tort liability for even compensatory damages where there was not a merger.

This Court's recent opinion on successor liability for compensatory damages indicates that Celotex should not be liable for punitive damages in the instant case. In Bernard v. Kee Manufacturing Company, Inc., 409 So. 2d 1047 (Fla. 1982)(A6-10) this Court rejected an argument that would hold successor corporations liable on a "product-line" theory

when they have purchased the assets of a predecessor corporation. Celotex does not dispute that as a statutory successor to the Philip Carey Manufacturing Company it can be held liable for compensatory damages. But the Supreme Court's holding in Bernard is consistent with the rationale for not extending punitive damage liability to a successor corporation. In rejecting the product line argument, this Court observed:

> Extending liability to the corporate successor is not consistent with at least one major premise of strict liability, which is to place responsibility for a defective product on the manufacturer who placed that product into commerce. The corporate successor has not created the risk, and only remotely benefits from the product. The successor has not invited usage of the product or implied its safety. Since the successor was never in a position to eliminate the risk, a major purpose of strict liability in modifying a manufacturer's behavior is also lost.

409 So. 2d at 1050 (citations omitted). These principles should preclude an automatic assessment of punitive damages against successor corporations, and the First District misapplied this case in citing it as support for its affirmance of automatic punitive damages.

The First District also erred in relying on its opinion in Johns-Manville Corporation v. Janssens, 463 So. 2d 242 (Fla. 1st DCA 1984), review denied. _____ So. 2d ___ (Fla. 1985). Regardless of the correctness of the decision in Janssens, it is simply inapplicable in light of the fundamental difference between the corporate histories, and the undisputed evidence that Celotex, a completely

independent company, was in no way involved in the complained of Philip Carey actions. 2/

In the First District, Plaintiff cited this Court's decision permitting insurance coverage for vicarious punitive damage liability, U.S. Concrete Pipe v. Bould, 437 So.2d 1061 (Fla. 1983) (A26-35). Plaintiff's suggestion that this decision aids him is wrong, as it deals with a peripheral question - when punitive damages are insurable. The threshold question is whether there is liability for punitive damages, and Mercury Motors holds there must be some fault on Celotex's part which contributes to Plaintiff's injury. That is absent in Celotex's situation. However, U.S. Concrete Pipe is instructive on the issue of whether one corporation, through merger or other corporate succession, could assume punitive damage liabilities of an unrelated predecessor. As both Justice Adkins' majority opinion and Justice Erlich's concurring opinion (in which a majority joined) note, Florida public policy prohibits liability insurance from covering punitive damages assessed directly for one's own wrongful conduct. Id. at 1064, 1066. If punitive damages stand in the instant case against Celotex, that is analogous to insuring Philip Carey for its own wrongful conduct. For all

2/ The First District's quotation of a portion of the Florida merger statute is inapposite since the Panacon-Celotex merger did not take place under Florida law, but pursuant to Michigan and Delaware law (as Plaintiff recognized in his First District brief at p. 5, Panacon was a Michigan Corporation and Celotex a Delaware corporation.)

these reasons, it makes no sense to assess punitive damages against Celotex for the actions of Philip Carey. A recent Federal district court has specifically so held.

B. The well-reasoned authority from other jurisdictions is persuasive that Celotex should not be held liable for punitive damages.

In an opinion issued later in the same month in which the instant case was tried, the Federal District Court for the Northern District of California granted a partial summary judgment in favor of Celotex on the ground that it could not be held liable for punitive damages for the alleged acts of Philip Carey. In re Related Asbestos Cases, 566 F. Supp. 818 (N.D. Calif. 1983). After tracing the corporate history of Philip Carey and Celotex (noted above) the court conducted an extensive analysis of an intermediate California appellate court opinion which had held a successor corporation liable in punitive damages for the fraudulent conduct of an employee of the predecessor corporation, Moe v. Transmerica Title Insurance Company, 21 Cal. App. 3d 289, 98 Cal. Rptr. 547 (1971). The court observed that in Moe the successor made no attempt to establish its separateness from the original entity and that the employee responsible for the culpable conduct in Moe apparently continued to be employed by the successor. 566 F. Supp. at 823.

By contrast, the district court observed that Celotex was not a mere continuation of Philip Carey, but was an ongoing

concern when it purchased the Panacon stock. As demonstrated in both this case and the California case, the Philip Carey officers and directors were not carried over. The court also observed that the "plaintiffs have proffered no evidence that culpable and responsible officers of the predecessor corporations continued to be employed by Celotex." 566 F. Supp. at 823 (original emphasis).

The district court went on to discuss at great length Mr. Pechstein and his position as assistant secretary in Philip Carey and the fact that he became aware of a health hazard associated with asbestos as early as 1958. The court noted that Mr. Pechstein was never a member of the board of directors of Philip Carey, and that "as secretary, cannot be considered, solely by virtue of his position, a culpable and responsible officer." 566 F. Supp. at 824. The court found that the facts presented did not suggest that Mr. Pechstein was an "individual guilty of egregious conduct nor, more importantly, that Celotex was an entity indistinguishable from Old or New Carey, under Moe, merely because it retained several individuals who possessed experience and expertise." 566 F. Supp. at 824.

The district court concluded that there was not sufficient evidence for the plaintiffs even to create an inference so as to avoid summary judgment, closing with the observations that:

> The mere fact that several key employees of Carey continue to be employed by Celotex is not significant or material, unless there is affirmative evidence - or a reasonable inference - that they were responsible for any egregious conduct of the predecessor corporation . . . There is no evidence, finally, that Celotex is perpetuating the allegedly malicious conduct that would have warranted the imposition of punitive damages against a predecessor.

566 F. Supp. at 824 (original emphasis).

As noted above, Plaintiff in the instant case did not even contend that punitive damages should be assessed against Celotex for any actions it committed or omitted. Indeed, it was obvious that Celotex was not "perpetuating" the alleged conduct as it put warning labels on asbestos products in the same year it purchased Panacon. Plaintiff did not and could not show Pechstein was a corporate decision maker, and the evidence of his receiving the Mancuso correspondence adds nothing to the facts set forth in Related Asbestos Cases where Celotex obtained a summary judgment. Similarly, in asbestos cases pending in Dade County, Florida, Celotex had been granted partial summary judgments on the question of its liability as a successor corporation for punitive damages based upon the conduct of its predecessor corporations (see representative judgment at A 5).

The First District's footnote effort to distinguish the compelling rationale of Related Asbestos Cases should be rejected. There is simply no real difference between California law and Florida law, neither of which award

punitive damages solely based on vicarious liability, but require proof of some fault on the part of the vicariously liable party. Related Asbestos Cases cited Hartman v. Shell Oil Co., 68 Cal.App.3d 240, 137 Cal.Rptr. 244, 250 (1977), which held that liability would be imposed against a company where the acts were by an agent or managerial employee absent a showing of authorization or ratification, and with such a showing for lower level employees. As Bankers Multiple Line demonstrates, this is obviously consistent with Florida law. In Moe, which awarded punitive damages against the successor corporation, the individual employee who had actually committed the fraud went on to be employed by the successor company and the court emphasized that the successor company "made no attempt in the trial court to contend that it was a corporation separate and distinct from [the predecessor] or that it was subject to a different standard of liability." 98 Cal. Rptr. 556.

Related Asbestos Cases rejected Plaintiff's argument that a successor through merger must always be liable for punitive damages for its predecesssors' actions. The Court granted summary judgment in favor of Celotex, finding as a matter of law that it could not be subject to punitive damages where the plaintiffs had put forth the same evidence that Plaintiff in the instant case used to attempt to link Celotex with Panacon (namely Mr. Pechstein). As Related Asbestos Cases notes, Pechstein had certain duties which he was directed by

the officers of Philip Carey to perform and "Mr. Pechstein merely assisted the secretary in carrying out the above duties." 566 F. Supp. at 824. Plaintiff proved no more culpability on Mr. Pechstein's part than Related Asbestos Cases held insufficient as a matter of law to establish punitive damage liability. Furthermore, Related Asbestos Cases was decided on summary judgment, in which Celotex had the burden of proof, whereas in the instant case Plaintiff had that burden at trial.

In contrast to the thoroughly reasoned 1983 California decision, a Pennsylvania District Court held in 1982 that Celotex was liable for punitive damages for the conduct of its predecessor, citing Moe without any analysis or reasoning. Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357, 391 (E.D. Pa. 1982). Clearly the efficacy of Neal was severely limited by the subsequent Related Asbestos Cases opinion from the state in which Moe originated. Even more significant, however, is that a subsequent Pennsylvania state court decision has implicitly rejected the simplistic approach of Neal (thereby effectively reversing Neal on this point since Neal was a diversity case and the federal court would have to defer to the subsequent state court appellate opinion on state law). See Martin v. Johns-Manville Corporation, 469 A. 2d 655 (Pa. Super. 1983).

In Martin the trial court had refused to submit the issue of punitive damages to the jury in an asbestos case and the

plaintiff appealed. The court cited Related Asbestos Cases for the proposition that simply because a compensatory award could be made against a successor, that it would not follow that punitive damages would be proper. The court went on to observe that the plaintiff would have to demonstrate "such a degree of identity of the successor with its predecessor as to justify the conclusion that those responsible for the reckless conduct of the predecessor will be punished." 469 A. 2d at 667. The court indicated that punitive damages may be appropriate against a successor only if a legal change in corporate identity was not accompanied by major changes in the identity of the predecessor's shareholders, officers, directors, and managers and personnel. 469 A. 2d at 667. As noted, there were undisputedly major changes in shareholders, officers, directors and management after Celotex purchased a controlling interest in Panacon from Glen Alden Corporation.

Since the judge in Martin had refused to allow this issue to be submitted to the jury, there was apparently insufficient evidence for the appellate court to make a ruling one way or the other, and thus it remanded the case for a new trial on the issue of damages, including punitive damages. It thereby rejected the position in Neal that a successor corporation would always be liable for punitive damages for the acts of its predecessor.

The First District's statement that Martin found a sufficient degree of identity between Celotex and Philip Carey to justify an award of punitive damages demonstrates its misunderstanding of the case. Martin simply reversed a directed verdict in Celotex's favor, holding that a jury question was presented. Martin clearly stated that liability of Celotex for punitive damages as a successor was not automatic, but that such successor liability "must be resolved on a case-by-case basis." 469 A.2d at 667. The First District also failed to understand the importance of Martin and Neal. The absolute statement by the federal court in the diversity case that a successor is liable for the punitive damages of its predecessor (Neal at 391) has necessarily been modified by the subsequent controlling state case of Martin which holds that whether the successor will be held responsible for punitive damages "must be resolved on a case-by-case basis," with damages awarded only where "those responsible for the reckless conduct of the predecessor will be punished." 469 A. 2d at 667 and n. 22. Plaintiff's argument - that there is always a sufficient identity for punitive damages once there is a merger - was expressly rejected by Martin in calling for a case-by-case analysis.

Therefore, under the facts presented in this case, considered in light of Florida case law and the standards for assessing punitive damages against a successor set forth in Related Asbestos Cases and in Martin, it is clear that as a

matter of law, punitive damages should not have been awarded against Celotex as Plaintiff failed to establish that Celotex was a mere continuation of Philip Carey and had such a degree of identity that those responsible for any reckless conduct of the predecessor would be punished.

The First District's statement that the greater weight of authority from other jurisdictions supports its conclusion is simply wrong, which is evident when those decisions are closely studied. The First District relied primarily on Hanlon v. Johns-Manville Sales Corporation, 599 F.Supp. 376 (N.D. Iowa 1984) which it fails to note merely denied Celotex's motion for partial summary judgement on punitive damages. In that posture Celotex had the burden of establishing the non-existence of an issue of material fact as to its liability, whereas in the instant case Plaintiff at trial had the burden of proving entitlement to punitive damages. Furthermore, Hanlon is clear that it merely denied summary judgment "at this stage of the litigation" and was not holding that all successor corporations are subject to punitive damages. (Id. at 377, 379). Hanlon failed to even discuss Related Asbestos Cases which had entered summary judgment for Celotex on punitive damages.

Examining the punitive damage cases cited in Hanlon demonstrates that that court's reliance was misplaced. The seminal case cited by all succeeding cases as authority that punitive damages may be awarded against a successor

corporation after a merger for the acts of its predecessor is Investors Preferred Life Insurance Company v. Abraham, 375 F.2d 291 (10th Cir. 1967). However, this was simply not the holding of Investors nor was the issue even presented. In Investors an individual officer of a subsidiary company perpetrated a stock fraud. The trial court found he was the agent of the subsidiary, and of the parent company as well. The parent and subsidiary were interlocking with the same chairman, president and a great majority of the same officers and stockholders participating in both corporations. Subsequently, the subsidiary corporation was merged into the parent corporation. (375 F.2d at 293.) The only issue raised regarding the entitlement to punitive damages was whether the evidence sustained the finding that the officer was the agent of the parent company (375 F.2d at 294). There was simply no holding that a successor corporation through a merger is automatically liable for punitive damages awarded against a predecessor, and no need for such a holding where the officer was the agent of the parent/successor. Moreover, Investors would obviously be distinguishable from the instant case where there was no relationship between Celotex and Panacon prior to the merger transaction. Two additional cases cited in Hanlon are equally inapposite.

Thomas v. E.J. Korvette, Inc., 329 F. Supp. 1163, 1169-70 (E.D. Pa. 1971), reversed 476 F.2d 471 (3d Cir. 1973), erroneously cited Investors for the proposition that a

successor corporation is liable for punitive damages. This was not the actual holding in Thomas as the suit was apparently brought against the predecessor corporation and the issue was whether the net worth of the successor corporation would be admissible. The incorrect statement in Thomas is entitled to even less weight since, as Hanlon neglected to note, Thomas was reversed for a new trial on the merits.

Western Resources Life Insurance Company v. Gerhardt, 553 S.W. 2d 783, 787 (Tex. Div. App. 1977), simply cited the above two cases without any further analysis. Additionally, there the transferring corporation received stock in the surviving corporation so that there was an argument that punitive damages would punish the prior owners. As noted, Panacon's previous owners acquired no ownership interest in Celotex.

In the First District Plaintiff also cited Atlanta Newspapers, Inc. v. Doyal, 84 Ga. App. 122, 65 S.E. 2d 432 (1951), another inapposite case. Therein, the court's own syllabus noted repeatedly that the libel action against the predecessor corporation was already pending at the time of the merger. The court also emphasized that the surviving corporation was in a position to repeat the trespass so that punitive damages might serve a deterrent purpose. That is not the situation in the instant case where Plaintiff's cause of action was not instituted until more than nine years after the Celotex-Panacon merger, and punitive damages against

Celotex for Philip Carey's actions would serve no deterrent purpose. 3/ The instant case is analogous to the refusal to award punitive damages in bankruptcy, since awarding punitive damages against an innocent representative of the wrongdoer does not further the purposes of punitive damages. Matter of GAC Corporation, 681 F.2d 1295, 1301 (11th Cir. 1982).

The special verdict punitive damage interrogatory amounted to a ruling as a matter of law that if Philip Carey were liable for punitive damages, then Celotex was liable as the statutory successor. Thus, because of the verdict form Plaintiff submitted and the court adopted, Plaintiff cannot be heard to argue that the jury determined that there was sufficient identity so as to hold Celotex liable as a successor under any theory, other than that a successor must always be liable for punitive damages without qualification. This holding is contrary to the rationale for awarding punitive damages in Florida and the holdings of well-reasoned cases from other jurisdictions. Plaintiff submitted no greater evidence to show that punitive damages should be

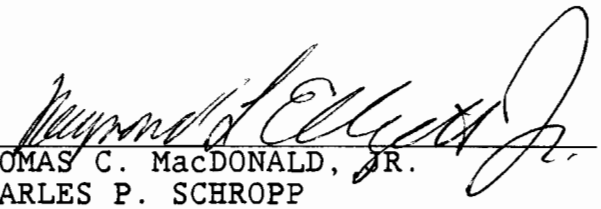
3/ Plaintiff's prior reliance on Dorsey v. Honda Motor Company Ltd., 670 F.2d 21 (Former 5th Cir. 1982), cert. denied, 459 U.S. 880, 103 S.Ct. 177, 74 L Ed. 2d 145 (1982), was also misplaced. The court noted that in the pre-trial stipulation the parent agreed that in legal effect the acts of its subsidiary 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.

assessed against Celotex at the trial than entitled Celotex to a summary judgment on punitive damages in California. The punitive damage award should be reversed and judgment entered in favor of Celotex on punitive damages. Alternatively, a new trial should be ordered and the case submitted to the jury pursuant to instructions that there must be a showing of some fault or culpability on Celotex's part.

CONCLUSION

For the foregoing reasons, the final judgment as to punitive damages entered by the trial court should be reversed, with directions to enter final judgment for Celotex on Plaintiff's claim for punitive damages or, alternatively, to remand for a new trial on liability for punitive damages.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to WAYNE HOGAN, ESQ., 804 Blackstone Building, Jacksonville, Florida 32202, by United States Mail this 11th day of June, 1984.

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